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Pardoning Powers: Some Unanswered Questions

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Abstract: The power to grant pardon is an act of mercy and forgiveness which helps to correct the fallacies of the criminal justice system as well as the judicial errors committed by the Judiciary. Since, even the judges at the highest level of the Judiciary are prone to make mistakes. There ought to be a system in place to check and correct such mistakes to ensure fairness and justice to all and to restore the public's confidence in the system. The power to grant pardon is entrusted with the highest authority in the country which is the head of the state, the President in case of India.

The pardoning power is a constitutional power exercisable as a sovereign power under Article 72 of the Constitution of India for the President exercisable as the head of the state and under Article 161 of the Constitution of India for the Governors, exercisable at the state government level.

The exercise of the pardoning power has been a topic of discussion since the inception of the Constitution of India. Reason being, first of all the power is not absolute as the President and likewise the Governors can exercise it only on the advice of their Council of Ministers. Secondly, whether the exercise of this power is subject to judicial review or not has always been a huge question. Though there has been catena of cases on this issue, the picture is still blur. Thirdly, there are no set guidelines regarding when, how and in what circumstances the sovereign should consider an application for pardon and also what is the criteria for granting the same. No specification of the time limit for the disposal of such applications is another issue.

Key Words: Pardon, sovereign, clemency, judicial review.

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I. RESEARCH QUESTION

1. Whether the power entrusted to the sovereign authority – the President for the Union under Article 72 and Governors for the respective states under Article 161 of the Constitution of India, *'absolute and unfettered'* ?
2. Whether the exercise of the pardoning power is subject to judicial review ?
3. Whether there is any need of guidelines as to when, how and in what circumstances an application for pardon will be allowed and how the exercise of the same will be governed ?
4. Is there a need of a time limit within which the application for pardon should be disposed of?

II. LITERATURE REVIEW

The research has been supplemented by various articles, reports, books and websites which helped to understand the executive clemency powers, how they are exercised and what are some of the problems or lagging behind with the same.

Reports like Report 262 of the Law Commission of India[1] helped to gain an insight on the exercise of pardoning powers in case of death sentence prisoners. The Report helped to understand that how the death sentence prisoners are treated, in what manner and with how much of attention the mercy petitions filed by them are disposed and decided.

Books like *Indian Constitutional Law* by Prof. M. P. Jain[2] helped to understand what basically the clemency power is and how is it exercised. It clarified how the power is entrusted to both President and Governors and what is the scope as well as the nature of the same.

Commentaries on the Constitution of India by Durga Das Basu[3], an eminent Indian jurist and lawyer provided detailed knowledge on the clemency powers given under Article 72 of the Constitution of India. The Commentaries provided the perspective of the other countries as well with respect to the inclusion of clemency powers in the Constitution or a separate statute as well as the authority vested with the power. The Commentaries helped to understand the meaning of the different terms like pardon, reprieve, remit, commute, used in the Article 72 of the Constitution. It provided a detailed note as to how the pardoning powers are exercised.

Another book which majorly supplemented the research was *The Governor's Guide* by SS Upadhyay[4] which helped to understand the pardoning powers entrusted with the Governor of the state under Article 161 of the Constitution. The entire chapter of *Power of Pardon of the Governor* was divided into questions which were answered concisely and precisely along with case laws for better understanding. It helped to understand the narrower scope of Article 161 than that of Article 72.

III. INTRODUCTION

The criminal justice systems around the world provide for various punishment for various crimes. Although the punishments are generally in the form of monetary fines or incarceration which can be simple or rigorous and can range from a few months to a lifetime, still they are not the only punishments imposed on the offenders who are declared guilty. The heinous and grave crimes like rape of minors, homicide, terrorist activities, waging war against the country and other such crimes call for a grave punishment like death sentence. Every country declares hundreds and thousands of activities as a crime under one statute or the other, punishable with either fine or imprisonment. The punishments are declared not only by the courts but also by other judicial and quasi-judicial authorities, for example tribunals like National Green Tribunal in our country for environmental protection, National Company Law Tribunal for the company related disputes and adjudicating authorities established under specific statutes like Consumer Disputes Redressal Commission at District, State and Central level under the Consumer Protection Act, 2019.

Any court, tribunal or other adjudicating authority takes the entire evidence placed before it into consideration before declaring the accused guilty. The courts have to give due consideration to all the facts, documents, witnesses and other information placed before the court before any order is passed. Even though the people announcing the verdicts are the ones who are educated and experienced in their work and very well understand the nature of the same, still it cannot be concluded at any point that they are not immune from committing mistakes. After all, they are human beings and are thus bound to make mistakes. *To err is human* is what has been the saying from times immemorial. Now, when a court, tribunal or any other adjudicating authority has committed a mistake in its decision, obviously anyone would go for the common remedies of revision, review or appeal. But many a times all such remedies fail or are inadequate. These remedies fail to correct the mistakes committed or are insufficient to correct them. What if the punishment given is one of a death sentence? There is a very bleak chance of it being overturned or remitted. So, what is the way out in such situations? A person has committed a crime so he/she will be forced to undergo the punishment imposed even if he/she is actually not guilty or the punishment is highly disproportionate. Is this what the principle of natural justice says? Is this what the criminal justice system of a country provides for?

Such situations call for a power, a power of such an importance that it is entrusted to the highest order of a country. A power that helps to correct the mistakes incurred by the courts and other adjudicating authorities and ensure that justice is actually done and not only seen. This power is the power to grant pardon. A power which is entrusted to the sovereign heads of a State- The President in case of India as well as the United States of America and the Crown in case of United Kingdom. The power allows the sovereign authority to grant pardon, remit or suspend or to reprieve, remit or commute the sentence of the punishment. The entire rationale behind the pardoning power is that-

"every country realizes and has, therefore, provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of government, the country would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgements are always tempered with mercy."[5]

The power to grant pardon is a constitutional power granted under the Constitution of different countries like India, United States of America, South Africa, Spain, Sri Lanka, Russia, Italy, Greece, Ireland etc. The power is entrusted in the hands of the sovereign head of the State like the President in case of India and the United States of America or the Crown in case of England. The rationale behind the power is that the educated and experienced people on the benches of courts and tribunals are not immune from commission of mistakes in their decisions, adjudging the accused as guilty and imposing a punishment on the same. A power needs to be entrusted to the highest order to correct such mistakes and ensure the principles of natural justice are properly followed. In *Corpus Juris Secundum*, an encyclopaedia of the US laws on federal and state levels, pardoning power has been considered to be based on the principle of public good and is to be exercised on the ground of public welfare. It has also been viewed as a means of doing justice by correcting the injustice done to the ones who are not guilty in the first place or have been handed down disproportionate and harsher punishments[6].

The pardoning power is not a product of the Constitution alone. In case of countries which were or are still the rule of a Monarch, the pardoning power is a royal prerogative of mercy, entrusted with the Crown like in case of England. In case of Hong Kong, till the transfer of the sovereignty in the year 1997, the power was a royal prerogative of the monarch of the United Kingdom. Some countries hand down this power as a part of a statute. For example, in the country of Chile, the pardoning power is regulated by the Criminal Code. In some

countries, it is not the sovereign head, but an authority established especially for the exercise of pardoning power that does the job. In Switzerland, for example, it is the Swiss Federal Assembly that grants the pardons for crimes prosecuted by the federal authorities. In Canada, it is the Parole Board of Canada which is the federal agency responsible for making pardon decisions under the Criminal Records Act.

The pardoning power in India is entrusted with the sovereign. The President exercises the pardoning powers under Article 72 of the Constitution of India whereas the Governors of the states exercise the corresponding powers under Article 161. The power is to be exercised on the advice of the respective Council of Ministers. As regards the nature of the power of clemency, the Supreme Court supports the American view rather than the British view. In England, the power is a *royal prerogative* exercised by the Sovereign. It is regarded as an *act of grace*. Whereas, in the United States of America, the exercise of the clemency power by the President is *not a private act of grace* but a *constitutional scheme*. This view towards the pardoning power as supported by Justice Holmes in *WI Biddle v/s Vuco Perovich*[7] was adopted by the Supreme Court of India in *Kehar Singh v/s Union of India*[8]. In *Shatrughan Chauhan and Anr. v/s Union of India and Ors.*[9], the clemency power has been declared neither an act of grace nor a matter of priviledge, rather it is a constitutional duty imposed by the People in the highest order. Also, the power is a strictly executive power which cannot be exercised by the judiciary in any manner. Therefore, in a case of conviction of a Bangladeshi national, by a trial judge for illegally entering the country, a writ petition[10] was filed before the Supreme Court for his release to go back to his country. The Supreme Court held that he can file an application either under Section 432 of the Code of Criminal Procedure, 1973 or under Article 161 of the Constitution of India. The Supreme Court has no power to exercise the executive powers of clemency[11].

IV. ARTICLE 72 AND 161 OF THE CONSTITUTION OF INDIA – THE SCHEME OF PARDON

In India, the pardoning power is a constitutional power entrusted to the executive and is thus exercised by the sovereign head. The power is given under Article 72, to be exercised by the President and Article 161 for the Governors of the states.

Article 72 of the Constitution of India states:

"Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases. —

(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

Article 161 of the Constitution of India states:

"Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.—The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

Both the President and the Governors have the powers to pardon, suspend or remit or to reprieve, remit or commute the sentence of imprisonment.

The power of pardon of the President is with respect to:

1. The offences against any law to which the executive power of the Union extends
2. The sentences or punishments declared by a Court Martial
3. The sentence is a death sentence

However, the President's power to pardon does not affect in any way either the power of any Army officer under any law to suspend, remit or commute a sentence passed by a Court Martial or the power of the Governor of a state to suspend, remit or commute a death sentence. This clarifies that only the President has the power to pardon or reprieve the death sentence. The Governors can only suspend, remit or commute it. Also, the power of Governors extends to those offences against the law wherein the executive power lies with the State.

However, the provision of Article 72, as settled by the Drafting Committee in the Draft Constitution was Article 59 which read as:

"(1) the President shall have the power to grant pardon, reprieve, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted for any offences-
in all cases when the sentence or punishment is by a Court Martial
in all cases when the punishment or sentence is for an offence under any law relating to a matter with respect to which Parliament has and the Legislative of the State in which the offence is committed has no power to make laws
in all cases where the sentence is a sentence of death
(2) Nothing in sub-clause (a) of clause (1) of Article shall affect the power conferred by law on any officer of the Armed Forces of India to suspend, remit or commute a sentence passed by a Court Martial.
(3) Nothing in sub-clause (c) of clause (1) of Article shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor or the Ruler of a State under any law for the time being in force."

During the Constituent Assembly Debates, Dr. Bhimrao Ramji Ambedkar mentioned that with respect to death sentences passed for an offence under a law made either by the Parliament or by a State Legislature, the power is vested in both the President as well as the Governors. However, an amendment was moved by Tajamul Hussain to remove the Governor's power with respect to death sentences. However, opposing the proposed amendment, Dr. Ambedkar said that since the Governor is advised by the Home Minister who is better well-versed with the facts and circumstances of the case, it will be better if such power is not taken away. He further stated that the President's clemency power would act as a safeguard in those situations where a condemned man's mercy petition to the Governor was rejected. Thus, the amendment was rejected.
However, the discussion on the Article was reopened on September 17th, 1949. The Article as passed by the Assembly was not able to give complete effect to the scheme expanded by Dr. Ambedkar because of the sub-clause (b) of Clause (1) which stated that the clemency power would rest in the hands of the President only with respect to the matters legislated by the Parliament and the state where the offence was committed has no power to legislate. It would mean that with respect to the matters of the Concurrent List where both Parliament and State Legislatures could legislate, the clemency powers could be exercised by the Governor or the Ruler of the state only. The plan of the Constitution with respect to the Concurrent List was that the Union Government assumed executive power only when such assumption is provided for by any federal law. So, it was felt that in such situations, the clemency powers should be in the hands of the President. Accordingly, T. T. Krishnamachari proposed an amendment to the clause to redraft it as:
"(b) in all cases when the punishment or a sentence is for an offence under any law relating to a matter to which the executive power of the Union extends"
The amendment was adopted without any discussion and the verbal changes became the current Article[12].
Section 295 of the Government of India Act, 1935 entrusted the Governor-Generals and Provincial Governors with the pardoning powers by stating that:
"(1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province :
Provided that nothing in this subsection affects any power of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court martial.
(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment."
Thus, the Governor-General had a discretionary power to grant pardon, suspension, remission etc. of a death sentence and the Provincial Governors had the same powers for all the sentences passed in a Province. However, the power of the Crown and that of Governor-General as the Crown's delegate remained unaffected.
The clemency power has also been recognized in Section 432, 433 and 434 of the Code of Criminal Procedure, 1973 but it does not affect either the power of the President or that of the Governors.

Meaning of the terms used
The President and the Governors have powers to grant pardon, reprieve or respite or can suspend, remit or commute the sentence or punishment imposed. It is important to understand the meaning of the terms used.

- Pardon – The act of forgiving the offender and restoring him to the position he/she occupied before the commission of the offence. The act of granting pardon means that the offender is absolved from the punishment imposed and is thus, now a citizen like any other. When pardon is granted against the political offences or offences against the State, the act is known as amnesty.

- Reprieve – Reprieve means the temporary suspension of the execution or enforcement of the punishment. Reprieve generally is granted in the cases of death sentence. It is derived from *reprendre* which means to keep back and signifies the withdrawal of the sentence for an interval of time.
- Respite – Respite is the awarding of a lesser sentence instead of the one prescribed, keeping in mind the fact that the accused has had no previous conviction. In *State (Govt. of NCT of Delhi) v/s Prem Raj*[13], respite has been defined as awarding a lesser sentence instead of the penalty prescribed in view of the fact of no previous conviction of the accused.
- Suspension – Suspension means staying the execution or enforcement of the sentence.
- Remission – Remission means reducing the amount or quantum of punishment awarded without changing its character. In this case, neither the guilt of the offender nor the sentence of the court is affected, it is just that the offender now does not need to serve for the full term of his sentence. For example, changing an imprisonment of 20 years for imprisonment of 14 years. Remission of punishment aims to correct the incorrect conviction.
- Commutation – Commutation means reducing the amount or quantum of the punishment in such a manner that the character of the same also changes. For example, changing a death sentence for life imprisonment.

V. EXERCISE OF THE PARDONING POWER UNDER THE CONSTITUTION OF INDIA[14]

The pardoning powers entrusted with the President and the Governors under Article 72 and 161 of the Constitution of India respectively, are exercised on the advice of the respective Council of Ministers. It has been clearly concluded in *Maru Ram v/s Union of India and Ors.*[15] that the President and the Governors cannot exercise the clemency power on their own. They must exercise it only on the binding advice of the concerned Government as the President is symbolic and Central Government is reality. There have been enough cases wherein the pardon, remission or commutation granted by the President or the Governor has been quashed when the advice of the Council of Ministers was not sought. In *Nalini and 3 others v/s The Governor, State of Tamil Nadu, Raj Bhavan, Guindy, Chennai and 4 others*[16], the Governor did not seek the advice of his Council of Ministers when he rejected the mercy petition of the accused in Rajiv Gandhi assassination case. The High Court of Madras held that clemency power has to be exercised on the advice of the Council of Ministers only. In another Madras High Court case, a plea was filed against the rejection of mercy petition on the ground that the Governor acted on the sole advice of the Home Minister. The High Court held that the advice of the Minister concerned is considered as the advice of the Council of the Ministers and thus plea was rejected[17].

The power can be exercised before, during or after the trial. The exercise of clemency power by the President or Governor is in no way an extension of the judicial proceedings. The pardoning power is an executive power, completely different from the judicial functions. It was clarified for the first time in 1989 that the pardoning powers under the Constitution of India[18] are a constitutional responsibility of great significance. The legal effect of a pardon is completely different from the judicial suppression of original punishment. The President and Governors act under a constitutional power which is not at all an extension of the judicial powers[19]. In *Sarat Chandra Rabha v/s Khagendranath Nath*[20], the question was whether the order of remission which had the effect of reducing the sentence imposed on the appellant, passed by the Governor of Assam was the same as the order of an appellate or revisional criminal court which had the effect of reducing the sentence passed by the trial court. Justice Wanchoo, speaking for the Court held that since the effect of a remission order is just to reduce the sentence to the period actually undergone, the order of conviction passed by the court and the sentence remain untouched and undisturbed. The same was held in *Tiger Muthiah v/s The State of Tamil Nadu rep. by its Secretary, Home Dept., Chennai-9 and Ors.*[21] and *Sonu Sardar v/s Union of India and Anr.*[22].

There are no set guidelines for the exercise of the pardoning power due to the myriad kinds of situations and circumstances under which a mercy petition is filed before the President[23] or Governor, still they need to exercise the power keeping in mind the principles of rule of law[24]. In *Mukesh Kumar v/s Union of India & Ors.*[25], the Supreme Court stated that a mercy petition has to be decided upon due consideration of various fators like nature of crime, manner of its commission, its impact on the society etc. In *Shatrughan Chauhan and Anr. v/s Union of India and Ors.*[26], the Supreme Court did not find any rationale behind framing the guidelines for the executive power of clemency. The Supreme Court held that firstly, a constitutional power is always exercised with due application of mind. Secondly, keeping in mind the nature of the power enshrined under Article 72 and 161, there is no need to spell out specific guidelines. So, basically the President and Governors are guided by the principles of natural justice that the exercise of pardoning power should not be unjust, unfair, arbitrary or discriminatory in any manner whatsoever.

While exercising the executive power of clemency, enshrined in the Constitution of India under Article 72 and 161, the President and Governors are empowered to consider the evidence placed on record as well as any additional evidence which arouse after the passing of the sentence. In *Kehar Singh v/s Union of India*[27], it has been specifically mentioned that the President while exercising his power under Article 72, can scrutinise

the evidence on record and can even give a completely different verdict than that given by the judiciary. Even though, the case has already been discussed in the court of law, still the President is empowered to go into the merits of the case.

The power of pardon entrusted with the Sovereign is an absolute and unfettered power which cannot be limited by any legislation or statutory provision. It was vehemently clarified in *State (Govt. of NCT of Delhi) v/s Prem Raj*[28] that the executive power under Article 72 and 161 is absolute and cannot be fettered by any statutory provision like Section 432, 433 or 433-A of the Code of Criminal Procedure, 1973 or any prison rules. The same principle has been reiterated recently in *Pyare Lal v/s State of Haryana*[29] by the Supreme Court. Section 432 of the Code provides for power to suspend or remit sentences to the appropriate Government, Section 433 call for power to the appropriate Government to commute sentences and Section 433-A discusses the restrictions on the power of remission or commutation in certain cases. The restriction imposed by Section 433-A is that notwithstanding Section 432, where a person is convicted with life imprisonment for an offence punishable with death or where the convicted person's sentence of death is commuted into one of life imprisonment, he/she won't be released from prison until and unless he/she has served at least 14 years of imprisonment. The Punjab and Haryana High Court clarified the point stating that the constitutional power enshrined in Article 72 and 161 is *untouchable & unapproachable* and cannot suffer the unpleasant changes in the legislative process[30]. The Supreme Court in a Criminal Appeal of 2005 held that Section 433-A of CrPC can restrict Section 432 and 433 of CrPC but not Article 72 and 161 of the Constitution of India as the Constitution is a higher law and a statute is subordinate to it[31]. In *State of Haryana and Ors. v/s Jagdish*[32], the issue before the Supreme Court was which remission would prevail out of the two- the one drafted as per Article 161 on February 4th, 1993 or the other drafted as per Section 432 read with Section 433 and 433-A[33] dated August 13th, 2008. The Court held that since the executive power under Article 72 and 161 cannot be restricted by Sections 432, 433 and 433-A[34], the policy of the year 2008 cannot override the 1993 policy.

While exercising the pardoning powers under Article 72 and 161 of the Constitution of India, the President and Governors respectively are not required to record reasons, irrespective of rejection or acceptance of mercy petition or rejection or provision of the relief sought under it. There have been plethora of cases specifying and justifying the unnecessity of disclosure of reasons. In *Kehar Singh v/s Union of India*[35], the Supreme Court outrightly ruled that there is no point in furnishing the reasons behind the exercise of clemency power in a particular manner. However, in *Epuru Sudhakar and Anr. v/s Govt. of Andhra Pradesh and Ors.*[36], the Supreme Court held that the absence of any obligation to disclose the reasons does not in any way imply that there shouldn't be legitimate or relevant reasons behind the President's action or Governor's action under Article 72 or 161 respectively.

In a few cases, the question regarding whether an opportunity of being heard should be given to the accused or not, came to be decided. In *Kehar Singh v/s Union of India*[37], the Supreme Court held that it is completely up to the President's discretion and Governor's discretion as well correspondingly with regard to how the executive power of pardon is exercised. It is the duty of the petitioner to submit all the relevant evidence related to the case. He/she has no right in any way to insist for an oral argument. If the President or Governor thinks that the evidence presented is sufficient, he/she will proceed accordingly. If additional material is required, the President or Governor can call for the same and can even allow for an oral argument.

Thus, in a nutshell, the executive power of pardon is an absolute and unfettered power to be exercised on the advice of the Council of Ministers.

VI. JUDICIAL REVIEW AND PARDONING POWER

The executive power of clemency enshrined in Article 72 to be exercised by the President and Article 161 to be exercised by the Governors is a constitutional power exercised on the advice of the Council of Ministers. Any kind of interference with the exercise of the power is not at all allowed. Due to the high significance attached to the power, the exercise of the same in an arbitrary, unjust and unfair manner is likely. The President or the Governor may not act as advised by the Council of Ministers. The exercise of the pardoning power may be influenced by personal vendetta. The advice furnished by the Council of Ministers may be based on their personal choices, thus, leading to bias and discrimination. The mercy petition may have been rejected on irrational grounds. Inordinate delay in the disposal of the mercy petitions has also been common. Thus, it has always been a hot topic of debate that whether the pardoning power is subject to judicial review or not.

There have been plethora of cases stating that the pardoning powers are subject to judicial review but only in a few specified circumstances.

In *G. Krishta Goud and J. Bhoomaiah v/s State of Andhra Pradesh and Ors.*[38], the Supreme Court held that the kind of power the executive power of pardoning is and the nature of duty entrusted to the President and Governors calls for a presumption on the part of the judiciary that the power would be exercised without any prejudice and with intelligence, care and honesty. The same presumption was emphasised upon in *Mukesh*

Kumar v/s Union of India & Ors.[39]. However, it doesn't in any way mean that the judiciary would remain silent in those situations where the exercise of this power is arbitrary and mala fide.

In a Criminal Writ Petition before the Supreme Court in the year 1989, the order passed by the President under Article 72 was held to be judicially reviewable when the mercy petition was not considered for more than 4 years[40].

A peculiar case came before the Supreme Court wherein the Order of the Governor granting the remission of the life sentence of the accused convicted for murder was under judicial review. The issue was that the Governor was not provided with the vital facts concerning the accused like his involvement in 5 other criminal cases, the rejection of the previous mercy petition which was filed on the same grounds, the report of the jail authorities specifying the far from satisfactory behaviour of the prisoner and the time for which he was out on parole. Now the question was whether the non-disclosure of all this vital information to the Governor led to an arbitrary and unjust decision. The Supreme Court held in affirmative and further stated that since it cannot go into the merits of the grounds which led to the Governor's decision, the order passed by him stands quashed and the Governor needs to reconsider the petition in light of the information which was not disclosed earlier[41].

In 2006, in a landmark judgement on pardoning powers[42], the Supreme Court laid down the grounds on which an order passed by the President or Governor could be subject to judicial review. The grounds laid down are:

(a) that the order has been passed without the application of the mind
(b) that the order is mala fide
(c) that the order has been passed on extraneous or wholly irrelevant considerations
(d) that the relevant materials have been kept out of consideration
(e) that the order suffers from arbitrariness."

The grounds *(a), (c), (d), (e)* have been reiterated in *Vinay Sharma v/s Union of India & Ors.*[43] as well.

The Supreme Court in *Shatrughan Chauhan and Anr. v/s Union of India and Ors.*[44] held that judicial review is available in those circumstances where the petition is rejected without considering the supervening circumstances of delay, mental illness and other circumstances. Pardoning power is a constitutional power not to be exercised on the whims and fancies but with due care and diligence otherwise judicial interference is the command of the Constitution for upholding its values.

In various cases, the Supreme Court has stated that sufferings of the prisoner in the prison is no ground for judicial review. The same was iterated in *Mukesh Kumar v/s Union of India & Ors.*[45] *and* reiterated in *Vinay Sharma v/s Union of India & Ors,*[46].

Thus, the pardoning power of the President and Governors is subject to judicial review but a limited judicial review. The judiciary cannot go into the merits of the exercise of the power, but only the nature and scope of it. Whenever the exercise of power is found to be arbitrary, unjust, founded on irrelevant considerations, judiciary will have to and should step in.

VII. CRITICAL ANALYSIS

The pardoning power entrusted with the sovereign head is a constitutional power to be exercised in accordance with the principles of natural justice. The exercise of this executive power of clemency should be just, fair and non-arbitrary, based on relevant considerations.

Even though the nature and scope of this executive power has been clarified and upheld in various judgements, some issues are still unanswered.

The pardoning power vested in the hands of the President and Governors is to be exercised on the advice of the respective Council of Ministers. What is the guarantee that the advice furnished would be free from any personal vendetta, bias or ulterior motives? And in today's times where a party is ruling not only at the Central level but at the state level as well and more than half of its politicians are accused of some crime or the other, the chances of advice being affected by personal bias and ulterior motives are higher. For example, in *Swaran Singh v/s State of Uttar Pradesh and Ors.*[47], one of the respondents was an MLA accused for murder. But within a short period of just 2 years, he was able to get his sentence remitted by the Governor of Uttar Pradesh. Now the element of bias is prima facie. In such situations, what is the safeguard against the misuse of this constitutional power which aims at protecting the life and personal liberty of the persons wrongfully convicted or sentenced.

Secondly, there are no set guidelines for the manner of the exercise of the power of pardon. The Supreme Court clarified in *Kehar Singh v/s Union of India*[48] that due to the widened scope of Article 72, formulating a set of guidelines for the exercise of the pardoning power does not make sense. But what about the situations where the President himself/herself engages in exercising the power on personal vendetta?

Also, the President and Governors are under no obligation to provide for the reasons of acceptance or rejection of the mercy petition or grant or refusal of the relief sought. In a country like India which is the largest democracy in the world, having a criminal justice system which runs on principles of natural justice under which even a terrorist like Yakub Abdul Razak Memon and Ajmal Kasab are provided with lawyers to defend

themselves, why the President and Governors are not obligated to disclose the reasons. After all the pardoning power is to be exercised for public good on the principle of public welfare.

The exercise of the pardoning power is not regulated by a time limit within which the mercy petition should be disposed of. The Courts have opined that the President and Governors are well aware of the kind of power, the nature of duty entrusted to them. Thus, the exercise of this power calls for disposition of the petition within a reasonable time period. However, there have been cases where this presumption of disposition of petition within *reasonable time* has been violated gruesomely. For example, in *Khem Chand v/s State*[49], the mercy petition was not considered for more than 4 years. In *K. P. Mohammed v/s State of Kerala*[50] as well, the mercy petition was pending before the President from 4 years. In the matters concerning the right to life and personal liberty, such a delay in the disposition of the mercy petitions is harsh and ruthless. The Ministry of Home Affairs, Government of India had drafted a set of guidelines known as *'Procedure regarding petition for mercy in death sentence cases'* for the guidance of State Government and the prison authorities in dealing with mercy petitions of the death sentence prisoners which were summarized in *Shatrughan Chauhan and Anr. v/s Union of India and Ors.*[51]. The Court held that it is the claim of all the petitioners that the guidelines are not being adhered to strictly causing inordinate delay in the disposal of mercy petitions.

All these matters seem somewhat petty but in the long run, these have a huge bearing on the overall effect the power has on the society.

VIII. RECOMMENDATIONS

The executive power of pardon is a constitutional power which flows from the People to the sovereign head. The power aims to correct the mistakes in convictions and sentences imposed. It acts as a safeguard to the right of life and personal liberty. However, the provision calls for some upgradation for an effective and efficient exercise of the power.

First of all, a set of rules and regulations should be laid down to ensure the exercise of power is not driven by personal vendetta and bias of the President or Governor as well as the mala fide and arbitrary advice of the respective Council of Ministers. Cases of violation of those rules and regulations should be dealt with strictly and disposed of as soon as possible. Laying down a formal set of guidelines will ensure the adherence on part of the Government as well as the Executive because those guidelines are out there specifically chalked out for them to follow.

Rules and regulations also need to be made for the disclosure of the reasons of acceptance or rejection of mercy petition and further grant or refusal of the relief sought. The need to disclose the reasons stem from the entire concept of Right to Life and Personal Liberty being safeguarded by the pardoning powers. Also, the power is exercised in public good on the basis of the principle of public welfare. A disclosure of reasons which in no way harms public interest ought to be made.

Since, there is no formal time limit set for the disposal of mercy petition, such time limit should be set. An accused who has been convicted and sentenced approaches the President when he knows that he is innocent or he does not deserve the sentence imposed on him. When all the doors of the judiciary close on him, only then he goes for the window provided by the Constitution in the form of pardoning powers. If there is no set time period within which a mercy petition is to be decided by the President or Governor, what is even the point in having any such power. Thus, a time period of 6 months should be the time limit within which the mercy petition should be disposed. If the President or Governor exceed this time limit, they shall record the reasons for the same in writing as the power is exercised in public good. There have been instances that due to the undue delay in disposing of the mercy petitions, the judiciary, under a judicial review grants remission or commutation to the prisoner. For example, in *Mahendra Nath Das v/s Union of India*[52], the petitioner when challenged the rejection of his mercy petition, the Supreme Court called for all the records related to the mercy petition and it was discovered that the recommendation for clemency made by a former President was not put before or communicated to the then President, Mrs. Pratibha Patil. The Court took it to be a serious lapse combined with a brutal delay of 11 years in disposal of the petition.

In many cases, the President or Governors are not furnished with complete information and records regarding the case at hand leading to a wrongful decision on the petition. For example, in *Satpal and Anr. v/s State of Haryana and Ors.*[53], the Court held that the mercy petition was processed with a lot of haste without proper application of mind and the Governor not being advised properly with all the relevant material.

For effective and efficient results, it will be better if these guidelines are formulated in one unique set of guidelines titled as *'Guidelines for the Exercise of Pardoning Powers'*

IX. CONCLUSION

The executive power of pardon enshrined in Article 72 and 161 of the Constitution of India is the constitutional power, more of a duty entrusted with the President and Governors- the sovereign heads. The power is to be exercised on the advice of the respective Council of Ministers only.

The mercy powers cure the defects of arbitrary and erroneous sentences and provide an additional protection against miscarriages of justice. The power ensures to correct the injustice caused due to the mistakes of the judiciary. It safeguards the Right to Life and Personal Liberty[54] for the ones who have been convicted wrongfully or sentenced wrongfully.

The power of pardon helps to restore the position of an accused to where he stood before the commission of the offence. It aims to clear him of any confinement or disability in return for a life like other law-abiding citizens.

Once convicted and sentenced to imprisonment or death sentence, a prisoner has to go through a lot of hardships- physically, emotionally, mentally and financially as well. It is not only the person imprisoned whose life is going to change, but it is his/her entire family that is going to suffer along with him/her. In such situations, the power of mercy is more of a duty under the Constitution, of the sovereign.

Need of the hour is to realise the importance of this power not just for the prisoner seeking pardon but for the society as large as well as to that is why the Constituent Assembly incorporated this power in the Constitution itself and entrusted it to the sovereign heads. In spite of having an independent and integrated judiciary where the Supreme Court has given unbelievably landmark judgements, the possibility of commission of mistakes by the judiciary which is a part of basic human nature has been realized and adequate safeguards for the same has been provided. All the Executive needs to do is exercise that safeguard in a just, fair and non-arbitrary manner without any personal bias or vendetta.

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