PARDONING POWERS OF PRESIDENT AND GOVERNOR IN INDIA: A CRITICAL STUDY

(SUMMARY)

Every civilised society recognises and has therefore provided for the pardoning power to be exercised as an act of grace and humanity in appropriate cases. This power is also an act of justice, supported by a wise public policy. It cannot, however, be treated as a privilege. It is as much an official duty as any other act. It is vested in the Authority not for the benefit of the convict only, but for the welfare of the people; who may properly insist upon the performance of that duty by him if a pardon or parole is to be granted. ¹ The term pardon is often used generically to describe the power vested in the head of state to grant clemency in individual cases. ² The Four Noble Truths, plagiarising the Buddha, but they are about an order of human behaviour in which the sovereign is one step ahead of society on the civilisational incline. The four may be summarised as: ³

First — Clemency is not a door which the President may open to let misplaced mercy through; but it is one he may cause to be opened to see if fairness has been blocked at its threshold.

Second — Pardon is not a gift the President may lavish on the criminal; but it is a power that the people of India have conferred on him to use when narrow codes hold a larger justice hostage.

Third — Mercy, when prayed for by one sentenced to death, is not just about an individual’s scream for life against its judicial extinction, but part of humanity’s journey towards a higher condition under law.

Fourth — Article 72 is not about the law, it is about the sovereign’s overview of the human situation involved in capital crime, that sees in it that which the law cannot see or evaluate, only the nation’s appointed guardian can

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and then again, not to saturate the law’s appetites, but the thirsts of society’s human sensibilities.  

Pardoning powers are not only recognised under Article 72 and 161 The Constitution of India, 1950 but these powers are recognized in all civilized countries. Learned Seervai’s has observed:

Judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws are not always just and the lights are not always luminous. Nor, again are Judicial methods always adequate to secure Justice. The Power of pardoning exists to prevent injustice whether from harsh, unjust laws or from judgments which result in injustice; hence the necessity of vesting that power in an authority other than the judiciary has always been recognized.  

Articles 72 and 161 of the Constitution of India, 1950 confer power of pardoning on the President and Governor. Under India's constitutional system, the actual decisions are not made by the Governor or the President, but instead by the State and Central governments, as the constitutional heads are bound by the advice of their respective Cabinets. The Supreme Court of India in the case of Maru Ram v. Union of India, has held that the executive should frame guidelines for their own use of power of pardon, but afterwards in the case of Kehar Singh v. Union of India & Ors., the Supreme Court held that there are sufficient guidelines in the Articles and there is no need of framing guidelines. Recently in the case of Shatrughan Chauhan v. Union of India, the Supreme Court has framed certain guidelines which are beneficial for the early disposal of mercy petitions. The power of the President under article 72 of the Constitution of India, 1950 is independent of the judiciary. He does not function as a court of appeal. The idea is to enable correction of any judicial error. Also,

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4 Ibid.
the President may decide to give relief from what may appear to him to be too harsh a punishment.\textsuperscript{10} Sometimes pardons are politically motivated which harm the society. “The case of life and death as per Article 72 of the Constitution of India, 1950 must not be decided without objective criteria and therefore, the criteria for considering the mercy pleas must be developed to avoid arbitrariness in life and death matters.”\textsuperscript{11}

In the International scenario also the power of pardoning has a very conspicuous place. The power is recognized under International Covenant on Civil and Political Rights, 1966, United Nations Economic and Social Council and United Nations Commission on Human Rights, 1946. The power is recognized in various countries such as Eire, Burma, Fourth French Republic, Ceylon, Italy, South Africa, Spain, UK and America. The Power of Pardon was historically vested in the British monarch. At common law, a pardon was an act of mercy whereby the king “forgiveth any crime, offence, punishment, execution, right, title, debt, or duty.” This power was absolute, unfettered and not subject to any judicial scrutiny. From this source, it came to find a place in the Constitutions of India and the USA as well as the Constitutional structure of Britain. However it could hardly survive in its unrestrained nature in the democratic systems of these states. Over a period of time, it became diluted in the U.K. and U.S.A. to a limited extent through the exercise of judicial scrutiny.\textsuperscript{12} The royal prerogatives in English law were originally discretionary powers exercised by the King, but because of the operation of convention, these powers are now exercised on the advice of the executive. A royal pardon is granted by warrant under the Great Seal, or under the Sign Manual in terms of the English Criminal Law Act, 1967, and is only granted upon the advice of the

\textsuperscript{10} Dr. Subhash C. Kashyap, Constitutional Law of India : An Exhaustive article-wise commentary on the Constitution of India with comprehensive coverage of Background, Review and Reform Volume 1, 993 (2008).

\textsuperscript{11} Stated by Mr Suhas Chakma, Director of Asian Centre for Human Rights available at http://abolishdeathpenaltyindia.blogspot.in/2013/04/74-of-mercy-petitions-were-rejected-by.html accessed on June 21, 2013.

Home Secretary, who may take the opinion of the Court of Appeal on the matter.\textsuperscript{13}

Under Article 72 of the Constitution the President has the power to grant pardons, reprieves, respites, or remissions of punishment or to suspend, remit or commute the sentence of any person only in cases such as where the punishment has been awarded by a Court Martial, is for an offence against a Union Law, or is a sentence of death.\textsuperscript{14} The Governor of a State has similar power under Article 161.\textsuperscript{15} 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.\textsuperscript{16} While exercising this power the delay has become one of the important factors in the disposal of mercy petitions of those on death row. It is always decided from case to case that in which case pardon is to be given and in which case not. There are lacunae in the present legal system which needs to be fulfilled. The present procedure of disposal of mercy petitions is very long and exhaustive. The judiciary has played an important role in dealing with the point of delay. \textit{Piare Dusadh v. Emperor},\textsuperscript{17} \textit{Vivian Rodrick v. The State of West Bengal},\textsuperscript{18} Edigma

\begin{itemize}
\item \textsuperscript{14} Article 72, Constitution of India, 1950
\item \textsuperscript{15} Article 161
\item \textsuperscript{17} AIR 1944 FC 1.
\end{itemize}

In the recent scenario, in the Devender Pal Singh Bhullar’s judgment the Supreme Court of India has held that the Government and the President’s Secretariat have not dealt with these petitions with requisite seriousness. We hope and trust that in future such petitions will be disposed of without unreasonable delay. 29 In the case of Devender Pal Singh Bhullar the Supreme Court of India has expressed that there will be no pardon for terrorists in India, while laying down the present judgment the Supreme Court has changed its age old pardon jurisprudence. In the judgment of Devendar Pal Singh Bhullar v. State of N.C.T. of Delhi, 30 the Hon’ble Supreme Court of India held that long delay by the President or the Governor in disposing of mercy petitions of

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18 1971 (1) SCC 468.
21 (1983) 2 SCC 68.
22 1984 (Supp) SCC 684.
23 (1983) 2 SCC 344.
24 AIR 1985 SC 231.
25 (1989) 1 SCC 678.
26 1991 (3) SCC 61.
27 AIR 1989 SC 2239.
persons convicted under anti-terror laws or similar statutes cannot be a ground for commutation of the death sentence.\footnote{31}{“Delay no ground for mercy in terror cases”, available at http://www.thehindu.com/news/national/delay-no-ground-for-mercy-in-terror-cases/article4609566.ece accessed on June 17, 2013.}

By denying relief to the death-row convict Devender Pal Singh Bhullar on the grounds of inordinate delay in disposing of his mercy petition, the Supreme Court has reversed the two-decade-old jurisprudence in favour of the human rights of prisoners.\footnote{32}{V. Venkatesan, “Mercy denied”, available at http://www.frontline.in/social-issues/general-issues/mercy-denied/article4653362.ece# accessed on June 17, 2013.} But after this judgment in the landmark case of \textit{Shatrughan Chauhan & Anr. v. Union of India & Ors.},\footnote{33}{Supra note 9, para 264.} even though the Court did not set a time frame for disposal of the mercy petitions, the Supreme Court has laid down certain guidelines for safeguarding the interest of death row convicts as in regard to solitary confinement it was held that there should not be any solitary or single cell confinement prior to the rejection of the mercy petition. Legal aid should be provided to the convict even after the rejection of the mercy petition so that he could challenge the rejection of his mercy petition. Superintendent of jail should intimate the rejection of mercy petitions to the nearest Legal Aid Centre apart from intimating the convicts.\footnote{34}{Ibid.} In regard to procedure in placing the mercy petition before the President, the Court said that there should be fixed time limit within which the authorities should forward the necessary documents to the Home Ministry. Further the Home Ministry should send the recommendations/views to the President within a reasonable time and it is also the duty of the Home Ministry for sending reminders to the President’s office for early disposal of the petition.\footnote{35}{Ibid.}

The Apex Court has further enunciated that the Governor should communicate about the rejection of the mercy petition to the convict and his family in writing or through some other mode of communication available. There should be a written communication made about the rejection of the mercy petition by the President. There is also a right in the death row convicts to
receive a copy of the rejection of their mercy petition by the President and the Governor.\textsuperscript{36} The Apex Court observed that it is necessary that a minimum 14 days period should be stipulated between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution.\textsuperscript{37} There should be regular mental health checkups of all death row convicts. If the Superintendent thinks that the prisoner is not fit the execution should be stopped forthwith. Sometimes due to poverty, the death row convicts do not have copies of necessary documents so the necessary documents should be furnished to the prisoner within a week by the prison authorities. There should be one final meeting between the prisoner and his family and friends. There should be compulsory post mortem of the prisoner.\textsuperscript{38}

In this judgment the Court laid down that the death sentence should be commuted into life imprisonment even in terrorism cases. Soon after this judgment the Supreme Court commuted the death penalty of terror convict Devinder Pal Singh Bhullar to life term over mental illness and an inordinate delay by the government in deciding his mercy plea. In the \textit{Navneet Kaur v. State of NCT of Delhi & Anr.},\textsuperscript{39} a bench led by Chief Justice P Sathasivam allowed the curative petition filed by Bhullar' s wife Navneet Kaur while also taking on record the government’s submission that Bhullar’s was a case that had to be allowed.\textsuperscript{40}

In \textit{V. Sriharan @ Murugan v. Union of India & Ors.},\textsuperscript{41} the bench comprising of Justices P. Sathasivam, Ranjan Gogoi and Shiva Kirti Singh the Supreme Court of India commuted the death sentence on the ground of inordinate delay.

\begin{itemize}
\item \textsuperscript{36} Ibid.
\item \textsuperscript{37} Ibid.
\item \textsuperscript{38} Ibid.
\item \textsuperscript{41} V. Sriharan @ Murugan v. Union of India & Ors., Transferred Case (Criminal) No. 1 of 2012, available at \url{http://judis.nic.in/supremecourt/jmg1.aspx?filename=41228} accessed on June 01, 2014.
\end{itemize}
The Supreme Court stayed the execution of the death sentence of Yakub Abdul Razak Memon, “mastermind” of the 1993 Mumbai serial blasts. A Bench comprising Justices J.S. Khehar and C. Nagappan on Monday issued notice to the Maharashtra government and the Union of India on Memon’s writ petition. Staying the execution proceedings, the Bench further referred the petition to a Constitution Bench.42

The researcher has undertaken an empirical study and from the analysis the researcher has come to the conclusion that there is awareness about pardoning powers exercised by the President and Governor in India. The percentage agreeing on the point of delay making a compulsory ground for commutation of death sentence is very less. On the basis of the empirical study the researcher has drawn certain inferences. The subjects have suggested that there should be no political interference, all cases should be decided on merits, irrespective of political interference, new information technology methods should be implemented in pardoning petitions, there should be interference of some nominated social workers, there should be time frame fixed for disposal of such cases so that such cases may be decided within the stipulated period, while deciding such mercy petitions one must pass the reasoning orders so as to satisfy for others also who are not pardoned.

The researcher has viewed that there is one major concern i.e. the delay caused in disposal of mercy petitions in India. Due to the procedural lapses there is always a delay caused by the authorities in disposing of the pardoning petitions. Delay adversely affects the prisoners’ rights and sometimes even the mental health of the prisoners is suffered due to the sword of fear hanging on their heads that today or tomorrow they are going to be hanged. The power of pardoning has come into light as one of the most vibrant issue of discussion in this era. There is no doubt that even today the power of pardoning is in criticism for a number of reasons such as delay involved in disposal of mercy petitions, human rights of prisoners being effected by such delays, political motivation in the use of power of pardoning and misuse of this power in one or the other way.

The researcher has further viewed that the main reason for all these factors is the time taken by the executive in disposal of pardoning petitions. With the passage of time burden on the President’s office has increased with each and every day increase in number of mercy petitions. The decisions taken by the executive have been criticized some times for delay involved or some times for taking a decision in a hasty manner. No doubt the pardon has a vital role in the Indian criminal justice system, but even then there is delay and misuse in disposal of pardoning petitions which hampers the goal of criminal justice system in India.

Suggestions:

While taking up the present research work the researcher would like to put forward certain suggestion which can help in exercise of pardoning power more efficiently without causing undue delay and injustice to the death row convicts.

- There has been an apprehension made that there is a danger of the power of pardon being misused since the President has to act in the aid and advice of the Council of Ministers. It has been stated that there should be no interference with the powers of pardoning vested in the office of the President is not a member of any party and thus his acts are supposed to be impartial and not politically motivated. The view has been expressed that the Constitution should clearly specify the scope and limitations as well as the procedure for the exercise of the power. In other words, there is a suggestion that the President should be able to act without the aid and advice of the Council of Ministers. However, this may upset the scheme of the Constitution and once again reopen the issue finally decided by the Court in Samsher Singh’s case. The President can have different opinion but in appropriate cases, he can discretely indicate his views to the Council of Ministers but

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eventually in the scheme of things, if the Cabinet reiterates its views, the President may have no choice but to fall in line.45

- The present disposal of the mercy petitions show that, no uniformity has been while dealing with these petitions and they are more influenced by the personal opinion. Asian Centre for Human Rights (ACHR) in its press release states that President Pranab Mukherjee has reduced the President’s Office to a rubber stamp of the Ministry of Home Affairs (MHA) while rejecting mercy pleas of the death-row convicts as per the advice of the MHA.46 The power of pardon as used by the Presidents presents a mixed picture which is influenced by their personal opinion. Some of them used Article 72 perfunctorily, even reluctantly, yet some others did so with differential effect, not just for the man under the shadow of the noose but for the future of capital crime and capital punishment.47 The researcher has emphasized the fact that providing mercy to a criminal is a very big task and the onerous responsibility is on the shoulders of the President. Before President Pranab Mukherjee’s taking the charge there was a huge backlog of mercy petitions, but after his taking the charge, there has been a hurry if disposal of the mercy petitions. Since the independence the Presidents of India have different approaches towards mercy petitions. Some have played a very active role in disposing of these petitions. The disposal of mercy petitions is an act of the Council of Ministers rather than presidential.

- If the pardons are administered with care and solely to correct injustices, they certainly do not diminish respect for the law. On the contrary, they will infuse confidence in the administration of criminal justice and the people. Its retention in the penal system is

47 Supra note 3.
essential. It may substantially help to save an innocent person from being punished due to erroneous justice, or in cases of doubtful conviction. Moreover, the very hope of being pardoned serves as an incentive for convicts to behave well in prison, which considerably helps in solving the problem of prison discipline.48

The researcher has highlighted certain shortcomings in the present legal system for disposal of mercy petitions. The present procedure of disposal of mercy petitions is insufficient. There should be some separate body for disposal of mercy petitions. The most crucial question which needs our immediate attention is that should there be some time frame for the disposal of these mercy petitions. Whether there is need of some guidelines to be followed for the disposal of mercy petitions. A number of guidelines are given by the Supreme Court of India in Shatrughan Chauhan v. Union of India.49 The researcher has viewed that apart from providing legal aid to the death row convicts as suggested by the Hon’ble Supreme Court in the Shatrughan Chauhan v. Union of India, the method of presenting a pardon petition to the President or the Governor should be so easy that even an illiterate convict could present the application on their own without any help of others. There should be a duty imposed on the executive authorities to send a report to the prisoner about the status of their pending pardoning petition before the authorities. It could help the prisoner to know about the time left in disposal of their mercy petition. The clemency statistics should be made available on the internet, the total number of petitions disposed of, time of their filing the petition, present status of the petition etc. all the things should be made available on the Home Ministry website.

Justice delayed is justice denied and this is true in case of mercy petitions also. During the processing of a mercy petition it travels

49 Supra note 9.
50 Ibid.
along many phases. The procedure which is followed in our country for processing of mercy petitions is a bit long, which puts a question mark on our system. A number of years take place for taking decision on any mercy petition which affects the prisoners languishing in jails. Our Constitution talks about the right to liberty. What about the liberty of those prisoners who spend a number of years in jails waiting decision on their mercy petition. Isn’t it a dead life before death? A sword of fear which is always on their heads that they are about to die today or may be tomorrow. If death is the solution for the heinousness of the crime which they commit then why there is need of such a long discussion on the decisions of the courts which have given them the death penalty. Why a number of years are taken to decide whether there is any scope for mercy in a case of death sentence. The need for today is that there should be some proper guidelines to be followed so that this procedure could be made simple which could be a helping hand in early disposal of these petitions so that there is no room for any kind of arbitrariness.

- The approach while dealing with mercy petitions shouldn’t be either delaying the same or following the recommendation of Union Home Ministry blindly. Death penalty which is given only in rarest of rare cases, while deciding upon every mercy petition the President should be very cautious and there should be some exclusive arrangement in the form of specific pardon boards at the national and state level which could refer to the President the proper cases for pardon and also which is well versed with the legal points involved in a case.⁵¹

- As in Canadunder section 110 of the Corrections and Conditional Release Act (CCRA), S.C. 1992, c. 20, the Parole Board of Canada is authorized to investigate RPM (Royal Prerogative of mercy) requests for federal offences. The role of the PBC in clemency

cases is to review applications, conduct investigations (at the direction of the Minister of Public Safety), and make recommendations to the Minister regarding whether to grant the clemency request. Today the granting of mercy is more a ministerial talk than the Presidential. There should be some proper mechanism to dispose of the mercy petitions, so that the mercy is tendered with justice.\textsuperscript{52}

- Even the countries like Philippines there are board of pardons and parole which comes under the department of justice and which review the clemency petition of a prisoner.\textsuperscript{53} The clemency boards should be constituted contain members like psychiatrist, social workers, advocates, justices of the Supreme Court, educationists, representatives of the citizens, victims of crime, philosophers or clerics etc. free from political pressure.\textsuperscript{54}

- In America the office of the pardon attorney is consulted, which clearly mentions about rules governing petitions for executive clemency, standards for consideration of clemency petitions\textsuperscript{55} and in case of states there are specific boards e.g. Utah Board of Pardons & Parole, Maine Governor’s Board of Executive clemency,\textsuperscript{56} and Pennsylvania Board of Pardons.\textsuperscript{57}

- In the United States of America there are certain set standards for considering pardon petitions such as post-conviction conduct, character, and reputation of the offender, seriousness and relative recentness of the offence, acceptance of responsibility, remorse, and atonement, the need for relief i.e. the purpose for which pardon is sought and lastly keeping in consideration the official

\textsuperscript{52} Ibid.
\textsuperscript{53} Available at http://www.probation.gov.ph/Questions%20Answers.html accessed on July 08, 2013.
\textsuperscript{54} Available at http://jurist.law.pitt.edu/kobil.htm accessed on June 23, 2013.
\textsuperscript{55} Available at http://www.justice.gov/pardon/ accessed on July 08, 2013.
\textsuperscript{57} Available at http://www.bop.state.pa.us/portal/server.pt/community/board_of_pardons_home/19192 accessed on July 08, 2013.
recommendations and reports.\footnote{Standards for consideration of clemency petitions, available at \url{http://www.justice.gov/pardon/petitions.htm} accessed on May 27, 2014.} No such parameters have been laid out in India for disposal of pardoning petitions. Even in America there are standards for commutation of sentence such as disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action. The amount of time already served and the availability of other remedies (such as parole) are taken into account in deciding whether to recommend clemency. When a petitioner seeks remission of fine or restitution, the ability to pay and any good faith efforts to discharge the obligation are important considerations. Petitioners for remission also should demonstrate satisfactory post-conviction conduct.\footnote{Standards for considering commutation petitions, available at \url{http://www.justice.gov/pardon/petitions.htm} accessed on June 01, 2014.}

- In the United States of America, there are certain eligibilities for filing a pardoning petition such as no petition for pardon should be filed until the expiration of a waiting period of at least five years after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date of the conviction of the petitioner. Generally, no petition should be submitted by a person who is on probation, parole, or supervised release. The eligibility for filing petition for commutation of sentence is that no petition for commutation of sentence, including remission of fine, should be filed if other forms of judicial or administrative relief are available, except upon a showing of exceptional circumstances.\footnote{Rules governing petitions for executive clemency, available at \url{http://www.justice.gov/pardon/clemency.htm#submission} accessed on June 1, 2014.} In the United States of America the characteristics presidential pardon officials look for in an application are, the pardon seeker’s participation in the community, the seeker’s activities related to
charity, the seriousness of the crime, the criminal history of the applicant and the misfortune experienced by the applicant because of the crime.\textsuperscript{61}

- It is now a well settled law that pardoning powers exercised by the President or the Governor are not just prerogative powers as was prevalent in ancient times, rather it is a constitutional duty. In \textit{Shatrughan Chauhan & Anr. v. Union Of India & Ors.},\textsuperscript{62} a Bench consisting of P. Sathasivam, Ranjan Gogoi J. and Shiva Kirti Singh J. has held that it is well established that exercising of power under Article 72/161 of the Constitution of India, 1950 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution of India, 1950 is a constitutional right and not at the discretion or whims of the executive. Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values.\textsuperscript{63}

- It is most humbly submitted that in recent times, it has been observed that the pardoning power shall be free from any kind of political pressure. Many of the decisions on the power of pardon are politically motivated. The party in power having its say pressurizes the executive authorities to pardon a criminal. Two recent hangings one of Afzal Guru and the another of Azmal Kasab only being muslims having less political support whereas the


\textsuperscript{62} \textit{Supra} note 9.

\textsuperscript{63} \textit{Id.}, para 263.
hangings of the Balwant Singh Rajoana and that of Rajiv Gandhi assassins being stayed only due to having a political backup. Recently the Supreme Court ruled that the convicts, Santhan, Murugan and Perarivalan, can also walk out of jail if the Tamil Nadu government grants them remission. The decision was a politically loaded one ahead of the national election.\textsuperscript{64}

While concluding the present research work the researcher reiterates the rationale of the pardoning power enunciated by the learned Justice Holmes in the following words

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.\textsuperscript{65}


\textsuperscript{65} Biddle v. Perovich 71 L. Ed. 1161 at 1163 as quoted in Epuru Sudhakar v. Govt. of A.P., AIR 2006 SC 3390, para 17.