

Exercise of Pardoning Power in India: Emerging Challenges

J.P. RAI*

Abstract

The power to grant pardon, as envisaged in Articles 72 and 161 of Indian Constitution can achieve its aim and object only when they are exercised with a sense of responsibility. The power of judicial review provides a kind of check over misuse of this extraordinary power in the hands of executive organ of the state. The purpose of Articles 72 and 161 is to provide a human touch to the judicial process. If this human touch is not exercised properly, the very purpose of mercy provisions is defeated. This paper attempts to make a comparative analysis of nature and scope of pardoning power in India and abroad and critically examines theory and practice of the pardoning powers in India. The powers of the Executive, the scope of judicial review and other factors influencing the commutation of sentences are also discussed.

Keywords- pardoning power, president of india, governor, commutation, judicial review

Introduction

A pardon is an act of mercy, forgiveness, clemency. The concept of pardon is an artifact of older times, of an age where an omnipotent monarch possessed the power to punish or remit any punishment. It became a symbolic attribute of a god-like king having control over his subject's life and death. The linking of punishment and pardon are at least as old as the Code of Hammurabi, where the prescription of harsh penalties was balanced by rules to limit vengeance and specify mitigating circumstances. It was exercised at any time either before legal proceedings are taken or during their pendency or after conviction. In the words of Seervai "Judges must enforce the laws, whatever they be, and decide

* J.P. Rai (jprailawschool@gmail.com) is LL.M. (Gold Medalist), Ph.D., and presently working as Associate Professor, Faculty of Law, Benarus Hindu University, Varanasi-221005.

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 pardon 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.”¹

Nature of Pardoning Power

The nature and extent of the power of ‘pardon’ has been dealt by the judiciary in different countries. Espousing the nature of a ‘pardon’, Justice Oliver Wendell Holmes in *Biddle v. Perovich* ²said, “A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of our constitutional scheme. When granted it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment fixed.”³ In *ex parte Garland*⁴, Justice Fields explaining the nature and effect of a pardon said “A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of law, the offender is as innocent as if he had never committed the offence.”⁵ The classic exposition of the law relating to pardon is to be found in *Ex parte Philip Grossman*⁶ where Chief Justice Taft stated: “Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments.”⁷

Coming to India, in *Kehar Singh v. Union of India*,⁸ the Court justified⁹ the existence of a ‘Pardon’, by acknowledging the fallibility of human judgment being undeniable even in a supremely legally trained mind and therefore, any such errors can be remedied by entrusting power to a higher authority, which shall “scrutinize the validity of the threatened denial of life or the continued denial of personal liberty”. Again in *Kuljeet Singh v. Lt. Governor* (famous Ranga-Billa Case)¹⁰, the Court held that undoubtedly, the President has the power in an appropriate case to

commute any sentence imposed by a court into a lesser sentence. But the question as to whether the case is appropriate for the exercise of the power conferred by Article 72 depends upon the facts and circumstances of each particular case. The courts usually held it salutary principle that ‘to shut up a man in prison longer than really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss to the community.’¹¹

Legislative Background

During the British rule, the Power of Pardon was historically vested in the British monarch. At common law, a pardon was an act of mercy whereby the king forgave 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. From 1935 onwards, the law of pardon was contained in Section 295¹² of the Government of India Act, 1935 which did not limit the power of the Sovereign. There was no provision in the Government of India Act, 1935 corresponding to Article 161 of the Constitution.¹³ In the Constitution of India, the power of Presidential Pardon is found in Article 72.¹⁴ Article 72 says that 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.¹⁵ A parallel power is given to the Governor of a state under Article 161 of the Indian Constitution.¹⁶ In addition to these constitutional provisions, the Criminal Procedure Code, 1973¹⁷ in Sections 432, 433, 433A, 434 and 435, provides for pardon. Sections 54 and 55 of the IPC confer power on the appropriate government to commute sentence of death or sentence of imprisonment for life as provided therein.

Pardoning Power at International Level

Pardoning Power is exercised in different countries the world over. The study of the legal and practical exercise of the power helps us to understand the Indian position better.

A. United States of America

Article II of the US Constitution grants the President the “Power to Grant Reprieves and Pardons for offenses against the United States, except

in cases of Impeachment.” Courts, in the USA, have been cautious in interpretation of the pardoning power where conditions have been imposed in grant of pardons which conflicted with the constitutional rights of the persons who were pardoned. In *Hoffa v. Saxbe*¹⁸, a condition imposed on a pardon was challenged as unconstitutional. The District Court held that the “framework of the constitutional system” establishes limits beyond which the President may not go in imposing and subsequently enforcing conditions on pardons. In *Burdick v. United States*¹⁹, the Court upheld an offender’s right to refuse a presidential pardon granted in order to compel him to testify in a case which conflicted with his right against self-incrimination. However, apart from judicial scrutiny in this area, the power of pardon has been allowed to be exercised freely.

B. United Kingdom

In United Kingdom, the exercise of mercy by the Crown became firmly established in the middle ages, with the infringement of King’s peace emerging as a basis for criminal liability. However, the judiciary, in UK, has constantly monitored the unbridled, irrational grants of pardons and has provided a few checks and measures. As early as 1673, in *Thomas v. Sorrel*²⁰ the maxim *non potest rex gratiam facere cum injuria et damno aliorum*, that is to say ‘the king cannot confer a favour on one man to the injury and damage of others’, was applied. More so, where any right or benefit is vested in a subject by statute or otherwise, the Crown, by a pardon, cannot affect it or take it away.²¹ At present, the monarch exercises the power on the advice of the Home Secretary.²² The Home Secretary’s decision can in some situations be challenged by judicial review. In *R v. Secretary of State for the Home Department ex parte Bentley*²³, the Court held that the formulation of policy for the grant of a free pardon was not justifiable but a failure to recognize that the prerogative of mercy was capable of being exercised in many different circumstances and therefore failure to consider the form of pardon which might be appropriate to meet the present case was reviewable. Thus, in UK, judicial review of the power of pardon is extremely restricted in scope.²⁴

C. Pakistan

The question of granting of Pardon was in limelight in Sarabhjit’s Case.²⁵ By the virtue of Article 45²⁶ of the Pakistan’s Constitution, the

President has an absolute power to grant pardon, reprieve, respite & remit, suspend or commute any sentence passed by any court, tribunal or authority. The power cannot be questioned.²⁷

D. Bangladesh

Article 49 of Bangladesh Constitution confers mercy power on the President.²⁸ Apart from constitutional provisions, the government may suspend, remit or commute the sentence of a person under the Code of Criminal Procedure of 1898.²⁹ According to the Constitution,³⁰ the President is to exercise the prerogative power of mercy in consultation with or in accordance with the advice of the Prime Minister through the Ministry of Law and Parliamentary Affairs.³¹ The President cannot act independently in exercising the prerogative power of mercy.

Pardoning Power in India

Unrestrained nature of the pardoning power in other jurisdictions could hardly survive in the democratic system of India. Over a period of time, it became diluted when the Supreme Court of India conclusively established that the power of pardon is subject to judicial scrutiny.³² In *Maru Ram v. Union of India*³³, the court observed, ‘Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favoritism cannot but be interlopers in this area. The order which is the product of extraneous or malafide factors will vitiate the exercise....For example, if the Chief Minister of a State releases everyone in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the Constitution to let such madness survive.’³⁴ The Court summarized its findings by stating “Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or malafide. Only in these rare cases will the court examine the exercise.”³⁵ In *Kehar Singh v. Union of India*³⁶, the Court considered the nature of the President’s power under Article 72 while dealing with a petition challenging the President’s rejection of a mercy petition by Indira Gandhi’s assassin, Kehar Singh. The Court explicitly held that Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review. However, the Court qualified this

finding by holding that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram*. What are these limitations? The Court provided that the pardoning power can be subject to a review where an executive decision has been made on altogether irrational, arbitrary, unreasonable or malafide grounds such as discrimination on the basis of religion, caste, colour or political loyalty. Citing *Ex parte William Wells*³⁷, C.J. Pathak observed that the prerogative power can be subjected to judicial review when the “circumstances of any case disclose such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice.”³⁸ However, unlike *Maru Ram*, the court refrained from laying guidelines stating that it “seems to us that there are sufficient indications in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law and specific guidelines need not be spelled out.”³⁹ The decisions in *Maru Ram* and *Kehar Singh* still hold the field and thus the present position is that Presidential Pardon under Article 72 is subject to judicial review on the grounds mentioned in *Maru Ram*. In subsequent cases, the Court enumerated specific grounds on which such scrutiny could be exercised. However, the Court has wisely avoided laying down any explicit guidelines for the exercise of this power.

If the Court cannot sit in judgment on how discretion is exercised, what exactly is it reviewing? The Supreme Court in the 1997 case of *Mansukhlal Vithaldas Chauhan v. State of Gujarat*⁴⁰ said that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made particularly as the Court does not have the expertise to correct the administrative decision. It clarified that the aim of such judicial review is not to substitute executive’s discretion for the judge’s discretion but to confine itself to questions of legality, which mean in effect the following five basic questions: 1. Did the decision-making authority exceed its powers? 2. Did the authority commit an error of law? 3. Did the authority commit a breach of the rules of natural justice? 4. Did the authority reach a decision that no reasonable tribunal would have reached? 5. Did the authority abuse its powers?⁴¹

In *Satpal v. State of Haryana*⁴², the Supreme Court quashed an order of the Governor pardoning a person convicted of murder on the ground

that the Governor had not been advised properly with all the relevant materials. The Court spelt out specifically the considerations that need to be taken account of while exercising the power of pardon, namely, the period of sentence in fact undergone by the said convict as well as his conduct and behavior while he underwent the sentence. The Court held that not being aware of such material facts would tend to make an order of granting pardon arbitrary and irrational. In *Epuru Sudhakar v. Government of Andhra Pradesh*⁴³, the Court set aside a remission granted by the Governor of Andhra Pradesh on the ground that irrelevant and extraneous materials had entered into the decision making.⁴⁴ The Court observed that, ‘the only reason why a pariah becomes a messiah appears to be the change in the ruling pattern. With such pliable bureaucracy, there is need for deeper scrutiny when power of pardon/remission is exercised.’⁴⁵ Though the contours of power under Article 72/161 have not been defined, the Supreme Court, in *Narayan Dutt v. State*⁴⁶ of Punjab has held that the exercise of power is subject to challenge on the following grounds: a) If the Governor had been found to have exercised the power himself without being advised by the government; b) If the Governor transgressed his jurisdiction in exercising the said power; c) If the Governor had passed the order without applying his mind; d) The order of the Governor was mala fide; or e) The order of the Governor was passed on some extraneous considerations. Thus, in these judgments concerning the Governor’s exercise of pardon, the Court seems to have widened the grounds for judicial review by enumerating specific grounds on which the grant of pardon can be considered arbitrary.⁴⁷

Superior Power of the President: Comparison of Article 72 and 161

A combined reading of Articles 72 and 161⁴⁸ reveals that an area of overlap between the pardoning powers of the President and the Governor – that is, cases concerning matters to which the executive power of the Governor extends and which have resulted in the sentence of death – has been contemplated by the framers of the Constitution. However, the Constitution ensures that the President is superior to the Governor while granting pardons to individuals convicted for such cases. Article 72(3) has the effect of allowing the Governor of a State to seize the mercy petition in respect of a death sentence, but there is no bar to such a petition being presented to the President at a later stage. Although the power of the President to grant pardon extends only to those cases that concern

matters for which the Union Government has the power to make laws, the practical effect of Article 72(1)(c)⁴⁹ read with Article 72(3)⁵⁰ is that the pardoning power of the President has a much wider ambit and extends even to matters that the State Government has the power to make laws in relation to, provided that cases concerning such matters have resulted in the sentence of death.

It is not impossible to conceive of situations where a mercy petition against a sentence of death, once rejected by the Governor of a State, finds its way to the President, and indeed the Constitution does not express any intention to create a bar against such a situation. It follows that the Constitution seeks to treat situations involving a death sentence on a higher pedestal than all other kinds of sentences, such as life imprisonment or rigorous imprisonment. By providing a recourse to those condemned to death against the rejection of their mercy petition by the Governor of their respective State, the Constitution places the President at the very top of the constitutional scheme of pardons, indicating that the exercise of the discretion of the President would be deemed to be more superior than that of the Governors. While the Constitution's implicit recognition of the importance of the right to life is commendable, the creation of such a hierarchy has the obvious drawback of increasing the time taken for the death sentence of a petitioner to achieve the utmost finality.

Power of the Governor: Distinct from the President

Whether the State Government does not have the powers to commute or stop of the execution if the President of India had rejected earlier commutation petitions? In this context, reference can be made to a circular⁵¹ dated 5.03.1991 of the Home Ministry, GOI to the effect that once the President of India exercised power under Art.72, "it will not be open for the government of the state to seek to exercise similar powers under Art. 161, in respect of the same case". This interpretation may not be legally tenable and constitutionally valid. The power of the President to commute the death sentence under Art.72 or of the Governor under Art.161 is in the nature of constitutional powers which the Supreme Court of India has described as '*residuary sovereign power*'.⁵² Generally exercise of power can be broadly traced to 3 sources; namely Constitution, Statute, Executive. Constitutional powers cannot be curtailed by statutes or the executive directions or instructions. Statutory powers cannot be curtailed

by executive instructions. The power to commute under Art.161 is a constitutional power which cannot be curtailed even by a statute much less executive instruction. Similarly, the powers to commute the death sentence under Section 54 of IPC and Section 433 of CrPC are statutory powers conferred on the executive. Hence, the executive instruction under Art.257 will not apply to the exercise of powers under the statute also.⁵³

The commutation power of the Governor under Art.161 is distinct and separate from the power of the President under Art.72. The Constitution doesn't envisage any hierarchy of powers between the President and the Governor. Executive instruction under Art.257 (1) can only be in respect of executive power of the Union and not to situations in which the executive power of the state also exists. Thus, executive directions can in no way fetter, curtail or limit the power of the Governor under Art.161, which is absolute, unfettered which cannot be limited even by a statute, much less by any executive instruction.⁵⁴

Exercise of Power: When?

A plain reading of Articles 72 and 161 would give an impression that the power of pardon can be exercised by the President only for persons convicted of an offence and not to under trials. However, the courts in India, on several occasions, have held otherwise, without giving due attention to the language of the provision. In *Re Maddela Yera Channugadu & others*,⁵⁵ the validity of a Governmental Order granting a general amnesty and releasing all prisoners in the State of Andhra Pradesh and Andhra Prisoners in jails in Mysore came into question due to the inclusion of condemned prisoners awaiting confirmation of their sentences from the High Court in the said order. Two levels of argument were pressed on behalf of the Government. It was first argued that a confirmation of sentence was not a continuation of the proceedings in a court of session, but a safeguard against the perpetration of any injustice, and as such, a person awaiting such confirmation from the High Court would be a person 'convicted of an offence' within the meaning of Article 161 of the Constitution. In addition, it was also argued that the power under Article 161 could be exercised at any stage, whether before or after conviction. The Court after declining to express an opinion on the first point proceeded to decide the case on the basis of the second argument. It observed that the similarity of the language of Article 161 and Article 2

Section 2(2) of the American Constitution permitted the use of American authorities in answering the question. Since in the United States, the Courts had held that the power could be exercised at any time after commission of the offence,⁵⁶ the Court found no reason to take a different stand and held that the power of pardon under Article 161 could, indeed be exercised by the Governor before a person is convicted and sentenced, and therefore, the government order was held to be valid.

Again, in *State v. K.M. Nanavati*⁵⁷, the validity of the Governor's order suspending the sentence imposed by the Bombay High Court on Commander Nanavati was challenged on the ground that an appeal was pending before the Supreme Court, and as such, the trial had not concluded. A Full Bench of the Bombay High Court dismissed this contention on the ground that the word 'trial' did not include the proceedings in an appeal and in any case, the powers under Article 161 could be exercised at any stage. The court relied upon the judgment of the Madras High Court in *Re Channugadu*, and held that the framers of our Constitution intended to confer on the President and the Governors, within their respective spheres, the same power of pardon, reprieve and clemency, both in its nature and effect, as was possessed by the Sovereign in Great Britain and by the President in the United States. The sentence being suspended, Nanavati appealed to the Supreme Court against his conviction where a plea was taken by the appellant to exempt him from the requirement of Order 21 Rule 5 of the Supreme Court Rules which mandated that during pendency of a criminal appeal, the appellant must necessarily surrender to his sentence before the appeal could be heard. This plea was taken on the basis of the Governor's order of suspension of sentence. A Constitution Bench, by a majority of four to one, decided that the power to suspend the sentence lay with the court under Article 142, and though the Governor had the power to grant a full pardon at any stage of the proceeding, including during pendency of the appeal, he could not grant a suspension of the sentence when the matter was *sub judice* before the Court.⁵⁸

Therefore, with respect to the stages at which the various forms of pardoning power can be exercised under the Constitution, the following conclusions have been reached by the Courts:

- (a) Pardon can be granted at any stage after commission of the offence, that is, before or after conviction.

- (b) Pardon can be granted during pendency of an appeal to a higher court.
- (c) A sentence cannot be suspended during pendency of appeal to the Supreme Court.⁵⁹

Exercise of Power and Role of Council of Ministers

In India, Article 72 of the Constitution of India empowers the President of India to grant pardon, however, the President cannot act as per his own whims and fancies and in this process he is to be guided by the Home Minister and the council of ministers.⁶⁰ The power to pardon rests on the advice tendered by the executive to the President, who subject to the provisions of Article 74(1) must act in accordance with such advice.⁶¹ However, there are few areas where the President can exercise his discretion, independently of the aid and advice of the Cabinet. Is Article 72 one of those areas where the President can exercise unfettered discretion?

Former Chief Justice of India P.N. Bhagwati, in the *Bachan Singh case*⁶², was of the view that the President enjoys absolute powers under Article 72. Advice by the Home Ministry is bound to be political and will not inspire confidence. As State is the prosecution agency in all cases of murder, it cannot be expected to decide on a mercy plea objectively and upset a judicial verdict. The Supreme Court in *Government of A.P. v. M.T. Khan*⁶³ stated that if the government considers it expedient that the power of clemency be exercised in respect of a particular category of prisoners, the government had full freedom to do so and also for excluding certain category of prisoners which it thought expedient to exclude. The Court further observed that 'to extend the benefit of clemency to a given case or class of cases is a matter of policy and to do it for one or some, they need not do it for all, as long as there is no insidious discrimination involved'.⁶⁴

Mohammed Afzal Guru, who was found guilty in the Parliament Attack case and sentenced to death⁶⁵, was on the death row for three years, and the UPA Government repeatedly delayed its decision on the petition.⁶⁶ Although, the political parties in power play a primary role in granting or rejecting the mercy petition, the Constitution recognizes the President and Governor as the repositories of the power to pardon. It is

the responsibility of the President to act in a proactive manner, such that the prerogative of pardon is not allowed to be made hostage to political pressures. Hence, in a case, where there has been unreasonable delay on the part of the Council of Ministers in arriving at a decision, the President should make prudent use of power to pardon and dispose of the petition in an expeditious manner. The indefinite deferral of a decision in the mercy petition has the undesirable impact of casting the constitutional power to pardon in bad light.

Delay and Commutation

The mercy petitions were disposed of more expeditiously in former days than in the present times. Mostly, until 1980⁶⁷, the mercy petitions were decided in minimum of 15 days and in maximum of 10-11 months. Thereafter, from 1980 to 1988, the time taken in disposal of mercy petitions was gradually increased to an average of 4 years. It is exactly at this point of time, the cases like *T.V. Vatheeswaran v. State of Tamil Nadu*⁶⁸ and *Triveniben v. State of Gujarat*⁶⁹ were decided which gave way for developing the jurisprudence of commuting the death sentence based on undue delay. Obviously, the mercy petitions disposed of from 1989 to 1997 witnessed the impact of the observations in the disposal of mercy petitions. Since the average time taken for deciding the mercy petitions during this period was brought down to an average of 5 months from 4 years thereby paying due regard to the observations made in various decisions of the Supreme Court, but unfortunately, now history seems to be repeating itself as now the delay of maximum 12 years is seen in disposing of the mercy petitions under Article 72/161 of the Constitution.

In *Devender Pal Singh Bhullar v. State (NCT) of Delhi*⁷⁰, the Court held that if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself.⁷¹ However, the Court held that when the accused are convicted under TADA, there is no question of showing any sympathy or considering supervening circumstances for commutation of sentence.

In *Shatrughan Chauhan v. Union of India*⁷², the Supreme Court, through various writs clubbed together, was called upon to decide, based on the ground that the impugned executive orders of rejection of mercy petitions against 15 accused persons were passed without considering the supervening events such as delay, insanity, solitary confinement, judgments declared *per incuriam*, procedural lapses, which are crucial for deciding the same. In one of the writs in this case⁷³, the accused were charged under TADA which ultimately ended in death sentence. Argument was forwarded against the ratio laid down in *Devender Pal Singh Bhullar Case* and petitioner emphasized the need for reconsideration of the verdict.⁷⁴ The Court held that there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Further, unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. The argument that a distinction can be drawn between IPC and non-IPC offences since the nature of the offence is a relevant factor is liable to be rejected. The Court in *Yakub Memon v. State of Maharashtra*⁷⁵ and in subsequent cases commuted the death sentence passed in TADA case to imprisonment for life.

It is well established that exercising of power under Article 72/161 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 the Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution 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 called for upholding the Constitutional values. Retribution has no Constitutional value in any democratic country. In India, even an accused has a *de facto* protection under the Constitution and it is the Court's duty to shield and protect the same. Therefore, when the judiciary interferes in such matters, it does not really interfere with the power

exercised under Article 72/161 but only to uphold the *de facto* protection provided by the Constitution to every convict including death convicts.

Effect of a Pardon Granted

What is the effect of the exercise of the power of pardon by the President/Governor on the judicial record of the sentence of the convicted person? Is this effect the same in cases where the sentence is merely remitted, or commuted? This question is of far reaching consequence, particularly in Election disputes, where questions of disqualification from contesting elections on the grounds of earlier convictions have arisen time and again before the Courts. In *Sarat Chandra Rabha v. Khagendra Nath*,⁷⁶ this question came up before the Supreme Court. The Court, in order to answer the question raised before it regarding the effect of remission of the sentence examined several authorities on the subject and came to the conclusion that a remission of a sentence did not in any way interfere with the order of the court; it affected only the execution of the sentence passed by the court and freed the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stood as it was. A distinction was drawn between reduction of a sentence done by an appellate or revisional court and an order of remission by an executive authority. The latter was held to be an executive power which could not interfere with or alter the judicial sentence, and the appellant was therefore held to be rightly disqualified under Section 7(b) of the Representation of the People Act.

A more interesting question would have come up if instead of a remission, a full pardon had been granted by the Governor. Would the person, in this case, still have been disqualified under Section 7(b)? The question regarding the effect of a full pardon, therefore, is yet to be answered by the Supreme Court of India. It becomes necessary to analyze and put the effect of a full, unconditional Presidential pardon in India in its proper perspective. The effect of a pardon depends upon the nature of the power enjoyed by the functionary entitled to the same. The constitutional scheme would reveal that the President and the Governor in India do not pardon the offence, but pardon the punishment and the sentence. The power, being one of an executive nature, cannot tamper or supersede the judicial record and the consequence of its exercise is merely

that the punishment or the sentence would not be executed either fully, or in part, even though the offender has been judicially convicted and held guilty. 79 A remission would pardon only a part of the punishment, whereas a full pardon would wipe out the entire punishment imposed. The disqualification under Section 7(b) of the Representation of the People Act would therefore, continue to apply to such a person, since he would be a person 'convicted of an offence' within the meaning of the provision. A presidential pardon, therefore, cannot blot out the guilt of the person; its effect is restricted to only non-execution of the punishment, and no more, since otherwise it would go against the principle of separation of powers by allowing the executive to virtually overrule the decision of the Court.

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. This ostensible incongruity is explained by Sutherland J. in *United States v. Benz* 77 in these words, "The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment".78

Power to Declare a General Amnesty

Does the President or the Governor have the power to declare a General Amnesty in the exercise of their powers under Articles 72 and 161 respectively? In *Re Channugadu*⁷⁹ the Madras High Court held that the general pardon by the Governor granted to all prisoners to mark the formation of the State of Andhra Pradesh did not amount to an act of interference with the due and proper course of justice. Fifty three years later the Supreme Court has stayed a pardon granted by the Governor of the same state to 1500 prisoners to mark the 150th anniversary of the Revolt of 1857.⁸⁰

Concluding Observations

The power of pardon has been made subject to judicial review. It is a good development in so far as it will prevent a misuse of this important constitutional power by unscrupulous politicians in favour of people with power and influence. However, it may serve to further increase the burden

of cases on the courts and altogether prolong the judicial process. It may also prevent the executive from utilizing this power for reasons that although may not strictly be in conformity with constitutional principles, may nevertheless be in the interest of the State. Given the bizarre twist that our polity has taken in recent times, it seems to be self-evident that the only protection we have from complete insanity is judicial review. Thus, while the trend towards greater judicial scrutiny of the power of pardon is undoubtedly a welcome one, the judiciary must leave the executive with a window of discretion in the exercise of the same. If we do not combine democratic governance with firm governance, we shall have no one except ourselves to blame for lawlessness resulting from the abuse of the provisions relating to pardon by criminals guilty of heinous crime.

Notes and References (Endnotes)

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- 4 71 U.S. (4 Wall.)333 (1867). Available at <http://www.legalserviceindia.com/article/I370-Presidential-Pardon.html> (visited on June 24, 2014)
- 5 *Ibid.* at 381.
- 6 Written Submissions of Senior Counsel Soli Sorabjee in the Supreme Court of India as Amicus Curiae in *Epuru Sudhakar v. Government of Andhra Pradesh* (WP (Crl.) No. 284-285/2006). Available at http://www.ebc-india.com/downloads/written_submissions_of_mr_soli_sorabjee_in_power_to_pardon_case.pdf (visited on 16.07.2014)
- 7 *Ibid.* The dicta in *Ex parte Philip Grossman* were approved and adopted by Indian Apex Court in *Kuljit Singh v. Lt. Governor of Delhi.*(1982 (1) SCC 417) In actual practice, a sentence has been remitted in the exercise of this power on the discovery of a mistake committed by the High Court in disposing of a criminal appeal. From the foregoing it emerges that power of pardon; remission can be exercised upon discovery of an evident mistake in the judgment or undue harshness in the punishment imposed.

- 8 1989 (1) SCC 204. In this case, the observations of Justice Holmes have been approved.
- 9 The Law Commission of India, *Report on Capital Punishment*, 317-18 (1967), also stressed on the need for the existence of an executive Pardoning Power citing the reasons (although not exhaustive) 1. Facts not placed before the court 2. Facts placed before the court but not in a proper manner 3. Facts disclosed after the passing of the sentence 4. Events which have developed after the passing of the sentence. The Law Commission stated that there is a plethora of other reasons which do not lend themselves to codification and therefore the Law Commission insisted on retaining the Scope of the pardon prerogative. (Available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> and <http://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf> (visited on 14.05.2014)
- 10 (1982) 1 SCC 417
- 11 *Ibid.* As quoted in Burghess, J.C. in (1897), U.B.R. 330 (334).
- 12 Section 295, the Government of India Act 1935 reads as: (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 of 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 sub-section affects any powers 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.
- 13 The above constitutional provisions were debated in the Constituent Assembly on 29th December 1948 and 17th September 1949. (See Constituent Assembly Debates, Vol.7, pages 1118-1120 and Vol. 10, page 389.) The grounds and principles on which these powers should be exercised were neither discussed nor debated. (See *Framing of India's Constitution : A Study*, 2nd Edition, Dr. Subhash C Kashyap, page 367-371, page 397-399.)
- 14 Article 72. 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.

- 15 These terms mean: Pardon: Complete pardon; Reprieve: Temporary suspension of sentence; Respite: awarding less sentence; Remission: Reducing amount of sentence; Commutation: Changing one punishment to another.
- 16 Article 161. 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.
- 17 (i) Section 432, CrPC, 1973 provides power to suspend or remit sentences.
- (ii) Section 433, CrPC, 1973 provides the power to commute sentence.
- (iii) Section 433A, CrPC, 1973 lays down restrictions on provisions of remission or commutation in certain cases mentioned therein.
- (iv) Section 434, CrPC, 1973 confers concurrent power on the central government in case of death sentence.
- (v) Section 435, CrPC, 1973 provides that the power of the state government to remit or commute a sentence where the sentence is in respect of certain offences specified therein will be exercised by the state government only after consultation with the central government.
- 18 378 F. Supp. 1221 (D.D.C. 1974). Available in *Judicially Reviewing the President's Prerogative of Mercy: A Comparative Study*, at <http://www.bdresearch.org/home/attachments/article/nArt/292.pdf> (visited on 14-04-2014)
- 19 236 U.S. 79 (1915). Available at <http://phbar.org/forum/viewtopic.php?f=65&t=1623&start=0&view=print> (visited on 28-05-2014)

- 20 (1673) Vaugh 330 at 343. Available at http://en.wikipedia.org/wiki/Thomas_v_Sorrell (visited on 29-05-2014)
- 21 Biggins case (1599) 5 Co Rep 50 a,b. Available at <http://www.legalserviceindia.com/article/1370-Presidential-Pardon.html> (visited on 24-05-2014)
- 22 According to the Report of the U.K. Royal Commission pardon can be granted where the Home Secretary feels that despite the verdict of the jury there is a ‘scintilla of doubt’ about the prisoner’s guilt. Judicial decisions, legal text books, reports of Law Commission, academic writings and statements of administrators and people in public life reveal that the following considerations have been regarded as relevant and legitimate for the exercise of the power of pardon. Some of the illustrative considerations are: (a) interest of society and the convict; (b) the period of imprisonment undergone and the remaining period; (c) seriousness and relative recentness of the offence; (d) the age of the prisoner and the reasonable expectation of his longevity; (e) the health of the prisoner especially any serious illness from which he may be suffering; (f) good prison record; (g) post conviction conduct, character and reputation; (h) remorse and atonement; (i) deference to public opinion. It has occasionally been felt right to commute the sentence in deference to a widely spread or strong local expression of public opinion, on the ground that it would do more harm than good to carry out the sentence if the result was to arouse sympathy for the offender and hostility to the law (*See* Law Commission Report, page 328, para 1071). Written Submissions of Senior Counsel Soli Sorabjee in the Supreme Court of India as Amicus Curiae in *Epuru Sudhakar vs. Government of Andhra Pradesh* (WP (Crl.) No. 284-285/2006). Available at http://www.ebc-india.com/downloads/written_submissions_of_mr_soli_sorabjee_in_power_to_pardon_case.pdf (visited on 16.07.2014)
- 23 1993 (4) All ER 442. Available at https://bookshop.blackwell.co.uk/extracts/9780199217762_leyland.pdf (visited on 09-05-2014)
- 24 *Lewis* in his book, *Judicial Remedies in Public Law*(1992) p 21, states: “In principle a failure to consider exercising the power to grant a pardon should be reviewable, at least if an individual can demonstrate that there is some reason why the Home Secretary should consider the case. It is also difficult to see why a decision to refuse a pardon should not also be reviewable in appropriate circumstances, for example, where the allegation is that there has been a failure to act in accordance with any relevant material or a failure to act in accordance with any relevant guidelines, or if there is an error of law as to the element of the offence for which the pardon was sought”. Available at <http://www.legalserviceindia.com/article/1370-Presidential-Pardon.html> (visited on 30-04-2014)

- 25 Available at <http://www.legalserviceindia.com/article/1149-Presidential-Pardon.html> (visited on 16-06-2014)
- 26 Article 45. President's power to grant pardon, etc.- The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. Available at <http://www.pakistani.org/pakistan/constitution/part3.ch1.html> (visited on 26-05-2014)
- 27 Available at <http://orissa.gov.in/e-magazine/Orissareview/2012/oct/engpdf/58-63.pdf> (visited on 24-04-2014)
- 28 Available at <http://orissa.gov.in/e-magazine/Orissareview/2012/oct/engpdf/58-63.pdf> (visited on 24-04-2014)
- 29 Section 401 & 402 of the Code of Criminal Procedure, 1898. Available at http://bdlaws.minlaw.gov.bd/pdf_part.php?id=75 (14-07-2014)
- 30 Article 48 (3) In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister: Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court.
- 31 Rule 14 of the Rules of Business of 1996 provides that the Ministry of Law, Justice and Parliamentary Affairs shall be consulted before tendering advice on a mercy petition against an order of death sentence and pardon, reprieve, respite, remission, suspension or commutation of any sentence.
- 32 See *Maru Ram v. Union of India*, 1981(1) SCC 107 & *Kehar Singh v. Union of India*, 1989 (1) SCC 204 etc. The Governor's power of pardon under Article 161 runs parallel to that of the President under Article 72 and thus several cases based on the same have a bearing on the Presidential Power under Article 72. Moreover judgments dealing with Article 72 have simultaneously deal with Article 161 and vice-versa.
- 33 1981(1) SCC 107.
- 34 Available at <http://indiankanoon.org/doc/1222748/> (visited on 05-07-2014)
- 35 *Ibid.*
- 36 1989 (1) SCC 204.
- 37 59 U.S. 18 How. 307 (1855). Available at <http://supreme.justia.com/cases/federal/us/59/307/case.html> (visited on 22-06-2014)
- 38 Available at <http://www.legalserviceindia.com/article/1370-Presidential-Pardon.html> (visited on 22-06-2014)

39 *Ibid.*

40 1997 (7) SCC 622

41 The Court quashed the order reasoning that the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner, hence the order fringed on arbitrariness.

42 2000 (5) SCC 170. The Court also noted the fact that the accused was a member of a political party and had committed the murder during election year.

43 Writ Petition (Cri.) 284-285 of 2005. The Court held that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the :

(a) that the order has been passed without application of mind; (b) that the order is mala fide; (c) that the order has been passed on extraneous or wholly irrelevant considerations such as political affiliation; (d) that relevant materials have been kept out of consideration; (e) that the order suffers from arbitrariness. Thus, in these judgments concerning the Governor's exercise of pardon, the Court seems to have widened the grounds for judicial review by enumerating specific grounds on which the grant of pardon can be considered arbitrary.

44 The Report of the District Probation Officer which was one of the materials on which the decision was based, highlighted the fact that the prisoner was a 'Good Congress Worker' and that he had been defeated due to political conspiracy. Similarly, the report of the Superintendent of Police reached a conclusion diametrically opposite to the one it had reached before elections were conducted.

45 Available at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=28103>(visited on 28-06-2014)

46 (2011) 4 SCC 353, para 24

47 The principles of judicial review on the pardon power have been restated in the case of *Bikas Chatterjee v. Union of India* (2004 (7) SCC 634 at 637).

48 Two points of comparison that may be gauged from the explicit wording of Articles 72 and 161 are first, the power of the President to grant pardon extends to the power of pardon to sentences granted by a Court Martial, whereas there is no comparable power vested in the Governor of any state; and second, the President is expressly granted the power to consider all cases where the sentence of death has been granted.

- 49 Art. 72(1)(c) of the Constitution of India- in all cases where the sentence is a sentence of death. Available at <http://indiankanoon.org/doc/26959/> (visited on 16-07-2014)
- 50 Article 72(3) of the Constitution of India- 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.
- 51 Available at http://www.pucl.org/Topics/Death-penalty/2011/letter_to_cm.pdf (visited on 28-06-2014)
- 52 *Ibid.*
- 53 The Supreme Court has recognized the constitutional powers under articles 72 and 161 as the “sovereign power to grant pardon has been recognized in our Constitution in Articles 72 & 161” (*State (Govt. of NCT Delhi) v Premraj* (2003(7) SCC 121)) and that this power is absolute and unfettered and cannot be curtailed by statute. (*State of Punjab v Joginder Singh*, 1990 (2) SCC 661). Under the Indian Constitution, certain powers are vested in the Central Government leaving certain powers to the State Governments to exercise autonomy in the spheres assigned to them. Thus the States are not mere delegates or agents of the Central Government. Both the Central and the State Governments draw their authority from the same source, the Constitution of India. Art. 257 is in the chapter titled, “Administrative Relations” and must be read with Article 256. Art. 256 concerns giving executive directions or instructions by the union government with regard to laws made by Parliament. Art.257 covers giving of executive directions by the Union government in a situation of exercise of ‘executive power of the Union’.
- 54 It will be useful to consider that the Executive direction u/ Art. 257(1) of 1991 came for consideration by the Supreme Court in the case of *Daya Singh v Union of India*, (1991 (3) SCC 61) which involved a similar fact situation. The convict therein filed a mercy petition before the Government of Haryana after his mercy petition was dismissed by the President of India. The petition before the Governor was pending for more than two years. In the counter affidavit, the delay was explained by the Union of India stating that the Government of Haryana referred the matter to the President of India seeking clarification on the question as to whether the Governor could exercise the constitutional powers in a case where an earlier mercy application had been rejected by the President. The matter was referred to the Ministry of Law for advise which then ultimately gave the directive under Art. 257(1) of the Constitution to all the Chief

Secretaries of all State Governments. It is pertinent here to point out that the Supreme Court held that the explanation given by the government was not reasonable and thereafter the Court proceeded to commute the sentence of death. In this context, it is therefore reasonable to infer that the SC did not consider valid the directive u/ Art.257 (1) that the Governor has no power to entertain fresh mercy petition after it was rejected by the President, because if the Governor was without power, the pendency of the petition before the authority who had no powers cannot said to be a delay at all. Hence, it requires reconsideration that the State government's has no power to commute or to stay or to grant executive stay of execution. Constitutionally, the 'executive instructions' of the Home Ministry, GOI cannot curtail or limit the 'sovereign power' under Art.161 to consider fresh commutation petition and to grant interim executive stay during the time that the commutation petitions is pending final decision by your State government.

55 1954 CriLJ 1370. Available at <http://indiankanoon.org/doc/536207/> (visited on 27-06-2014)

56 *Ibid.*

57 (1960) 62 Bom. LR 383.

58 *K.M. Nanavati v. State of Bombay*, AIR 1961 SC 112.

59 Available at http://www.nujslawreview.org/pdf/articles/2009_2/rohan-sahai.pdf (visited on 01-07-2014)

60 Constitution of India, Article 74(1) - There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

61 Under the Constitution, the President can return a recommendation to the Cabinet for reconsideration only once; if the Cabinet sends the recommendation back, the President is bound to act on that advice.

62 1980 (2) SCC684. Former Chief Justice of India P.N. Bhagwati was the lone Judge who dissented in the *Bachan Singh case*.

63 2004 (1) SCC 616.

- 64 The theory that the President or the Governor, while deciding on mercy petitions, acts with the aid and advice of the Council of Ministers has led to bizarre situations. The President, in practice, is asked to submit to the opinion of a Joint Secretary in the Department of Justice or the Home Minister, in their individual capacities. The Council of Ministers headed by the Prime Minister, with whose aid and advice the President exercises his powers in most other matters, does not collectively apply its mind to the merits of every mercy petition. If the President disagrees with the Home Ministry's advice, he has the option in practice to avoid taking a decision on these petitions.
- 65 No Urgency to Dispose of Afzal's Clemency Petition, Economic Times, June 11, 2008, available at http://economictimes.indiatimes.com/News/PoliticsNation/No_urgency_to_dispose_of_Afzals_clemency_petition/articleshow/3121228.cms (Last visited on June 29, 2008).
- 66 Government Doesn't Want Another Martyr, Hindustan Times, June 10, 2008, available at <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=4cfa1ba0-536e-417e-acfb-8ccc2b80c1be> (Last visited on June 29, 2008). The Government hinted that the reason it has chosen not to take a decision yet is because the execution of Mohammad Afzal Guru may lead to his attaining the status of a martyr, which may have an adverse impact on the situation in Jammu and Kashmir. The reluctance to take action may also be reflective of an intention to not antagonize the Muslim electorate before the elections in 2009.
- 67 The records of the disposal of mercy petitions compiled by Bikram Jeet Batra and others, attached as annexure in almost all the petitions in *Shatrughan Chauhan v. Union of India* (Writ Petition (Criminal) NO. 55 OF 2013).
- 68 (1983) 2 SCC 68. This was not the first time when the question of such a nature is raised before this Court. In *Ediga Anamma v. State of A.P.*, 1974(4) SCC 443 Krishna Iyer, J. spoke of the "brooding horror of haunting the prisoner in the condemned cell for years". Chinnappa Reddy, J. in *Vatheeswaran* said that prolonged delay in execution of a sentence of death had a dehumanizing effect and this had the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the fundamental right under Article 21 of the Constitution. Thereby, a Bench of two Judges of this Court held that the delay of two years in execution of the sentence after the judgment of the trial court will entitle the condemned prisoner to plead for commutation of sentence of death to imprisonment for life. Subsequently, in *Sher Singh and Ors. v. State of Punjab* (1983) 2 SCC 344, which was a decision of a Bench

of three Judges, it was held that a condemned prisoner has a right of fair procedure at all stages, trial, sentence and incarceration but delay alone is not good enough for commutation and two years' rule could not be laid down in cases of delay. Owing to the conflict in the two decisions, the matter was referred to a Constitution Bench for deciding the two questions of law viz., (i) whether the delay in execution itself will be a ground for commutation of sentence and (ii) whether two years' delay in execution will automatically entitle the condemned prisoner for commutation of sentence.

- 69 (1988) 4 SCC 574. The Court held that 'undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the court while finally maintaining the sentence of death. The Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in *Vatheeswaran* case cannot be said to lay down the correct law and therefore to that extent stands overruled.'
- 70 (2013) 6 SCC 195
- 71 The Court held that the nature of delay i.e. whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard.
- 72 Writ Petition (Criminal) NO. 55 of 2013 (Decided on January 21, 2014)
- 73 This Writ Petition No. 34 of 2013 was clubbed with *Shatrughan Chauhan v. Union of India*, Writ Petition (Criminal) NO. 55 of 2013.
- 74 According to Petitioner, *Devender Pal Singh Bhullar* is *per incuriam* and is not a binding decision for other cases. He also prayed that inasmuch as the ratio laid down in *Devender Pal Singh Bhullar* is erroneous, this Court, being a larger Bench, must overrule the same. He pointed out that delay in execution of sentence of death after it has become final at the end of the judicial process is wholly unconstitutional inasmuch it constitutes torture, deprivation of liberty and detention in custody not authorized by law within the meaning of Article 21 of the Constitution. He further pointed out that this involuntary detention of the convict is an action not authorized by any penal provision including Section 302 IPC or any other law including

TADA. On the opposite, heavily relying on the reasonings in *Devender Pal Singh Bhullar*; it was submitted that inasmuch as the crime involved is serious and heinous and the accused were charged under TADA, there cannot be any sympathy or leniency even on the ground of delay in disposal of mercy petition. Accordingly, it was contended that *Devender Pal Singh Bhullar* has correctly arrived at a conclusion and rejected the claim for commutation on the ground of delay.

- 75 Criminal Appeal No. 1728 of 2007 delivered on 21.03.2013
- 76 *AIR* 1961 SC 334. The appellant in this case, had filed nomination papers for election to the Assam Legislative Assembly, which was rejected on the ground that he was disqualified under Section 7(b) of the Representation of the People Act, 1951 having been sentenced to 3 years rigorous imprisonment under the Explosive Substances Act, 1908. The rejection was made notwithstanding the fact that his sentence was remitted by the Government of Assam under Section 401 of the Code of Criminal Procedure, and the appellant was released after serving an imprisonment of about one and a half years. The election to the assembly was therefore, challenged by the appellant inter alia on the ground that his nomination was wrongly rejected by the Returning Officer, who did not take into account the fact that his sentence, having been remitted to less than two years, did not disqualify him under the provisions of the Representation of the People Act.
- 77 75 L. Ed. 354. Available at <http://justicekatju.blogspot.in/2013/04/appeal-for-pardoncommutation-of-death.html> (visited on 16-07-2014). Appeal(Dated April 13, 2013) of Justice Katju to the President of India for Pardon/Commutation of Death Sentence to Devender Pal Singh Bhullar.
- 78 *Ibid.* In Kehar Singh's (1989 (1) SCC 204) case, the Court observed that in exercising the power under Article 72 "the President does not amend or modify or supersede the judicial record. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. The President "acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it".
- 79 *AIR* 1954 Mad 911.
- 80 Available at <http://www.indianexpress.com/story/210852.html>. *The Indian Express*, "SC puts brakes on Andhra Govt's I-Day pardon for 1500 Prisoners", August 17, 2007 (visited on 01-07-2014)