

THE EXECUTIVE POWER TO PARDON: DILEMMAS OF THE CONSTITUTIONAL DISCOURSE

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The discretionary power to pardon finds recognition in the Indian Constitution, which confers this power on the President of India and the Governors of States. This article traces the boundaries of the power stipulated under the Indian Constitution, as well as the jurisprudence developed by the Supreme Court of India. It commences with an enquiry into the rationale underlying the power to pardon and goes on to engage with a number of issues that the power to pardon has given rise to. One of the issues examined in the article is the doctrine of separation of powers in the context of the prerogative to grant pardon. The constant tussle between the executive and judicial branches of the State is discussed with special reference to the dilemmas posed by the issue of defining the extent of this executive power.

I. INTRODUCTION

An important function of the President and the Governors of States under the Constitution is the power to pardon. This paper seeks to delve into a study of this power by examining some of the problematic issues that it poses. For the purpose of convenience, the paper has been divided into seven parts. Section I of the paper deals with the background of the power to pardon, by discussing the historical origins of the power and the various purposes sought to be achieved through an exercise of the power. Section II analyzes the manner in which the Constitution of India provides for this power. Section III pertains to the importance of the advice of the Council of Ministers with regard to the pardoning power and suggests that such advice should not be considered binding on the President or Governor. Section IV examines the areas where the executive power to pardon could potentially interfere with the legislative and judicial branches of the government, thereby upsetting the theory of separation of powers. Section V attempts to ascertain the extent of the discretionary power to pardon. Section VI highlights the importance of a review mechanism of the pardoning power. Lastly, Section VII discusses the power to pardon in the practical context by providing a critique of the Mohammad Afzal Guru case.

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II. EXAMINING THE BACKGROUND OF THE POWER TO PARDON

The power to pardon, as it exists in the Constitution, must be examined in light of the historical evolution of the concept of pardon, and the purpose sought to be achieved by vesting such a power in the executive branch of the State. This section of the paper seeks to delve into a conceptual understanding of the notion of pardon, or clemency, as it is very often referred to.

A. HISTORICAL DEVELOPMENT OF THE POWER TO PARDON

In ancient Rome, *circa* 403 B.C., a process known as ‘Adeia’ facilitated a democratic pardon for individuals, such as athletes, orators and other powerful figures, who were successful in obtaining the approval of at least 6000 citizens by way of secret ballot.¹ Although the source of this power to pardon was not an executive privilege, it is not difficult to see the similarities in the ancient concept of Adeia and the contemporary practice of pardon, which also often takes into consideration factors such as the public opinion in relation to the individual sought to be pardoned.

Another ancient practice analogous to the power of pardon existed in ancient Rome, where instead of executing an entire army of transgressors, the Romans would execute every tenth condemned troop member.² The reasons for carrying out such a practice appear to be largely political, and hence, it is more difficult to draw parallels from this practice to the contemporary practice since it is not clear whether mercy was the intended motive. However, the effect of such an act seems to be similar to the effect of pardoning accused individuals in present times: although an individual is found guilty and sentenced to a punishment, the actual execution of the punishment does not take place.

Notwithstanding the possible analogies that may be drawn to the aforementioned ancient practices of pardoning accused individuals, the concept of pardon as enshrined in the Indian Constitution can most realistically be said to be derived from the British tradition of granting mercy. Granting mercy has historically been the personal prerogative of the Crown, exercised by the monarch on the basis of advice from the Secretary of State for the Home Department.³ This practice is based on the understanding that the sovereign possesses the divine right and hence, can exercise this prerogative on the ground of divine benevolence.⁴ While under the British system, the monarch is the Head of the

¹ R. Nida and R. L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the President's Self-Pardon Power*, 52 OKLA. L. REV. 197 (1999).

² *Id.*

³ B. V. Harris, *Judicial Review of the Prerogative of Mercy*, PUBLIC LAW 386 (1991).

⁴ G. B. Wolfe, *I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts*, 27 B.C. THIRD WORLD L.J. 417 (2007).

State, under the Indian Constitution, it is the President who is deemed to be the Head of the State, which would explain the reason why the power to grant pardon has been vested in him, along with the Governors of States, who act in a manner similar to the President at the level of the states.

The English concept of pardon was also borrowed by the U.S. Constitution which, under Section 2, Clause 1, placed the power to pardon in the President of the United States.⁵ The United States Supreme Court has clarified on more than one occasion that the term ‘pardon’ should be given the same meaning under the United States Constitution as was given to it in England.⁶

B. THE PURPOSE UNDERLYING THE POWER TO GRANT PARDON

There are many views regarding the rationale behind granting pardon to accused individuals. The Hegelian view advocates that pardons are justified only when they are ‘justice-enhancing’, that is, in certain cases justice may not be served without the grant of pardon due to the unduly harsh nature of the sentence or due to an individual being sentenced wrongly.⁷ As per this view, the grant of pardon in cases where a larger goal of justice is not sought to be achieved would be unwarranted. The Hegelian view may be linked to the larger philosophy of retribution: the retributivist school of thought believes that pardon is only justified as an extra-judicial corrective measure to remedy any failure of the system, such that the ultimate aim of the accused receiving just deserts may be secured. The philosophy of retributivism only concerns itself with the goal of enhancing justice and no further.⁸

In contrast to the retributivist view is the school of thought based on rehabilitation and redemption, which believes that pardons may be justified even when the goal is ‘justice-neutral’, that is, not necessarily concerned with the aim of securing remedial justice.⁹ For example, the redemptive philosophy gives importance to the post-conviction achievements of the accused, which the retributivists refuse to consider relevant. The redemptive school of thought justifies pardon on the grounds of public welfare and compassion.¹⁰

⁵ Art. II, Section 2, Clause 1, United States Constitution.

⁶ *U.S. v. Wilson*, (1833) 7 Pet. 150; *Ex parte Wells*, (1855) 59 U.S. (18 How.) 307.

⁷ M. Strasser, *The Limits of Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 *BRANDEIS L. J.* 85 (2002).

⁸ *Supra* note 4.

⁹ *Id.*

¹⁰ *Id.*

It is argued that the modern practice of granting pardons reflects a combination of both the abovementioned philosophies, since pardons may be granted as both justice-enhancing and justice-neutral measures. In the case of *Kehar Singh*,¹¹ the Supreme Court discussed the grounds on which the power to pardon can be exercised. Pathak, C.J. stated that the right to life and personal liberty, as granted to citizens of India under Article 21, is of paramount importance. Since judicial error cannot be precluded due to human fallibility, recourse from erroneous judgments has been provided in the Constitution of India in the form of the executive power to pardon.¹² It was noted that under the British tradition, this power was exercised by the sovereign head of the state, that is, the monarch so as to safeguard against judicial error, as well as on the basis of reasons of state.¹³ The Supreme Court accepted that such an approach seems the most appropriate in the Indian context as well, albeit failing to elaborate upon such ‘reasons of state’.

It is submitted that the expression ‘reasons of state’¹⁴ should be interpreted to mean those reasons that the judiciary is not concerned with, and should not be concerned with, while arriving at a decision regarding the guilt of the accused based purely on a consideration of the facts of the case and the relevant law applicable thereto. Hence, promoting the general welfare or recognizing the need for compassion in light of positive contributions of the accused after conviction would be policy-based considerations that only the executive can give effect to. In *Satpal v. State of Haryana*,¹⁵ one of the reasons given by the Supreme Court for quashing the grant of pardon by the Governor was that the conduct and behaviour of the convict during the period that he was serving the sentence was not taken into account by the Governor while rejecting the mercy petition.

Further, it is the executive that can give effect to widespread public opinion in favour of or against the sentence of a particular accused, thereby upholding the principle of public accountability that is so dear to every democratic state. Discussing the history of the British tradition of the grant of pardon by the monarch, Blackstone stated that the purpose of such an act of mercy was to “endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince.”¹⁶ In countries where the power is exercised by an elected head of the state, this principle could translate into upholding the widespread views of the public which has, directly or indirectly, chosen the head of the state as its representative.

¹¹ *Kehar Singh v. Union of India*, (1984) 4 SCC 693.

¹² *Id.*

¹³ *Id.*

¹⁴ Professor Upendra Baxi’s critique of the expression ‘reasons of state’ would be discussed at a later stage in the context of the extent of the pardoning power of the President and Governor, in Section VI of this paper.

¹⁵ *Satpal & Anr. v. State of Haryana*, (2000) 5 SCC 170.

¹⁶ *Supra* note 1.

III. POWER TO PARDON: THE CONSTITUTIONAL SCHEME

The power of the executive wing of the State to grant pardons finds mention in the Constitution of India in two forms: first, the power of the President to grant pardon under Article 72 of the Constitution and second, the power of the Governor to grant pardon under Article 161 of the Constitution. Before delving into a discussion of the myriad legal issues that the exercise of the power to pardon presents, it would be useful to study the nature of this power, as conveyed by a bare reading of the text of the Constitution of India. The power to pardon covers the power to suspend, remit, and commute sentences. In the course of this paper, the term ‘pardon’ would be used as a general term, which would cover these modes of reducing the sentence passed by the court.

A. THE POWER OF THE PRESIDENT TO GRANT PARDONS

Under Article 72(1) of the Constitution, the President is empowered to grant pardons, reprieves, respites or remissions of punishment, or to suspend, remit or commute the sentence of any individual who has been convicted of offences that are covered within the ambit of clauses (a) to (c) of Article 72(1). The instances enumerated under Article 72(1) are: first, cases where the punishment or sentence has been given by a Court Martial¹⁷; second, cases where the punishment or sentence relates to an offence against any law concerning matters that the power of the Union extends to¹⁸; and third, all cases where the sentence in question is a sentence of death¹⁹.

Article 72(1)(a) is qualified by Article 72(2), which states that the power conferred by law on any officer of the Armed Forces for the purpose of suspending, remitting or commuting a sentence passed by a Court Martial would not be affected by the power of the President contained in Article 72(1)(a).²⁰ Further, Article 72(3) expressly provides that the power of the President to suspend, remit or commute a sentence of death under Article 72(1)(c) would not affect the power of the Governor of a State to suspend, remit or commute a sentence of death under any applicable law in force.²¹

B. THE POWER OF THE GOVERNOR TO GRANT PARDONS

In addition to vesting the power of pardon in the President of India, the Constitution also provides the Governor of a State the power to grant pardons; however, this power of the Governor, dealt with under Article 161 of the Constitution, is narrower in scope than the power of the President to grant pardons under Article

¹⁷ Article 72(1)(a), Constitution of India, 1950.

¹⁸ *Id.*, Article 72(1)(b).

¹⁹ *Id.*, Article 72(1)(c).

²⁰ *Id.*, Article 72(2).

²¹ *Id.*, Article 72(3).

72. Article 161 of the Constitution empowers the Governor to grant pardons, reprieves, respites or remissions of punishment, or to suspend, remit or commute the sentence of any person who has been convicted of an offence against any law that relates to a matter covered by the executive power of the State.²²

C. THE SUPERIOR POWERS OF THE PRESIDENT: A COMPARATIVE ANALYSIS OF THE SCOPE OF ARTICLE 72 AND ARTICLE 161

A plain reading of the Constitution of India would, by itself, reveal that the nature of the power of pardon granted to the President under Article 72 is far superior to the power of pardon granted to the Governor under Article 161. Two points of comparison that may be gauged from the explicit wording of Articles 72 and 161 might be stated in this regard: 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.

At this juncture, it is important to observe that a combined reading of Articles 72 and 161 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.

Hence, it merits mention that, 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) read with Article 72(3) 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 those

²² *Id.*, Article 161.

condemned to death a recourse 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 of various States. 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.

IV. PARDONING POWER AND THE COUNCIL OF MINISTERS

As discussed above, the Constitution of India vests the power to pardon in the President and the Governors of the States. Although the Constitution provides for the President and the Governor to be aided and advised by the Council of Ministers at the Union and State level, respectively, whether such advice must be mandatorily followed while granting or declining pardon is an issue that requires examination.

A. A TEXTUAL INTERPRETATION OF THE CONSTITUTION OF INDIA

Article 74(1) of the Constitution states that the Council of Ministers headed by the Prime Minister would aid and advise the President, "who shall, in the exercise of his functions, act in accordance with such advice".²³ Similarly, Article 163(1) of the Constitution states that the Council of Ministers headed by the Chief Minister would aid and advise the Governor in the exercise of his functions. However, Article 163(1) differs from Article 74(1) in one important respect, since the former half of the provision is qualified by the latter, which states: "except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion".²⁴ Further, Article 163(2) provides that if a question arises as to whether a certain matter requires the Governor to act in his discretion, the decision of the Governor in his discretion would be final and the validity of such decision cannot be called in to question on the ground that he should not have acted in his discretion on the matter.²⁵ The prevalent view appears to be that the Governor is expected to play a more activist role than the President,²⁶ particularly since in the era of coalition governments, Governors must act as the link between Centre and the States, and for maintaining an effective constitutional machinery within the States.²⁷

²³ *Id.*, Article 74(1).

²⁴ *Id.*, Article 74(1).

²⁵ *Id.*, Article 74(2).

²⁶ M. P. JAIN, INDIAN CONSTITUTIONAL LAW 404 (2003).

²⁷ *Id.*, 402.

However, there is a need to distinguish between *functions* that may be performed using a certain degree of discretion, for the purpose of maintaining an effective constitutional machinery within States, and a *power* in the nature of the power to pardon, which is intended to give a much broader degree of discretion to the President and the Governors. Articles 72 and 161 expressly use the term ‘power’, and maintain a staunch silence regarding the guidelines on the basis of which such power is to be exercised. The use of terms such as ‘mercy’, ‘clemency’ and ‘grace’ in relation to this power indicate that it is intended to be in the nature of a prerogative, entirely based on the subjective satisfaction of the President and Governors. An inference that the President and the Governor would not be bound by the advice of the Council of Ministers while exercising the power to pardon does not seem unjustified, on a bare reading of the text of the Constitution.

B. JUDICIAL PRECEDENT

Although a textual interpretation of the Constitution fails to convince that the framers of the Constitution intended for the advice of the Council of Ministers to be binding on the President and Governors while exercising their pardoning powers, the judicial interpretation of the Constitution suggests an entirely different proposition. In *Samsher Singh v. State of Punjab*,²⁸ a seven-judge bench of the Supreme Court held that the satisfaction of the President or the Governor required by the Constitution is not their personal satisfaction, but the satisfaction of the Council of Ministers on whose aid and advice the President and the Governor exercise their powers and functions. The judgment in *Samsher Singh* was applied to the power of pardon in the case of *Maru Ram v. Union of India*,²⁹ where the Supreme Court held that it is not up to the President or the Governor to take independent decisions while deciding whether to pardon an individual, since they are bound by the advice of the Council of Ministers.

C. THE HISTORICAL TRADITION IN BRITAIN

As per the established practice, the power to grant pardon in Britain is exercised by the reigning monarch in consultation with the Secretary of State for the Home Department.³⁰ The Supreme Court, in *Maru Ram*, laid emphasis on the British practice while arriving at its conclusions regarding the Indian position. Krishna Iyer, J. stated: “it is fundamental to the Westminster system that the Cabinet rules and the Queen reigns”.³¹ The British practice appears to have been incorporated in India as well, where a Section Officer in the Ministry of Home Affairs prepares a note, “which moves up the hierarchy with varying degrees of indifference or interest”.³²

²⁸ *Samsher Singh v. State of Punjab and Anr.*, (1974) 2 SCC 831.

²⁹ *Maru Ram v. Union of India*, (1981) 1 SCC 107.

³⁰ *Supra* note 3.

³¹ *Supra* note 29.

³² *Supra* note 14, 503.

D. THE POSSIBILITY OF ABSURDITY

An interpretation of the Constitution to the effect that the President and Governors are bound to act as per the advice of the Council of Ministers while exercising their pardoning powers may lead to situations of absurdity. For example, in the case of *Kehar Singh*,³³ the accused in relation to whom pardon was sought was the assassin of Ms. Indira Gandhi, a former Prime Minister of India. In such a situation, the possibility of the advice of the Council of Ministers, which comprised ministers from the same political party as the former Prime Minister, suffering from bias or a lack of objectivity cannot be precluded. Further, in the era of coalition governments, there is a chance that the advice given to the Council of Ministers would not reflect a 'true, just, reasonable and impartial opinion',³⁴ and would instead be based wholly on political motivations.

In light of such possibilities, it is submitted that some leeway for the President to exercise the power to pardon without being bound by the advice of the Council of Ministers, and without bowing to political pressures, is absolutely necessary. Hence, I am of the opinion that the decisions of the Supreme Court in this regard have been far from prudent.

E. THE SOLUTION

A study of the prevailing situation indicates that there is a need to find a reasonable solution such that the exercise of the pardoning power is based on equitable, logically sound reasons, and that the advice of the Council of Ministers is given effect to, wherever appropriate.

It has been recommended that there should be a constitutional amendment which expressly vests the power to pardon in the President, such that he is under no obligation to act on the aid and advice of the Council of Ministers.³⁵ I find that such a view is flawed on two counts: first, such an amendment to the Constitution would be virtually impossible to pass, since the reigning party in the Parliament or State Legislature would be absolutely unwilling to divest themselves of the power of aiding and advising the President or the Governor, respectively; and second, regardless of the possibility of absurdity in certain cases, the reigning party is the representative of the will of the people, and its advice must be given effect to as far as possible, to uphold the public confidence.

I submit that the solution to the foreseeable problem described above may be found by way of the President or Governor exercising his/her discretion in a

³³ *Supra* note 11.

³⁴ N. Thakur, *President's Power to Grant Pardons in Case of a Death Sentence*, 105 CRI.L.J. 101 (1999), 104.

³⁵ P. J. Dhan, *Justiciability of the President's Pardon Power*, 26 (3, 4) INDIAN BAR REVIEW 78 (1999).

self-determined manner. That is, the President/Governor should be allowed to use his/her discretion to distinguish between situations where the advice of the Council of Ministers is extremely important in light of the context of the case and the need to give effect to certain policy decisions of the ruling party (for example, a strong stand against terrorism), and those situations where giving effect to the advice tendered by the Council of Ministers would be most obviously problematic and raise doubts as to the correctness of the decision to grant or deny pardon.

It is important that the judiciary takes note of the fact that the power to pardon has been vested in the President and Governor, as opposed to the Prime Minister, Cabinet or the Legislature, for a reason: the President is an impartial Head of the State, who stands on a higher pedestal than the Prime Minister, Cabinet or the Legislature; similarly, the Governor is deemed to be in a position similar to that of the President in his respective State. Thus, to deny the President and Governor the discretion intended to be vested in them by the Constitution would be a grave injustice.

V. THE POWER TO PARDON AND THE THEORY OF SEPARATION OF POWERS

The power to pardon, vested in the President and the Governors of State, is an executive power. This is an important power, and as demonstrated above, it is based on a wide form of discretion. It requires to be examined how this prerogative of the executive can be reconciled with the functioning of the other branches of the state, namely the legislature and the judiciary, and whether there are any areas of conflict.

A. THE POWER TO PARDON AND THE LEGISLATURE

In my opinion, there are two ways in which the Parliament and State Legislatures in India can interfere with the President or Governor exercising their pardoning power: first, under Article 61 of the Constitution, the President may be impeached by the Parliament; and second, by carrying out the function of enacting legislations, which may have a direct or incidental impact on the carrying out of the discretionary power of granting pardons. The first measure acts as a direct check on the President, and will be discussed subsequently in Section VI of this paper.

As regards the second aspect, namely interference with the pardoning power by enacting legislations, it was held in the United States decision of *Ex parte Grossman*³⁶ that the “executive can reprieve or pardon all offences after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress”. This indicates that the Legislature is not at liberty to modify the

³⁶ *Ex parte Grossman*, 267 U.S. 87 (1925).

decision of the President in relation to a pardon. In the Indian context, it may be noted that the vesting of this power in the President and Governors, as opposed to the Prime Minister or Legislatures, may have been deliberate, so as to prevent the grant of pardon being made open to any sort of legislative debate.

In addition to directly modifying the decision of the President or Governor, the Legislature can also enact legislations, which may be directly relevant to issues such as sentencing. The decision of the Constitution Bench in *Maru Ram v. Union of India*,³⁷ while discussing Section 433A of the Code of Criminal Procedure, 1973, which pertains to restrictions on the power of remission or commutation in certain cases, stated that it could not be said to be violative of Articles 72 and 161 of the Constitution, since the source and substance of the two powers was different, and although Section 433A did not act as a fetter on the powers laid down in these Articles, it would be desirable if the spirit of Section 433A was not overlooked while exercising the power to pardon.

It was held in *Ashok Kumar v. Union of India*³⁸ that the Rules enacted under the Prisons Act and other similar legislations by State Governments should be treated as guidelines by the President and Governors while exercising their power to remit sentences, before the executive can formulate guidelines for itself in relation to the exercise of this power. It is submitted that this decision is incorrect in that it departs from the view expressed by the Constitution Bench of the Supreme Court in *Kehar Singh v. Union of India*³⁹ that since the power to pardon is of the widest amplitude, it is not open to the Court to suggest guidelines.

However, it remains to be seen whether the enactment of a legislation reflecting a significant policy decision, as opposed to a mere procedural change, would have an impact on the exercise of the power to pardon. For example, in the event of an amendment to put in place the death sentence as a punishment for a class of crimes, such as crimes pertaining to terrorism, it is possible that some degree of deference may be shown to such an amendment by the President/Governor while exercising the pardoning power, particularly when the advice of the Council of Ministers may echo the same policy.

B. THE POWER TO PARDON AND THE JUDICIARY

In the context of the power to pardon, the possibility of conflict between the executive and the judiciary is more apparent than that of the conflict between the executive and legislature. This stems from the fact that the power of the President/Governor to grant or deny pardon may overlap, to some degree, with the power of the judiciary while pronouncing its sentences. However, this friction has been sought to be minimized by those who argue that the power of the executive and the judiciary exist in entirely different realms.

³⁷ *Supra* note 29.

³⁸ *Ashok Kumar v. Union of India*, (1991) 3 SCC 498.

³⁹ *Supra* note 11.

1. The exercise of investigative and adjudicative powers by the President/Governor

The decision in *Kehar Singh* was extremely significant for expressly pronouncing that while exercising the pardoning power, the President/Governor would have liberty to enter into the merits of the decision passed by the court: “it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on the accused”.⁴⁰ It is not difficult to see why such a ruling tests the concept of separation of powers, by allowing the executive to perform the same function as the judiciary. As per one view, vesting investigative and adjudicative powers in the President threatens the rule of law, particularly since the limits of exercising these functions are determined by the President himself/herself.⁴¹

2. The theory of different planes

The Supreme Court in *Kehar Singh* qualified the pronouncement discussed above in Section V(B)(1) by stating:

“The President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts on a wholly different plane from that on 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. 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”.⁴²

A similar proposition was made in *Sarat Chandra Rabha v. Khagendranath Nath*,⁴³ where the Supreme Court distinguished between the practical effect and the legal effect of an order of remission by the President/Governor:

“An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees 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 stands as it was...in law, the order of remission merely

⁴⁰ *Id.*

⁴¹ H. J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665 (2001).

⁴² *Supra* note 11.

⁴³ *Sarat Chandra Rabha v. Khagendranath Nath*, AIR 1961 SC 334.

means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched.”⁴⁴

In the opinion of Seervai, the Supreme Court’s decision in *Sarat Chandra Rabha* deprived the decision of the Court in *K. M. Nanavati*,⁴⁵ a case decided by the Court earlier in the same year, of its binding value.⁴⁶ In the case of *Nanavati*, the Supreme Court had stated that the judicial power of the Supreme Court under Article 142 of the Constitution, whereby it can make orders ‘for doing complete justice’ and the executive power contained in Article 161 could be exercised in the same field within certain narrow limits. The Court had suggested a harmonious interpretation of the two provisions of the Constitution.⁴⁷ Seervai cautions against the misapplication of the principle of harmonious construction, such that disharmony is created between two constitutional provisions where such disharmony does not exist in the first place.⁴⁸

3. Legal rights versus compassion

Another argument that is made to distinguish between the powers of courts and the executive power to grant pardon is that while the former is concerned with the legal rights of an individual, the latter is concerned with compassionate grounds for relieving the individual of the punishment imposed on him/her. In the words of Lord Diplock: “Mercy is not the subject of legal rights. It begins where legal rights end”.⁴⁹ While making decisions, the judiciary considers the legal grounds for imposing punishments and is not at liberty to make pronouncements on the basis of compassion. It is said that through its exercise of the power to pardon, the executive performs the function of neutralising the insufficiently compassionate judgments of the judiciary.⁵⁰ This principle has been recognized in India in *Mohinder Singh v. State of Punjab*.⁵¹

4. The limits of the power of the judiciary

It is submitted that the power of the judiciary to make decisions regarding the guilt of an accused and the appropriate sentence in each case may be said to be more limited than the power to decide the acceptance or rejection of a mercy petition for two reasons. First, it may not be possible for the judiciary to take into account certain factors that can be considered only after the sentence of the convict has begun, such as the post conviction behaviour and contributions

⁴⁴ *Id.*

⁴⁵ *K. M. Nanavati v. State of Bombay*, AIR 1961 SC 112.

⁴⁶ H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, VOLUME II 2104 (2004).

⁴⁷ *Supra* note 45.

⁴⁸ *Supra* note 46, 2103.

⁴⁹ *De Freitas v. Benny*, [1976] A.C. 239, 247 (Judicial Committee of the Privy Council).

⁵⁰ *Supra* note 41.

⁵¹ *Mohinder Singh v. State of Punjab*, (1977) 3 SCC 346.

made by the convict. The Supreme Court has recognised that this is an important consideration and should be given due importance by the President/Governor while making a decision on whether pardon should be granted.⁵²

Second, the decision to grant pardon may be based on certain reasons that may not be appropriate for the court to consider while sentencing an individual. It has come to be accepted that decisions granting or declining pardon contain a certain policy element. Courts may not be the most appropriate forum for giving effect to such policy decisions, since they are concerned only with ascertaining the guilt or innocence of the accused. Further, it is pointed out that courts may be logistically handicapped to decide cases on the basis of policy considerations: “policy decisions often require access to empirical information and the benefit of the views of a wide range of people, neither of which may be available through the judicial process”.⁵³

5. The principle of comity

It must be noted that the executive and judiciary give due regard to the principle of comity between the branches of government. That is, both branches have been willing to recognise the limits of their realms of functioning and behave in a manner deferential to the other branch of government, or assist the other branch of government in carrying out its functions. In certain instances, the Supreme Court has declined to adjudicate on a petition brought before it on the ground that the same matter has been seized by the President under his pardoning power.⁵⁴ The principle of comity has also been extended to cases where, for example, two out of the three individuals who were accomplices in the same crime have been granted commutation, whereas the third has been unsuccessful in this regard – the Supreme Court may recommend to the President that in the interests of equity, the punishment of the third accomplice be commuted as well.⁵⁵

6. The issue of deterrence and the need for executive self-restraint

Lastly, it must be said if the power to pardon is exercised in an indiscriminate manner, then it may undermine the precedential value of judicial decisions and upset the equilibrium that should ideally exist between executive and judicial action. Unless the President and Governors exercise a certain degree of self-restraint while making decisions under the pardon to power, the use of this power could potentially destabilise the authoritativeness of decisions made by the judiciary, and have a negative impact on the deterrent effect sought through such judgments. It is important that the President and Governors provide cogent and convincing reasons while exercising their pardoning power.

⁵² *Supra* note 15.

⁵³ *Supra* note 3.

⁵⁴ *Mohinder Singh v. State of Punjab*, (1977) 3 SCC 346.

⁵⁵ *Harbans Singh v. State of Uttar Pradesh*, AIR 1982 SC 849.

VI. THE EXTENT OF THE POWER TO PARDON

A. THE NATURE OF THE POWER AND THE ABSENCE OF GUIDELINES

That the nature of the power envisaged under Articles 72 and 161 of the Constitution is a discretionary power may be established through a textual interpretation of these Articles. A plain reading of these provisions shows that there is complete silence regarding the factors which must be taken into account by the President and the Governor while exercising the power to pardon. It is reasonable to assume that this silence was deliberate, since the power to pardon has historically been in the nature of a prerogative.

The view that it is not desirable to fetter the power to pardon by imposing guidelines has been endorsed in a number of decisions. The judiciary has been reluctant to impose guidelines on the executive for exercising the power to pardon in most cases, with a few exceptions.⁵⁶ In *Kuljit Singh v. Lt. Governor of Delhi*,⁵⁷ the Supreme Court expressed the view that the pardoning power of the President is a wholesome power that should be exercised 'as the justice of a case may require', and that it would be undesirable to limit it by way of judicially-evolved constraints. In *Kehar Singh*,⁵⁸ the Supreme Court stated that the power under Article 72 should be construed in the widest possible manner without the Court interfering to lay down guidelines of any sort. However, the Court went on to state that the power to pardon may be exercised to correct judicial errors, and for 'reasons of state'. Even though such a proposition appears to be extremely broad, providing ample scope to the President to exercise his discretion, it has come under attack from Upendra Baxi, who is of the opinion that such a statement would fetter the scope of the power in a manner not contemplated by the Constitution:

"To extend to clemency power the logic of the doctrine of the reasons of state is constitutionally perverse in the face of the fundamental right to life and liberty in Article 21. The Constitution does not authorise a policy of death to 'traitors', 'insurgents', 'naxalites', 'dacoits', 'terrorists' in the exercise of the discretion inherently entailed in the clemency power. Nor can the Constitution authorise such a pattern of exercise of that power. It has to be exercised case by case, and under the discipline of Article 21."⁵⁹

It is submitted that the view that fundamental rights act as sufficient guidelines for the exercise of pardoning powers under the Indian Constitution is

⁵⁶ See *supra* note 38, where the Supreme Court expressed the view that the executive should formulate its own guidelines for exercising the power to pardon.

⁵⁷ *Kuljit Singh v. Lt. Governor of Delhi*, (1982) 1 SCC 417.

⁵⁸ *Supra* note 11.

⁵⁹ *Supra* note 14, 504.

correct. To go beyond the most fundamental prescriptions in the Constitution for circumscribing the power to pardon may have the dangerous effect of unjustly curtailing the power of the President and the Governor, which is not intended by the Constitution. Hence, the examination of the circumstances and context of each case on its own merits represents the most appropriate approach while exercising the pardoning power.

B. THE REPERCUSSIONS OF THE WIDE DISCRETION OF THE PRESIDENT AND GOVERNOR

Having discussed the merits of an approach where pardoning power is decided in light of the facts and circumstances of each case, and the undesirability of fettering the power by prescribing guidelines, it must be said that certain exceptional instances may warrant a mechanism of review of the exercise of power.

1. The violation of Fundamental Rights

As stated above, the fundamental rights prescribed by the Constitution of India comprise the basic minimum guidelines that the President and Governor must defer to, while exercising their pardoning power. It follows that in instances where there is a failure to do this, the aggrieved individual should have some remedy, whereby a violation of his fundamental rights is recognised. To my mind, the situations where the fundamental rights of an individual may be violated in the course of the President/Governor exercising the power to pardon may be classified into two broad categories: first, the discretion of the President/Governor may be exercised in an arbitrary manner at the time of decision-making, whether in terms of the procedure employed or the substantive reasons given for accepting or rejecting the mercy petition; and second, in the event that the pardon granted is conditional – that is, the person seeking pardon must fulfil certain conditions before the pardon becomes effective – and the condition imposed by the President/Governor is violative of fundamental rights.

2. The example of self-pardon

In the absence of any well-defined guidelines for the exercise of the pardoning power, the possibility of the President/Governor granting pardon to himself/herself cannot be precluded. Undoubtedly, such a situation would be rare, and it is argued that any individual worthy of holding a position as important as the position of a President should be vested with the power to pardon.⁶⁰ Although it is expected that the position of the President and those of Governors of States, being such privileged positions, would be occupied by individuals who do not possess a criminal record, there are two important facts that require to be noted: first, the Constitution of India does not prescribe a bar on convicted or under-trial individuals contesting the position of President/Governor; and second, neither

⁶⁰ *Supra* note 1.

Article 72 nor Article 161 prescribe a bar on the power of pardon being exercised in relation to the person exercising the power. Although not expected in the ordinary course, the possibility of such a situation arising cannot be excluded completely, and in such instances, it would be necessary for the propriety of the decision of the President/Governor to be reviewed.

VII. CHECKS ON THE POWER TO PARDON: PROPOSING A MODEL OF DISCIPLINED JUDICIAL REVIEW

As discussed in Section VI above, there is a possibility that in certain instances, the decision of the President/Governor under Articles 72 and 161 would require to be subjected to a mechanism of review, in the interests of justice. This section of the paper discusses the viability of various methods of checking the power of the executive, such that it is not exercised in a capricious manner, and arrives at a conclusion regarding the most appropriate mechanism.

A. PUBLIC ACCOUNTABILITY

There is a widespread belief that the political or electoral process acts as the perfect check on the President while exercising the power to pardon.⁶¹ This view is based on the assumption that the electorate keeps a check on the President by voting the President out of power when the prerogative of pardon is exercised in an arbitrary manner. While this may be relevant for holding the President accountable in countries such as the United States, where the President is elected directly, in countries such as India, where the common masses directly elect the members of Parliament and State Legislatures, and not the President/Governor, the relevance of this measure for the purpose of holding the President and the Governor accountable is significantly diminished. The political process can act as a check only as far as voting out political parties who exercise an influence on the President in relation to the power to pardon is concerned. Moreover, it has come to be accepted that allowing judicial review to accompany existing political checks might yield more favourable results by facilitating greater accountability.⁶²

B. IMPEACHMENT OF THE PRESIDENT

As per one school of thought, the impeachment of the President acts as a sufficient check against the misuse of the pardoning power.⁶³ The Constitution of India provides for the impeachment of the President under Article 61 of the Constitution. It is submitted that in the Indian context, impeachment cannot be said to exist as a sufficient check against the pardoning power being exercised in an arbitrary manner. Three reasons may be furnished in support of this argument.

⁶¹ *Supra* note 41.

⁶² *Id.*

⁶³ *Id.* See also M. Strasser, *Some Reflections on the President's Pardon Power*, 31 CAP. U. L. REV. (2003).

First, the Constitution of India only provides for the impeachment of the President and does not contain any provisions for dealing with the impeachment of Governors of States. Hence, the process of impeachment is of limited value in relation to the power to pardon, which may be exercised by the President and also by the Governors of States. Second, the process of impeachment, as provided for under Article 61, is carried out by the Members of Parliament. In the event that the Council of Ministers have advised the President to render the unsatisfactory decision of granting or declining pardon, it would be unlikely that the ruling party or coalition would be in favour of undertaking the measure of impeachment against the President, since the President's decision would, in such an instance, be a reflection of the decision of the Council of Ministers. Indeed, if in the situation envisaged here, the Council of Ministers were to actively attempt to impeach the President, it would be an utterly irresponsible act.

Third, in the event that there is a general dissatisfaction with the manner in which the President has exercised his power under Article 72, one of the reasons for which could be that the advice tendered by the Council of Ministers was rejected by the President, the Members of Parliament can commence proceedings for impeaching the President. However, due to the inherent nature of the requirements of Article 61, it may be extremely difficult for the impeachment process to be successful. Since the President occupies such an important position, stringent conditions have been imposed for his/her removal. As per Article 61(2), the first step in the process of impeachment is the submission of a resolution to impeach the President that must be signed by at least one-fourth of the total number of members of the House seeking to impeach the President. It is to be noted that the resolution must be signed by one-fourth of the *total number of members of the House*, as opposed to the number of members present and voting in the House, which is the term used in relation to passing Bills in a joint sitting of both Houses of Parliament. Similarly, after the charge(s) against the President have been examined,⁶⁴ and after the President has had an opportunity to appear before such investigation, it is required that a resolution is passed by at least two-thirds of the *total membership of the House* for the impeachment to be successful.⁶⁵ Hence, the impeachment of the President is not likely to be successful in the ordinary course, unless there is a substantial degree of agreement between the members of the House of Parliament initiating impeaching proceedings that the President should be impeached.

⁶⁴ *Supra* note 17, Article 61(4).

⁶⁵ *Id.*, Article 61(4).

C. THE UNDENIABLE IMPORTANCE OF JUDICIAL REVIEW

After discussing the limited viability of the political process and impeachment as potential measures to prevent the arbitrary exercise of pardoning power by the President and Governor, I would like to propose a model of judicial review wherein the judiciary would act in a disciplined manner to lay down limits for itself, such that the principle of comity between the judiciary and executive remains intact, but the exercise of the pardoning power in blatant violation of the fundamental rights and principles of natural justice does not go unchecked.

1. Justiciability of the subject matter of pardon decisions of the President/Governor

The appropriateness of judicial review of a particular subject matter is measured on the basis of ‘justiciability’. Courts are said to have a constitutional obligation to uphold the rule of law by enforcing the procedural rights in relation to executive decision-making.⁶⁶ Being in the nature of an executive power, the power to pardon may be said to be justiciable insofar as examining the procedural propriety of decisions of pardon is concerned. The view that this executive power should not be subject to judicial review merely since it’s in the nature of a prerogative has been criticised by some as being merely ‘a bald assertion’.⁶⁷ The model of judicial review sought to be proposed by me is one that would operate on the basis of self-regulation by the judiciary. It is a well-recognised principle of administrative law that judicial review may vary in intensity based on the subject matter sought to be reviewed. It has been observed: “It is increasingly becoming common for courts to adopt a variable standard of review, the intensity of which alters depending upon the subject matter of the action. Terms such as irrationality and proportionality can be applied with differing degrees of rigour or intensity. This feature has become more marked as the courts have shown a greater willingness to protect individual rights, employing more intensive review in such instances”.⁶⁸

Hence, in cases involving judicial review, courts may choose to enter the domain of review only insofar as procedural impropriety and the rights of individuals are concerned, and not on the substantive merits of the decision made by the President/Governor. In the event that courts were divested of the power to exercise this qualified power of review, individuals suffering due to the arbitrary action of the President/Governor would have no remedy to correct procedural wrongs and the injustice of their fundamental rights being violated.

⁶⁶ B. V. Harris, *Judicial Review, Justiciability and the Prerogative of Mercy*, 62(3) CAMBRIDGE LAW JOURNAL 631 (2003).

⁶⁷ *Supra* note 3.

⁶⁸ P. P. CRAIG, ADMINISTRATIVE LAW 552 (2003).

2. The perceived dangers of judicial review of the pardoning power

One of the reasons why the judiciary is seen as being unfit for carrying out the review of the pardoning power is that decisions of pardon are policy-laden, akin to foreign affairs and the distribution of resources, and hence courts may not have access to adequate factual and empirical data to assist them with making decisions.⁶⁹ It is submitted that the review of decisions relating to pardon should be exercised in a limited form, such that the merits of the decision made by the President/Governor are not scrutinised or interfered with; rather, it must be ensured that the fundamental rights of the individual in question are not violated, and that procedural norms have been complied with. Since the purpose of review would not be to interfere with the propriety of the policy sought to be given effect to by the executive, this fear about the inadequacy of the judiciary is unfounded.

It is also apprehended that evaluation of relevant procedural considerations may by itself introduce subjectivity in the review process and may cause the review process to be based on merits.⁷⁰ It is submitted that while such a possibility cannot be ruled out, such a criticism of judicial review is not specific to the judicial review of pardon decisions but may be said to be true of the judicial review of most types of executive action. Such a fear would be belied through the consistent functioning of the judiciary in a responsible manner over a period of time.

3. Judicial Review of Pardon Decisions: An Exercise in Self-Restraint by the Judiciary

As mentioned above, I seek to propose a model of judicial review whereby the judiciary would act in a mature, disciplined manner by setting its own limits and respecting the exercise of discretion by the President and Governors insofar as it does not border on arbitrary action. It has been recommended that “rather than classifying the prerogative of mercy as not reviewable, the court should determine the appropriateness, and therefore the availability, of judicial review, after consideration of each application brought before the court”.⁷¹ It is submitted that this is the most reasonable approach to the judicial review of decisions of pardon, one which strikes a balance between providing a remedy to the aggrieved individual in case of the violation of his/her rights and restraining the judiciary within sensible limits.

The Supreme Court has recognised the existence of its power to review decisions made by the President/Governor while exercising their pardoning power in a limited class of instances. The power under Article 72 of the Constitution was said to “fall squarely within the judicial domain” and thus, open to judicial review,

⁶⁹ *Supra* note 66.

⁷⁰ *Supra* note 3.

⁷¹ *Id.*

in *Kehar Singh*.⁷² In *G. Krishta Goud v. State of Andhra Pradesh*,⁷³ the Supreme Court stated that it would not turn a blind eye to public power being exercised in an arbitrary or *mala fide* manner, including instances where the President exercises his power under Article 72 in a discriminatory manner. In *Satpal v. State of Haryana*,⁷⁴ it was held that since the power of the Governor to grant pardons was a constitutional power, it would be open to judicial review on certain limited grounds, for example, in cases where the Governor has failed to apply his/her mind, or where the order has been based on extraneous considerations.

While the Supreme Court has been quick to recognise its power to review decisions of the President/Governor under their pardoning power, it is essential that the Supreme Court accepts that this power requires to be exercised in a regimented manner, without falling prey to the temptation of making judgments on the substantive grounds on which the power to pardon has been exercised by the President/Governor.

VIII. THE CASE OF MOHAMMED AFZAL GURU

One of the pending mercy petitions, which has been in the news in recent times is that of Mohammed Afzal Guru, who was found guilty in the Parliament Attack case and sentenced to death.⁷⁵ He has been on the death row for three years, and the UPA Government has been repeatedly delaying its decision on the petition.⁷⁶ The Government has 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.⁷⁷ Such inaction on the part of the Government has been criticized by the Bharatiya Janata Party, which feels that strong action must be taken against acts of terrorism.⁷⁸ The reluctance to take action may also be reflective of an intention to not antagonize the Muslim electorate before the elections in 2009.

It is submitted that regardless of the manner in which the practice to grant pardons has developed, whereby the political parties in power play a primary

⁷² *Supra* note 11.

⁷³ *G. Krishta Goud v. State of Andhra Pradesh*, (1976) 1 SCC 157.

⁷⁴ *Supra* note 15.

⁷⁵ *No Urgency to Dispose of Afzal's Clemency Petition*, *Economic Times*, June 11, 2008, available at http://economictimes.indiatimes.com/News/Politics/Nation/No_urgency_to_dispose_of_Afzals_clemency_petition/articleshow/3121228.cms (Last visited on June 29, 2008).

⁷⁶ *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).

⁷⁷ *Id.*

⁷⁸ *Take Decision on Afzal: BJP*, *Hindustan Times*, June 9, 2008, available at <http://www.hindustantimes.com/Redirect.aspx?ID=d924c139-363a-46c0-aa24-286716707a78> (Last visited on June 29, 2008).

role in granting or rejecting the mercy petition, the Constitution recognizes the President and Governor as the repositories of the power to pardon. In the case of Mohammed Afzal Guru, 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. Although the President is at liberty to base her opinion for granting or rejecting the petition on the advice of the Council of Ministers, as has been demonstrated through this paper, she should not be seen as being obliged to defer to the advice of the Council of Ministers. Hence, in such 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 her power to pardon and dispose of the petition in an expeditious manner. In the event that the adverse impact on the public anticipated due to the execution of Mohammed Afzal Guru outweighs the merits of executing him, the petition must be rejected and reasons of public interest must be furnished for the same. However, the indefinite deferral of a decision in the mercy petition has the undesirable impact of casting the constitutional power to pardon in bad light.

IX. CONCLUSION

A study of the power to pardon under the Constitution of India reveals that this power is intended to be in the nature of a discretionary power, or a prerogative, a theme that runs through the course of this paper. I have attempted to demonstrate reasons why the President and Governors of State may need to exercise this power without being bound by the advice of the Council of Ministers, as well as the undesirability of putting in place guidelines that would fetter the discretion that should ideally be exercised upon an examination of the facts and circumstances of each case. In a mature democracy, it is expected that the various branches of the government would be reasonably capable of laying down limits for their own jurisdiction. It is precisely this premise that my conclusions have been based on. I seek to propose a model wherein the executive and judiciary operate through self-regulation, by being deferential to the realms of each other's powers. Through such a disciplined exercise of their respective powers, justice would be ensured in the best possible manner. Any undue interference by one branch in the functioning of the other would erode the authority of both the branches. Both the executive and the judiciary must also aim at dealing with cases pertaining to pardon in an expeditious manner, since the detrimental effects of an inordinate delay in decision-making is clear from cases such as that of Mohammed Afzal Guru, which have caused much controversy in recent times.