

LIMITS OF THE PARDONING POWER UNDER THE INDIAN CONSTITUTION

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The President's power of Pardon is granted, limited and controlled by the Constitution, both expressly and impliedly. The sweep of this power therefore has to be gauged with the Constitutional Scheme in mind, and not by repeated references to the power enjoyed by the British Crown. This paper seeks to examine several issues determining the scope of the pardoning power of the President under the Indian Constitution, including the stage at which it can be exercised, the offences which fall within its reach, the procedure and judicial review, and the effect of a pardon on the guilt of the offender, and concludes that even though the power of Pardon has survived through the ages, its scope is limited by the axioms of modern political philosophy such as Separation of Powers and Supremacy of the Constitution.

I. INTRODUCTION

The power of pardoning offenders has been a privilege enjoyed by the Sovereigns around the world since time immemorial.¹ In England, the power of pardon was one of the royal prerogatives of the Crown to be exercised as an act of grace by the Sovereign. By the word prerogative we usually understand, observes Sir William Blackstone, “that special pre-eminence which the King hath over and above all the other persons, and out of the ordinary course of the common law, in right to his royal dignity.”² Therefore, the power of pardon of the British Crown was a prerogative to be exercised as an act of grace in order to administer justice with mercy.³

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¹ The Old and New Testaments make references to “divine pardon.” References to the prerogative of mercy have also been made in the Mosaic Law, Greek Law and Roman Law. For more information, See generally William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476 (1977).

² JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 4 (1820).

³ *Id.*

The power of pardon has not gone unchallenged. Beccaria has attacked such a prerogative as being a tacit acceptance of the imperfection of the system of administration,⁴ and the power has seen continuous conflicts between the British Parliament and the Crown, till the Act of 1535 strengthened and recognized the absolute power of the King to pardon, by denying such a power to all other members of the Royalty.⁵ The only restriction to this power followed later, in 1679 when the King was denied the power to pardon impeachments.⁶ However, in spite of these oppositions, the power of pardon has stood the test of time and has been incorporated in most of the Modern Constitutions.⁷ In India, the power of Pardon has been vested in the President and the Governor by the people through the Constitution, not as an act of grace, but as part of the constitutional scheme.⁸ That being the case, it becomes necessary to examine the text of the Constitution, since the power would then be granted, extended and controlled by the relevant constitutional provisions.⁹

II. CONSTITUTIONAL SCHEME

The power of pardon has been conferred upon the President and the Governor through Articles 72 and 161 of the Constitution respectively.

Art. 72 reads as follows: 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, or remissions of punishment or suspend, or 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 any matter to which the executive power of the union extends;
 - (c) in all cases where the sentence is a sentence of death.

⁴ CESARE BECCARIA, ON CRIMES AND PUNISHMENT 81 (1986).

⁵ See Duker, *supra* note 1, 486-7.

⁶ *Id.*, 493.

⁷ See Constitutions of the United States of America, France, Germany, etc.

⁸ Kehar Singh v. Union of India, AIR 1989 SC 653, ¶7.

⁹ In *Thaivalappil Kunjuvara Varied v. State of Travancore-Cochin*, AIR 1956 SC 142 (An unusual question came up before a Constitution Bench regarding the prerogative of the Maharaja of Cochin to pardon offences committed within his state, and whether the same continued after coming into force of the Constitution in light of Article 372(1). It was held that the prerogative stood repealed as it was inconsistent with Articles 72 and 161 of the Constitution, to which Article 372 was subject. Furthermore, Article 362 was also held to be not applicable since it only protected the personal rights, privileges and dignity of the Indian Rulers).

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 the sentence of death exercisable by the Governor of a State under any law for the time being in force.

Although the power of pardon in England and the United States is deemed to include the powers of remission, reprieves and suspension,¹⁰ the Constitution of India specifically confers these latter powers upon the President¹¹. Sub-clauses (a), (b) and (c) of clause (1) specify that the power of pardon extends only to *punishments* and *sentences*. All punishments imposed via a Court Martial are pardonable by the President. Furthermore, all punishments or sentences imposed for *offences* under a law relating to any matter to which the executive power of the Union extends is also within the power of the President to pardon. Lastly, the President has the power to pardon any sentence of death regardless of the law the person is convicted under.

Art. 161 reads as follows: 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 of which the executive power of the State extends.

The Governor's power to pardon, as can be seen, extends to all punishments and sentences imposed under any law relating to a matter to which the executive power of the State extends. Therefore, the President and the Governor have the exclusive power to pardon offences under statutes relating to matters in List I and II respectively, while both exercise concurrent powers for pardoning offences under statutes relating to matters in List III. In English Law too, the "King's right to pardon and remit the consequences of a violation of the law, is confined to cases in which the prosecution is carried on in his Majesty's name, for the commission of some offence affecting the public, and which demands public satisfaction, or for the recovery of a fine or forfeiture, to which his Majesty is entitled."¹²

¹⁰ See CHITTY, *supra* note 2, 97 ("The prerogative may also be partially exercised in pardoning an offender; so that the King may remit part of the sentence of the law"). See *United States v. Wilson*, (1833) 7 Pet. 150 (Furthermore, The American Courts attach the same meaning to the word 'pardon' as was understood in England).

¹¹ See H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY* 2102 (1993) (Seervai treats this as a means of caution on part of the Constituent Assembly to avoid leaving it to the Court for determining the content of the pardoning power).

¹² See CHITTY, *supra* note 2, 90.

The only exception to the above rule is in case of death sentences where the President has the power to pardon regardless of the law the person is convicted under, and clause (3) of Article 72 ensures that such power is independent of, and does not affect the power of the Governor to pardon such punishment if the Executive power of the State extends to the same.

The power of pardon, being an executive one, is of course subject to Article 74(1), and has to be exercised by the President on the aid and advice of the council of ministers. This is strikingly different from the position in countries with Presidential forms of government, where the power is to be exercised at the personal discretion of the President.¹³ The scope of the power of pardon shall be discussed in this paper in the form of several issues. These include the stage of exercise of the power, the offences which can be pardoned by the President, the procedure to be followed while exercising powers under Article 72, and judicial review, the effect of a pardon granted under Article 72, and whether the power empowers the President to declare a General Amnesty. Owing to the similar nature of the power, and for the sake of brevity all references to the President shall include the Governor as well, unless the context otherwise requires.

III. STAGE OF EXERCISE OF THE POWER

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 undertrials. 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,¹⁴ 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

¹³ See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 176 (1829) (For example, the United States of America. It is for this reason that in the United States, the power of pardon does not exist during a vacancy in the office of the President, but is revived as soon as the vacancy is filled up).

¹⁴ ILR, (1955) Mad 92.

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,¹⁵ 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 G.O. was held to be valid.

Again, in *State v. K.M. Nanavati*¹⁶, 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 *In Re Channugada*,¹⁷ 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.¹⁸ 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 decided by a majority of four against one 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.¹⁹

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.

¹⁵ *Id.*, ¶12.

¹⁶ (1960) 62 Bom. LR 383.

¹⁷ See Channugadu, *supra* note 14.

¹⁸ See Nanavati, *supra* note 16, ¶12.

¹⁹ *K.M. Nanavati v. State of Bombay*, AIR 1961 SC 112.

It is submitted that the Courts, in reaching the above conclusions have neglected the core principles of interpretation of a constitutional text.

It is not doubted that in England, the Royal Prerogative to pardon offences could be exercised by the King at any time. As stated in Halsbury's Laws of England, "Pardon may, in general be granted either before or after conviction".²⁰ It is also not doubted that in the United States, too, the power of pardon has been held to be available to the President at any stage, either before or after conviction of the offender.²¹ However, these conclusions need to be put in their proper perspective before they can be applied in India, a task the Indian judiciary has failed to perform. The power of pardon of the British Crown was in the nature of a prerogative, that is, 'something out of the course of the ordinary common law'.²² This is clearly not the case with our Constitution. In India, the power of pardon is vested with the President as an integral part of the constitutional scheme.²³ As is rightly pointed out by Balakrishna, "The President of India has no prerogatives; he has only powers granted and functions enjoined by the Constitution of India. There being vital distinctions between the two, it is not permissible to proceed on the presumption that the powers of the President of India are those which are enjoyed by the British Crown at the present day."²⁴ The Constitution makers were very specific in those cases where there was a clear intention to confer a power of the same nature and effect upon any functionary as the one enjoyed by its British counterpart: the most prominent being the reference to the House of Commons in the unamended Articles 105(3) and 194(3). A Court of Law must gather the spirit of the Constitution from the language used, and what one may believe to be the spirit of the Constitution cannot prevail if not supported by the language, which therefore must be construed according to well-established rules of interpretation uninfluenced by an assumed spirit of the Constitution.²⁵

The conclusions reached by the American Courts can be understood better by referring to the provision in the Constitution of the United States which enunciates the power of pardon of the American President, "... and he shall have the power to grant reprieves and pardons for offences against the United States except in cases of impeachment."²⁶ In *United States v. Wilson*, the primary case relied upon by the bench in *Channugadu, In Re*²⁷, the U.S. Supreme Court held that the power of pardon vested in the President in the United States was the same as the power enjoyed by the King in the United Kingdom, and therefore, could be

²⁰ HALSBURY'S LAWS OF ENGLAND, 8606 (Lord Hailsham ed., 1974).

²¹ Wilson, *supra* note 10.

²² See CHITTY, *supra* note 2, 4.

²³ See Kehar Singh, *supra* note 8.

²⁴ Balkrishna, *Presidential Power of Pardon*, 13 JILI 103.

²⁵ Keshavan Madhava Menon v. State of Bombay, AIR 1951 SC 128, ¶5. See also, SEERVAI, *supra* note 11, 172.

²⁶ Constitution of the United States of America, Article 2 § 2.

²⁷ See Channugadu, *supra* note 14.

exercised at any time after commission of the offence. The Court found ample support from the express exclusion of pardon in cases of impeachment in the U.S. Constitution which was also the position in England. It is difficult to see how this case could be relied upon by the Indian Courts. The language of the provision in the American Constitution is substantially different from ours, since it talks about pardoning 'offences against the United States', and not the punishment and sentence for persons *convicted of an offence*, as is the case in India. The conclusion was arrived at because the continuation of the prerogative of the Crown through the President in the United States would not have run contrary to their Constitution and therefore, could be easily incorporated.

The Indian Courts hastily adopted the stand taken by the U.S. Supreme Court without appreciating the fact that the Constitutions of several states in the United States do not empower the Governor to exercise the power of pardon at the stage of trial that is before conviction.²⁸ There was, therefore, no reason for the Courts to assume that the power of pardon of the President in India would be the same as that of the President in the United States simply from what was held in the authorities interpreting a provision, the language of which is, in fact substantially different from that used in Articles 72 and 161 of the Indian Constitution. Perhaps this was the reason why a three-judge bench of the Supreme Court in *Harshad S. Mehta v. State of Maharashtra*²⁹, while pointing out the difference between powers of the court under Sections 306 and 307 CrPC and those of the President/Governor under the provisions of the Constitution observed that the latter powers were meant to be exercised *after* a person has been found guilty.³⁰ The decision in *Nanavati*³¹ regarding the harmonious construction of Articles 161 and 142 also fails to impress. The majority opinion does not take into account the difference in the nature of powers exercisable by the Governor and the Supreme Court under Articles 161 and 142 respectively. The former being a purely executive exercise, and the latter being judicial in nature cannot be harmoniously construed to curtail the fields of each other, even though there may be an overlap in the practical impact of the exercise of both powers. Criticisms on this line have been levied by several eminent jurists, who even argue that the case ceases to be good law in the light of several subsequent judgments of the Supreme Court.³²

The correct perspective to the problems regarding the stage of exercise of the various forms of the pardoning power is that the power of pardon in India extends only to punishments and sentences, and therefore, can be exercised only when such penalty has already been imposed, that is, after the person has been tried and found guilty. However, post conviction, the power of pardon should be made available in its plenary form, and no artificial restrictions should be imposed on the same.

²⁸ Constitution of Ohio, Article 3 § 11; Constitution of California, Article 5 § 8(a).

²⁹ AIR 2001 SC 3774.

³⁰ *Id.*, ¶13.

³¹ See *Nanavati*, *supra* note 19.

³² See *SEERVAI*, *supra* note 11.

IV. OFFENCES WHICH CAN BE PARDONED

Which offences can be pardoned by the President in the exercise of his power under Article 72? Can contempt of court or contempt of the legislature be pardoned? Can offences vesting private interests in the parties, such as those under the Negotiable Instruments Act, 1882 be pardoned? Two approaches can be taken with respect to the above problem, each of them giving a slightly different field of acts/omissions covered by the term 'offences'. The first would be to accept the meaning given to the word 'offences' in the General Clauses Act made applicable to the interpretation of the Constitution by Article 367. The second would be to follow a broad approach, by including all acts for which there is a punitive sanction as being covered by the term 'offences'. While the choice of approach would not have any impact on the major offences covered in the Penal Code, it would be crucial in case of those offences, in which the nature of the act or omission is not clear.

In India, this question first came up before a full bench of the Allahabad High Court in *State v. Padma Kanta Malviya*³³, in which the extent of the word 'offence' used in Article 20(3) was examined and whether the same included criminal contempt of court. The Court incorporated the definition of the word 'offence' given in The General Clauses Act,³⁴ and went on to hold that the Contempt of Courts Act, 1926 (which was the law in force at that point of time) and Article 215 of the Constitution of India did not *make* contempt of court punishable, but merely recognized the same as an inherent power of the High Courts. The Court, therefore concluded that contempt of court was not an 'offence' for the purposes of Article 20(3).

A similar conclusion was reached, albeit for different reasons, by the Supreme Court of Indiana in *State v. Shumaker*.³⁵ The Court held that contempt of court was not an offence within the meaning of Article 5, Section 17 of the State Constitution (the provision empowering the Governor of the State with the power of pardon). The Court assigned the following reasons for the same: (a) No jury trial is provided for in trials of individuals accused of contempt, (b) Proceedings are summary in nature and incidental to proper administration of justice and unintimidated and unembarrassed functioning of the court, and (c) Contempt of court is neither defined nor is punishment thereof fixed in any statute. The Supreme Court of the United States, however, has gone for the wider approach towards the meaning of the word 'offences' in Article 2, Section 2 of the US Constitution. In *Ex Parte Philip Grossman*³⁶, the Court speaking through Taft, C.J., while pointing

³³ AIR 1954 All. 523.

³⁴ Article 367 makes the General Clauses Act applicable for the meaning of terms used but not defined in the Constitution, according to which an offence is "an act or omission made punishable by law for the time being in force". See The General Clauses Act, § 3(38).

³⁵ *State v. Shumaker*, 164 N.E. (Ind.) 408.

³⁶ 267 U.S. 87, 69 L. ed. (Adv. 377).

out the common law difference between civil and criminal contempt, held that so far as civil contempt was concerned, it was a kind of “remedial part of the court’s order necessary to secure the rights of the injured suitor.”³⁷ However, in case of criminal contempt, the same was imposed to “punish the contemnor for violating the dignity of the court and the King, in the public interest.” While the punishment for civil contempt was held to be remedial and for the benefit of the complainant, the sentence for criminal contempt was held to be punitive in the public interest to vindicate the authority of the court and to deter other like derelictions.³⁸ The intention of the American Constitution makers to confer similar powers of pardon on the President as was enjoyed by the King in Britain was highlighted through several committee reports, and the same position was adopted. Therefore, it was decided that while the American President did not have the power to pardon acts of civil contempt, he had the power to pardon acts of criminal contempt of court, which qualified as ‘offences’ within the meaning of Article 2, Section 2. To the question of frustration of judicial power and independence of the judiciary, Taft, C.J. eloquently pointed out, “If we could conjure up in our minds a President willing to paralyze Courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?”³⁹

Is it justified to include the power to pardon criminal contempts of court within the competence of the President under Article 72 of our Constitution? As it turns out, the stand in favour of such a power is not unanimous, and several reasons have been given to the contrary. A very forceful opinion against such a power is stated in the dissenting opinion of Judge Ryan in *State of New Mexico v. Magee Publishing Co.*⁴⁰ While the majority took the broader view that criminal contempt of court did amount to an offence, since it offended the judiciary as an agency of the state, Judge Ryan held, “... The question concerns a constitutional existence of power; that granted, it may be exercised in any of the instances above stated and to the frustration of judicial power as indicated. Only, if the extension of the pardon power to criminal contempt be clearly indicated by the language of the Constitution should the pardon in this case be upheld; not by forcibly reading the intent into the provision examined.”⁴¹

In several other cases, strong views have been expressed against such a power; the central line of concern being the danger of conferring the power to negate and nullify the authority of the Court to enforce obedience and making it a dependent branch of government.⁴² In my opinion, it is the narrower view which would exclude the power of pardoning acts of criminal contempt, which seem to be the correct one. The power to punish for contempt is an inherent power of the

³⁷ *Id.*, 135.

³⁸ *Id.*, 136.

³⁹ *Id.*, 36.

⁴⁰ 1924, 224 Pac. (New Mex.) 1928.

⁴¹ *Id.*

⁴² State ex rel. Rodd v. Verage, 187 N.W. 830.

Court to uphold its majesty and dignity. Indeed, all executive pardons work to the frustration of judicial power, but the power to pardon acts of criminal contempt of court goes a step ahead and frustrates the power of the judiciary to maintain its authority and uphold its majesty and dignity. For similar reasons, the power to pardon acts of contempt of the legislature have been unanimously argued against,⁴³ and it would be hypocritical on the part of those against such a power to urge that the power to pardon acts of contempt of court be extended to the President. For, if the legislature can be given the privilege to enjoy an unfettered, independent power to punish for its contempt, there is no reason why the same should not be granted to the courts.

In India, the task is simplified by the fact that the General Clauses Act applies to the interpretation of the Constitution, and therefore, the narrow view of the word 'offences' for the purposes of Article 20(3) taken by the Allahabad High Court, would apply to Article 72 as well, thereby denying the President the power to pardon acts in contempt of court. Another exception to the power of pardon is in cases where there is a private interest generated out of a punishment. It is settled law in England, that the right of pardon is confined to offences of a public nature where the Crown is prosecutor and has some vested interest either in fact or by implication, and 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.⁴⁴ This restriction to the pardoning power in England is derived from the Latin maxim, *non potest rex gratiam facere cum injuria et damno aliorum*, meaning, "the king cannot confer a favour on one subject to the injury and damage of others."⁴⁵ Under this principle, the Crown cannot enable a subject to erect a market or fair so near that of another person so as to affect his interest therein⁴⁶, nor can the king grant the same thing in possession to one, which he or his progenitors have granted to another.⁴⁷ On the same principle, the Crown cannot pardon an offence against a penal statute after information brought, for thereby the informer has acquired a private property in his part of the penalty.⁴⁸

Therefore, if part of the punishment for the offence is by way of a fine payable to the complainant, then the power of pardon shall not extend to such punishment, which, though punitive in nature, also confers a benefit and a right upon the complainant. It follows, that in a conviction under Section 138 of the Negotiable Instruments Act and all other offences of a similar nature, if a fine imposed upon the offender is made payable to the complainant, then payment of such amount cannot be pardoned by the President. The President may only pardon that portion of the punishment in which no rights of private individuals are involved.

⁴³ See RAWLE, *supra* note 13, 177 ("The purpose of this privilege is to secure a purity, independence, and ability of the legislature, adequate to the discharge of all their duties").

⁴⁴ HALSBURY'S LAWS OF ENGLAND 606 (Lord Hailsham ed., 1974).

⁴⁵ HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 31 (1999).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

V. PROCEDURE AND JUDICIAL REVIEW

Much has been talked about whether there should be a procedure to be followed by the President while exercising his power of pardon. Questions regarding application of the rules of natural justice, and against arbitrariness have been raised by several scholars, and have been the issue in several cases decided by the Supreme Court.

In *Maru Ram v. Union of India*⁴⁹, while examining *inter alia* the alleged inconsistency between Section 433-A of the Code of Criminal Procedure and Articles 72 and 161 of the Constitution of India, a Constitutional Bench of the Supreme Court observed that even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power.⁵⁰ Judicial review of such power was held to be available, but only on the Wednesbury grounds for ordinary administrative actions.⁵¹ In *Kehar Singh v. Union of India*⁵², the question regarding the procedure to be followed by the President came in issue directly. The petitioner was convicted of serious offences relating to the assassination of Indira Gandhi, then Prime Minister of India and sentenced to death by the Sessions Court, which was upheld by all the higher courts, including the Supreme Court. A mercy petition was filed before the President in which it was alleged that the evidence on record was insufficient and that the petitioner was wrongly convicted. A request for an oral hearing by the representative of the petitioner was also made. The mercy petition was rejected by the President and thereby a writ was filed challenging the order of the President *inter alia* on the ground that no oral hearing was given to the petitioner. It was also pleaded that guidelines may be laid down for regulating the exercise of the power of pardon in order to prevent its arbitrary exercise. On the first point, the Court held that since the proceedings before the President were of an executive character, the petitioner would not have any right to insist upon an oral hearing and it was at the discretion of the President to decide how he would prefer to acquaint himself with the information necessary for the effective disposal of the petition.⁵³ The Court also found it unnecessary to lay down any guidelines regulating the exercise of the power under Articles 72 and 161 and held that the provisions contemplated a 'myriad kinds of cases' for which it would not be possible draw a channelized set of guidelines.⁵⁴

⁴⁹ AIR 1980 SC 2147.

⁵⁰ *Id.*, ¶63.

⁵¹ *See Epuru Sudhakar v. Govt. of A.P.*, AIR 2006 SC 3385 (The action can be judicially reviewed on the following grounds: (a) No application of mind, (b) Mala fide, (c) Irrelevant or extraneous considerations, (d) Relevant materials not considered, (e) Arbitrariness).

⁵² AIR 1989 SC 653.

⁵³ *Id.*

⁵⁴ *Id.*

This apparent conflict between the decisions in *Maru Ram* and *Kehar Singh* was later reconciled in *Ashok Kumar v. Union of India*,⁵⁵ in which it was clarified that the recommendation of framing guidelines for the exercise of powers under Articles 72 and 161 in *Maru Ram* was not part of the ratio and therefore, not binding upon the bench which decided *Kehar Singh's case* and it was the latter which stated the legal position regarding the procedure to be followed by the President. The arguments in favour of having a procedure are mostly centred around the possible misuse of the power of pardon and growing cases of party favouritism, especially considering the fact that the power of pardon is to be exercised by the President on the aid and advice of the Council of ministers. In addition, there are arguments regarding effective representation of the offender, since the question is one regarding his life and personal liberty. In *Swaran Singh v. State of UP*,⁵⁶ a member of the Legislative Assembly of Uttar Pradesh was convicted of the offence of murder. He was also accused in five other cases of serious offences, and a clemency petition before the Governor of the State had already been dismissed. In spite of this, a second clemency petition was filed by him before the same Governor, which was allowed by the Governor on the basis of a report submitted by the police officials who had recommended remission of the sentence on 'humanitarian grounds'. The Court set-aside the order on the grounds that the facts regarding the pending criminal cases and the dismissal of the first clemency petition were not brought to the notice of the Governor and therefore, the same was passed without application of mind and 'fringed on arbitrariness'. Again, in *Satpal v. State of Haryana*,⁵⁷ the Governor of Haryana passed an order remitting the unexpired portion of the sentence of the accused, a member of the Bharatiya Janata Party convicted of murder, criminal conspiracy and other serious offences. When the order of the Governor was challenged before the Supreme Court, it was found that the order, which was passed on January 25, 1999, stated that the convict was confined in Central Jail, Hissar whereas he had surrendered before the Court of Sessions only on February 2, 1999. It was therefore, concluded that the same was passed by the Governor without application of mind, and was liable to be quashed. The Court however, made it clear that quashing of the order did not debar the Governor from reconsidering the matter in the light of the relevant materials and acting in accordance with the constitutional mandate.

Although, the above cases do highlight the abuses of the power of pardon, scattered cases of this kind cannot be the ground for curtailing the power of the President by having a specialized pardon board, or some other mandatory procedure to be followed in the exercise of the power. Post exercise remedies like judicial review, which though limited in its scope, can be and have been exercised in the appropriate cases to good effect. The very purpose of investing such a power with the President alone is perhaps because the sense of responsibility is

⁵⁵ AIR 1991 SC 1792.

⁵⁶ AIR 1998 SC 2026.

⁵⁷ AIR 2000 SC 1702.

always strongest in proportion as it is undivided.⁵⁸ Furthermore, a body of a large number of members, if involved in the procedure for pardoning offenders may take too long to decide upon the case, which can be fatal in some situations.⁵⁹ Similarly, having a long drawn procedure can be an impediment in the way of effective exercise of the power by the President.

Prof. Upendra Baxi, has vehemently argued in favour of an oral hearing being given to the offender on grounds of Article 21. He writes, "If, as the Supreme Court maintains, clemency power is a part of the constitutional scheme, then Article 21 rights and standards assuredly extend to its exercise ... If Article 72 clemency power as a part of the constitutional scheme, is thus subject to the discipline of Article 21, then the accused convicted to die must have a minimal right to personal hearing."⁶⁰ It is difficult to see how these arguments can be maintained. Like the Bench which decided *Nanavati*, Baxi too, falls in the trap of failing to differentiate between an executive and a judicial power. The stage of pardon comes *after* a person has been tried and convicted by the courts of law, which is done as per the rules of natural justice. It is a discretionary power of the President, which does not confer any right upon the person praying for the same. The person is not *deprived* of his right to personal liberty by the President's refusal of pardon, for if that was the case, all refusals including those after giving the offender a personal hearing, would violate Article 21, since none of them would be through a procedure established by *law*, within the meaning of the provision. Additionally, it is not necessarily an incident of the rules of natural justice that personal appearing must be given to a party likely to be affected by the order.⁶¹ Giving a right to personal hearing to a person applying for pardon before the President would be to convert the President's office to a virtual court of appeal from the regular criminal courts, which is plainly absurd and inconsistent with the constitutional scheme.

Though, there have been scattered cases of misuse of the power of pardon by the Governors of several states, the situation is not as grave so as to make it necessary for the President to go through a standard procedure before he can exercise his power of pardon. In fact, if that is the case, then the benefits of such a power may be compromised rendering it meaningless. The courts have been able to prevent misuse of the power of pardon in most cases through their own power of judicial review,⁶² and therefore, the appropriate measure seems to be to continue with this practice, until the situation demands something different and more radical.

⁵⁸ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 310 (1851).

⁵⁹ *See Ibid*, 312 (Justice Story writes: "... in seasons of insurrection or rebellion there are critical moments, when a well-timed offer to pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and if these are suffered to pass unimproved, it may be impossible afterwards to interpose with the same success").

⁶⁰ Upendra Baxi, *Clemency Erudition and Death: The Judicial Discourse in Kehar Singh*, 30 JILI 501.

⁶¹ *Union of India v. J.P. Mitter*, AIR 1971 SC 1093, ¶25.

⁶² *See Harbans Singh v. State of U.P.*, AIR 1982 SC 849 (The Court has gone a step ahead and even recommended that the President grant a pardon to meet the ends of justice).

VI. EFFECT OF A PARDON GRANTED BY THE PRESIDENT/ GOVERNOR

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*,⁶³ this question came up somewhat in issue before the Supreme Court. 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. 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.⁶⁴ 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 answer to this question requires a close examination of the reasoning given by the Court to arrive at the final conclusion, and the positions of law in England and the United States.

⁶³ AIR 1961 SC 334.

⁶⁴ *Id.*, ¶4.

In England, it is clear that the effect of a free pardon is to clear the person from all infamy and from all consequences of the offence for which it is granted and from all statutory or other disqualification following upon conviction.⁶⁵ It makes him, as it were, a new man, so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence for which he was convicted, and, in the days when crime disqualified a man from being a witness, removed the disqualification.⁶⁶ In the United States, however, the position is far from settled. In *Ex Parte Garland*,⁶⁷ under an 1856 statute, a person had to take an oath that he had never voluntarily borne arms against the United States or given aid and comfort to its enemies. Garland challenged the validity of the statute and furthermore sought to appear without the oath on the ground that he had received a full pardon from President Johnson, which absolved him from the requirements of the oath. The Statute was held unconstitutional since it imposed a punishment with retrospective effect, and was therefore, an *ex post facto* legislation. With respect to the effect of the pardon, Field J., observed, "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 eye of the law the offender is as innocent as if he had never committed the offense."⁶⁸ However, in *Re Spencer*,⁶⁹ a seemingly different view was taken when, while deciding upon the requisite conditions of moral character of an alien seeking naturalization, it was held, "The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offence."⁷⁰ Again, in *Carlesi v. People of State of New York*⁷¹, the latter view was strengthened when it was held that a pardon could not prevent the State from taking into consideration the pardoned offence for imposition of punishment in a subsequent one. Unlike England, the law in the United States is not settled. While in *Ex Parte Garland*, the court held that a pardon makes the person "as innocent as if he had never committed the offence", *Carlesi* and *Spencer* would indicate that at least some stains are left on the offender after the grant of the pardon.

The reasoning in *Rabha's case*,⁷² does not solely rely on the English position differentiating between a full pardon and a remission. The Court goes on to follow the difference given between a judicial reduction in sentence and cutting short of the same by an executive act of clemency, by Justice Sutherland of the U.S. Supreme Court as quoted in Water's Constitutional Law. Reliance on this

⁶⁵ HALSBURY'S LAWS OF ENGLAND 608 (Lord Hailsham ed., 1974).

⁶⁶ *Id.*

⁶⁷ 4 WALL. 333 (U.S. 1867).

⁶⁸ *Id.*, 380-1.

⁶⁹ 5 SAWY. 195, 199 (1879).

⁷⁰ *Id.*

⁷¹ 233 U.S. 51 (1914).

⁷² HALSBURY'S, *supra* note 65.

difference would have been sufficient to reach the conclusion, and it follows that this case cannot be said to be an authority for the purposes of determining the effect of a full pardon as against a remission. The question regarding the effect of a full pardon, therefore, is yet to be answered by the Supreme Court of India, but considering the problems which have already cropped up in the United States and the confusion created in their Lower Courts due to the two conflicting decisions,⁷³ it becomes necessary to analyse 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. In England, as has already been stated earlier, the power to pardon offenders is a prerogative of the Crown, and a private act of grace ensuing from the Sovereign to the offender. The nature of the power does not by itself impose any restriction in the exercise of the same. Being a prerogative of the King, a pardon is something 'out of the ordinary course of common law'.⁷⁴ The Common law position was initially followed in the United States,⁷⁵ but was later held to be not applicable to cases in which the sentence had been merely commuted.⁷⁶ In the later cases, it was held that a pardon was not an act of grace but a part of the constitutional scheme. This position was followed in India in *Kehar Singh v. Union of India*⁷⁷, and therefore, the law in India, should be construed from its joint reading along with *Rabha's* case.⁷⁸

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

⁷³ The question has raised immense controversy over the disbarment of lawyers previously convicted of a crime but subsequently pardoned. Some courts have held that even though the pardon relieved the offender from any punishment the law imposed, it did not restore the lawyer's character, some have abided by the Garland decision and held that the pardon was a complete bar to disbarment proceedings based on the pardoned offense. See *Branch v. State*, 163 So. 48 (Fla. 1935) and *Scott v. State*, 25 S.W. 337, 339 (Tex. Civ. App. 1894) respectively. See also, Ashley M. Steiner, *The Effects of a Presidential Pardon*, 46 EMORY L.J. 959, 973.

⁷⁴ See CHITTY, *supra* note 2, 4.

⁷⁵ Wilson, *supra* note 10.

⁷⁶ *Biddle v. Perovich*, 274 U.S. 480 (1927).

⁷⁷ See *Kehar Singh*, *supra* note 8.

⁷⁸ *Rabha*, *supra* 63 (This is notwithstanding the fact that at ¶ 8, the Court quotes, with approval, the dicta of Field, J. in *Garland*, thereby leading to a mutually contradictory stand. However, since this question was not in issue in the case, not too much value should be attached to this dicta, as should be the case with similar observations made in *State v. Prem Raj*, (2003) 7 SCC 121, ¶10).

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.

VII. POWER TO DECLARE A GENERAL AMNESTY

The above discussion about the effect of a pardon leads us directly to the next question. 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? An amnesty is an act of pardon by which crimes against the Government in times of war up to a certain date are so obliterated that they can never be brought into charge.⁸⁰ An important difference between amnesty and pardon is that the former is usually granted by the Parliament, or the Legislature; and to whole classes, before trial. Amnesty is the abolition or oblivion of the offence; pardon is its forgiveness.⁸¹

The question has not come up in issue before the Court yet, but is nevertheless an important one to answer since it shares an inherent link with the nature of the power of pardon, and there have been several observations made by the Court with respect to the same.

⁷⁹ See Samuel Williston, *Does a Pardon Blot out Guilt?*, 28 HARV. L. REV. 647, 653 (A similar solution was proposed by Prof. Williston in his 1915 comment in Harvard Law Review. Williston writes: "The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible." However, there is a subtle difference in this proposal to the one enunciated above. Williston does accept the fact that the pardon blots out the conviction, even though it may not blot out the fact of commission of the offence, which can be considered for determining the character of the offender. The author here questions the very blotting out of the conviction, considering the nature of the power entrusted to the President).

⁸⁰ P. RAMANATHA AIYER, THE LAW LEXICON 103 (1997, Rep. 2004).

⁸¹ State v. Black, 61 NC 242, 247 as cited in AIYER, *id.*, 103.

The closest any Court in India has come to this issue was the decision in *The Deputy Inspector General of Police v. D. Rajaram and others*⁸², in which a Special Bench of the Andhra Pradesh High Court was called upon to decide the effect of a general amnesty granted by the Government of Andhra Pradesh to all prisoners convicted for crimes committed in Andhra Pradesh. It was argued by the beneficiaries of the amnesty that the proclamation issued by the Government would have the effect of absolving them from their guilt and therefore their consequential dismissal from service would also be deemed to have been revoked. Although this argument was accepted by a Single Judge Bench of the High Court, it failed to have any impact on the Special Bench which decided the matter in appeal. The bench, distinguishing between remission of a sentence and a pardon, held that even though the term 'general amnesty' was used by the government, in effect, the intention of the Government was to merely remit the unexpired portions of the sentence and not to issue full pardons to the prisoners. This decision was reached after examination of several American authorities to the contrary on the point, and distinguishing the case on facts.

The question regarding the power to declare a general amnesty came up in the United States right after the Civil War when Presidents Lincoln and Andrew Johnson used the amnesty power extensively in favour of persons engaged in the rebellion, for the offence of treason against the United States. The Congress had passed a legislation punishing treason and rebellion, which had a clause authorizing the President to declare amnesty with respect to persons participating in rebellion. This law was later repealed, and a question arose whether the power of the President to declare amnesty continued after the repeal of the law. The Supreme Court of the United States held that the power to declare amnesty was included in the power to pardon and therefore, the repeal of the statute did not affect it at all, since no legislation could control a power conferred by the Constitution.⁸³ Right on the face of it, the decision appears to be somewhat strange. As it has been seen, two approaches have been taken by the U.S. Supreme Court on the nature of the power of pardon; the Marshallian conception of pardon as a private act of grace,⁸⁴ and the Holmesian conception of pardon as part of the constitutional scheme,⁸⁵ extended and controlled by the Constitution. The decision seems to be inconsistent with both. If the former approach is taken, then a pardon would need to be accepted for it to become effective.⁸⁶ It is evident that an amnesty is a unilateral act on part

⁸² AIR 1960 A.P. 259.

⁸³ *United States v. Klein*, 13 WALL. 128 (U.S. 1872).

⁸⁴ Wilson, *supra* note 10.

⁸⁵ Perovich, *supra* note 76.

⁸⁶ BERNARD SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK 198 (1979).

of the State where there is no choice of acceptance or rejection given to the offender. If the latter approach is taken, then the pardon would not have any effect on the fact of conviction, as has been argued in the previous section. Again, in cases of amnesty, guilt of the offenders is supposed to be vindicated, since it is an act of *oblivion*, or forgetfulness, and not merely of *pardon*.

Regardless of the American position, it is clear that the President of India cannot be deemed to have the power to declare a general amnesty. As has already been argued, the President can exercise his power only after the person has been convicted, and that too, to pardon the punishment imposed, without affecting the guilt and the conviction.

VIII. CONCLUSION

The central argument running through the issues presented is that the Power of Pardon under the Indian Constitution is significantly different and limited than what is available to the Crown in Great Britain, or to the President of the United States. Although, restrictions to the power of the Crown to pardon were noticed even in England with the emergence of the modern political concepts of the *Rule of Law* and *Separation of Powers*, the limitations in the Constitution of India go far beyond. This may be strongly evidenced by the exhaustive manner in which the scope of the Pardoning Power has been defined in Articles 72 and 161.

The impact of the above is highlighted in this paper, which has argued that the Indian Constitution has, expressly and impliedly, provided for a restricted and controlled power of Pardon to the President. Thus, the power cannot be exercised before conviction of the person. It cannot be used to pardon acts in contempt of court. It does not blot out the guilt, or the factum of conviction of the offender. Neither can the power be deemed to include the power to declare a General Amnesty. However, within the limited sweep of this power, the President should be left with maximum discretion to grant or refuse pardon, and judicial review should be limited to clear cases of mala fide, non-application of mind and the like. Such a conclusion is a mere reinforcement of the principles of Separation of Powers and Supremacy of the Constitution, based on which the Power is argued to be restricted in the first place.

