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MERCY PETITIONS: INADEQUACIES IN PRACTICE

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The executive power of pardon has been the focus of much attention recently, in the light of the clemency petitions filed by the condemned assassins of Rajiv Gandhi.

Articles 72[1] and 161[2] merely vest the authority to pardon in the President/ Governor. They contain no guidelines for the exercise of the power. Though the power involves the use of wide discretion, the courts have desisted from laying down any guidelines.[3] This poses serious problems for the clemency applicant, in addition to being unjust and unfair. The aim of this article is to expose the inadequacies of executive practice in exercise of its power of pardon, and to suggest guidelines for the same.

Inadequacies

Articles 72/161 do not prescribe a time limit within which the executive must come to a decision on the mercy petitions. Consequently, petitions often take years before they are considered. In the case of petitions filed for the commutation of death sentence, the delay is especially painful and torturous for the prisoner.[4]

In *T.V. Vatheeswaran* v. *State of Tamil Nadu,*[5] the Supreme Court held that the procedure established by law does not end with the pronouncement of sentence but *includes the carrying out of the sentence.* The Apex Court observed, "Delay exceeding two years in the execution of a sentence of death is sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing

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1 Article 72(1) reads, "the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any persons convicted of any offence."

2 Article 161(1) reads, " 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 persons convicted of any offence against any law relating to a matter to which the executive power of a state extends."

3 *Kehar Singh* v. *Union of India,* (1989) 1 SCC 204.

4 *Madhu Mehta* v. *Union of India,* 1989 Cri LJ 2321. In this case, there was an eight-year delay in disposing the mercy petition.

5 (1983) 2 SCC 68.

of the sentence."[6] In effect, the Court laid down that the time limit for the executive to dispose the mercy petition is two years, failing which, the accused would be entitled to commutation of his/her sentence. This is a turning point in the issue of executive clemency. For the first time, a concrete time period was stipulated in keeping with constitutional safeguard enshrined in Article 21.

However in *Sher Singh* v. *State of Punjab,*[7] the Court disagreed with the time limit of two years suggested in *Vatheeswaran.* It was the apparent unfeasibility of a two-year timeframe that the court objected to, "the fixation of time limit of two years does not accord with the common experience of the time normally consumed by the *litigating process* and the proceedings before the Executive."[8] Having admitted that delay is unreasonable, the court could have committed itself to an alternate timeframe.

The court further observed in *Sher Singh* that the accused might misuse the process of clemency were a time frame to be stipulated. This was a dominant consideration in the judicial hesitancy in laying down a time frame. However, to deny every prisoner the right to speedy disposal because of abuse by a few is unreasonable.

The court opined that it is not possible to have a "rule of thumb" because each case needs to be decided on its own merits, and hence, a common time frame for all cases is inappropriate.[9] For the same reasons, the court held in *Triveni Ben* v. *State of Gujarat,*[10] that it cannot prescribe a time limit for disposal of mercy petitions.[11] It is submitted that the impracticality of a "rule of thumb" cannot be a valid reason. The absence of a time frame leads to delays, and this must be checked. *Sher Singh* clearly goes against the letter and spirit of the *Maneka*[12] dictum. Unless and until a time period is laid down, this will remain a constitutional right with little remedy.

Fortunately, the decision in *Sher Singh* was rejected in *Javed Ahmed Pawala* v. *State of Maharashtra,*[13] wherein the Court affirmed the stand in *Vatheeswaran.*

6 *Ibid.* This decision is a fallout of the ratio of *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597 at 624, wherein, reading Articles 14 and 21 together, the 7-judge Bench declared, "The principle of reasonableness, which legally as well as philosophically is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be right, just and fair, and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied."

7 (1983) Cri LJ 803.

8 *Ibid.*

9 *Ibid.*

10 (1989) 1 SCC 679.

11 *Ibid.* The reasons for the decision being, "the time taken for disposal depends upon the nature of the case, the scope of the enquiry to be made, and the number of mercy petitions submitted by the accused."

12 AIR 1978 SC 597.

13 (1985)1 SCC 275.

However, subsequent case laws indicate that the ratio in *Vatheeswaran* and in *Javed Ahmed* have not been applied.

In *K.P. Mohammed.* v. *State of Kerala,*[14] the court observed "it is perhaps time for accepting a *self-imposed rule of discipline of within, say, three months.* These delays are gradually creating serious social problems by driving the courts to reduce death sentences even in those rarest of rare cases..... in which death sentence....is called for." However, experience shows that the purpose will be better achieved with a mandate; even orders issued by the Courts to the Home Ministry to act expeditiously have been in vain.[15]

What emerges from the prevailing judicial stance is that the Courts are desisting from laying down a time period, despite calling attention to the right under Article 21. The absence of a time period has resulted in innumerable violations of the human rights and constitutional rights of prisoners.

Natural Justice and Articles 72/161

A crucial issue is whether the principles of natural justice[16] apply to executive clemency. If the principles of natural justice are applicable to the executive, then even without the express formulation of legal provisions, there would at least be some guidelines for the exercise of the power.

A Division Bench of the Apex Court[17] has held that that the power of the government is executive in nature and the principles of natural justice cannot be grafted thereon by means of judicial innovations and activism. However, an observation to the contrary has been made in that though the act of granting pardon is executive, it is more quasi-judicial than administrative, and hence, the government has to set out reasons which influence its mind for passing an order either granting or refusing to grant remission.[18] A quasi-judicial power would impose "a duty to act fairly". Moreover, although the statute may not impose a duty to give reasons, the circumstances and fair procedure may call for stating of reasons.[19] The Court has further held that even if the power of pardon were to be administrative in

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14 (1984) Supp SCC 684.

15 *Supra.*, n. 14. In this case, two orders were issued to the Home Ministry, as the first order was disregarded.

16 The principles of natural justice include (1) the absence of bias (2) Audi alterem partem (3) Reasoned decision. *See generally*, C.K.Thakker, *Administrative Law*, 168-198 (1992).

17 *Harbans Singh* v. *State of Punjab*, 1987 Cri LJ 1088 at 1091.

18 *R.Raghupathy* v. *State of Tamil Nadu*, 1984 Cri LJ (NOC) 117 (DB).

19 H. W. R. Wade, *Administrative Law*, 430 (1977).

character, it should contain reasons that would enlighten the mind of anyone, and especially the concerned persons as to the factors considered, and the reasons that weighed with the government for deciding in a particular way. So the judicial stand is that regardless of whether executive clemency is quasi-judicial or administrative in nature, the principles of natural justice must apply.

Natural Justice and Article 21

It has been held that the constitutional safeguard enshrined in Article 21 extends to the executive disposal of mercy petitions.[20] The Supreme Court in *Maneka Gandhi* v. *Union of India*[21] examined the question "How far is natural justice an essential element of the procedure established by law?" The Court enunciated the composite code theory, by reading Article 21 with Articles 14 and 19 and declared that the obligation to apply rules of natural justice stems from the terms of Articles 14 and 19.[22] The Court further declared "any procedure which permits impairment of the constitutional right[23] ..... *without giving reasonable opportunity to show cause* cannot but be condemned as unfair and unjust, and hence, ... is a clear infringement of the requirement of Art 21."[24] This is a clear authority that the Court read the rules of natural justice into Article 21. Moreover, the learned judge observed that the Article seems, on the face of it to embody a restriction on the executive.[25]

What emerges is that the principles of natural justice apply to Article 21 and 72/161, and the procedure governing mercy petitions is covered by Article 21.

Given the manner in which executive clemency is exercised today, it is violative of Article 21. There are no procedural guarantees that assure the clemency applicant fair access to the decision-maker, and an opportunity to present his case, the President/Governer need not give a reasoned decision.

Additionally, the accused has no right to be represented by a legal counsel; the condemned prisoner cannot correct or rebut information adverse to his application. There are also doubts as to whether the President is properly briefed on such cases.

However, the prevailing view is that since the principles of natural justice have been applied at each stage of the sentencing procedure, it may legitimately

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20 *Supra.*, n. 5.

21 *Supra.*, n. 12.

22 T. S. Rama Rao, *Supreme Court and Higher Logic*, 25 JILI 190-194 (1983).

23 This observation was made with regard to the right to go abroad.

24 *Per* Bhagwati, J.

25 *Supra.*, n. 12.

be done away with at the executive stage. It is respectfully submitted that after the composite code theory enunciated in *Maneka*, there is no room for such an opinion. Since executive clemency is subject to Article 21, it is indisputable then that the accused must have a minimal right to personal hearing. This constitutional imperative cannot be undermined by a judicial order.

Scope for Arbitrariness

The exercise of the clemency power under Articles 72 and 161 leaves much scope for arbitrariness. In a situation, where two persons, convicted of the same offence, and sentenced to death file independent mercy petitions, it is possible in law for the President/Governors to commute the sentence of only one prisoner. Unfortunately, no writ against this will lie because there is no accountability in the clemency system. The President's or Governor's personalised approach to death sentences may give scope for arbitrariness. Uniformity is further sacrificed as the executive cannot be bound by the guidelines that exist for the judiciary. It is submitted that only a statutory (or constitutional amendment) guideline can prevent such arbitrary exercise of power.

Within the present constitutional framework, the Court is permitted to look into the merits of a case only if it is alleged that exercise of power is mala fide.[26] In *Swaran Singh* v. *State of Uttar Pradesh,*[27] although remission of life sentence was granted, the Governor was not told of certain vital facts concerning the prisoner.[28] This is an exceptional case where the order of the Governor was quashed with a direction to reconsider the petition of the prisoner. However, the Court categorically stated it would not go into the merits of the Governor's decision.[29] Such a limitation on judicial review of executive clemency would make it virtually impossible for a petitioner to prove arbitrariness. The judiciary has worked in a rather limited context as earlier judgements like *Jagmohan Singh* v. *State of Uttar Pradesh*,[30] have held that Article 14 cannot be invoked in every matter of judicial discretion.

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26 *Maru Ram* v. *Union of India*, (1981) 1 SCC 107, *per* Krishna Iyer, J. He further observed, "If such power is exercised arbitrarily, mala fide or in absolute disregard of the finer canons of constitutionalism, the by-product orders cannot get the approval of law."

27 (1998) 4 SCC 72. In this case, the respondent, an MLA, though convicted of the offence of murder succeeded in coming out of prison in less that two years as the Governor of Uttar Pradesh granted the remission of his life sentence.

28 These facts included his involvement in five other criminal cases of serious offences, the rejection of his earlier clemency petition filed on the same grounds, the report of jail authorities as to his unsatisfactory conduct.

29 *Supra.*, n. 26.

30 (1973) 1 SCC 20. This was an appeal to the Supreme Court against the death sentence confirmed by the Allahabad High Court.

In the absence of guidelines for the powers of the President or Governors, the solution towards minimising the arbitrariness would lie in creating a framework for the lower level authorities. This lacuna was sought to be rectified in *Harbans Singh* v. *State of U.P.*[31] On the question of unequal treatment of an accused and a co-accused, it was held that the Jail Superintendent should personally ascertain if the death sentence imposed on any co-accused has been commuted. It was further observed that such information should be brought to the notice of the Court. While this is admittedly a positive step, its application is limited. It can apply only where there is alleged discrimination between the co-accused.

Wrongful Exercise of Power

Articles 72 and 161 clearly mandate that the power of pardon is to be exercised by the President/Governors. However, in practice, the Council of Ministers exercises this power. The Apex Court observed in *Maru Ram*,[32] "in exercising this power, the Governor and the President must act not on their judgement but in accordance with the aid and advice of the Council of Ministers."[33]

It is submitted that only the President/Governors should exercise this power. The traditional theory of separation of powers[34] is based on a notion that if two or more of the governmental functions are vested in the same organ, there may arise the danger that it may enact, execute and interpret the laws in an arbitrary way without any external control.[35] The constitutional scheme provides for checks on the functioning of the President. In turn, the President is expected to be a check on the other organs. Therefore, the form of the Government appears to be one closely knit through co-ordination, integration and interaction. The Courts, in view of the "fusion of powers" theory have rendered the theory of checks and balances nugatory.

Conclusion : Are Guidelines Necessary?

Over numerous decisions, the court has debated the laying down of guidelines for the exercise of executive clemency. In *Kehar Singh*,[36] the Court held against any such necessity.

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31 (1982) 2 SCC 101.

32 *Supra.*, n. 26.

33 *Ibid.* The reading of Article 74(1) with Articles 72/161 was the primary reason for such a decision.

34 *Ram Jawaya Kapoor*, AIR 1955 SC 549 at 556, held that the Indian Constitution has not recognised the doctrine of separation of power in its absolute rigidity, but the functions of the different branches of the government show that our Constitution does not contemplate assumption by one organ or part of the state of functions that essentially belong to another.

35 B.Dutta, *The Rule of law and Parliamentary Sovereignty*, 7 C.U.L.R. 174 (1983), No.2.

36 *Supra.*, n. 3.

Article 72 and 161 being *constitutionally enshrined powers*, the judges observed that the discretion was entrusted to persons of such high stature so as preclude arbitrariness. Accordingly, it was held that there were enough indications as to how the power was to be exercised from "the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law,..... and specific guidelines need not be spelled out. It is of great significance that the function itself enjoys high status in the constitutional scheme."[37]

It is submitted that this argument cannot hold much ground. After the decision in *A.R.Antulay* v. *R.S.Nayak*,[38] Article 21 provides a standard for judging state power including the orders passed by the Supreme Court. Thus, any action involving a manifest violation of Article 21 has to be rectified, no matter how high an authority is. Since clemency power is a part of the "constitutional scheme," Article 21 rights and standards will definitely extend to its exercise.

The Court further pointed out in *Kehar Singh,* "it may not be possible to lay down any precise, cleanly defined and sufficiently channelled guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time."[39]

It is submitted that there is little basis for the supposition that it is impossible to lay down guidelines. It is respectfully submitted that it would be possible to at least make broad categories of cases, and draw guidelines for the same. For those "special cases," that may require different consideration, the use of discretion may be permitted.

In the earlier decision in *Maru Ram,*[40] there was judicial emphasis on guidelines for the exercise of executive clemency. The Apex Court correctly observed, "the proper thing to do, if the government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power, keeping....a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination."[41] It is submitted that this decision is in keeping with the letter and spirit of the Constitution.

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37 *Ibid.* at p.22.

38 (1988) 2 SCC 602.

39 *Supra.*, n. 3 at pp.217-218.

40 AIR 1980 SC 2147.

41 *Supra.*, n. 35 at p.150. In *Maru Ram*, the court observed that until such guidelines were framed, the remission rules framed under the Prisons Act or under any other similar legislation by state governments would fill the void. However, these guidelines would only be of a recommendatory nature, helpful to the government to release the prisoner by remitting the remaining term.

There is a tendency for the Courts to shift responsibility for the final decision with respect to the death sentence onto the Executive. It is not proper that the Court depend upon the President/ Governor's prerogative of pardon with reference to the imposition of death sentence, merely because there may be a doubt that the executive may commute the sentence ultimately. The reasons for condemning such a practice are obvious. It leads to the infusion of delay into the already tedious process. Further, such refusal and negation of the responsibility of a branch of the government leads to a failure of justice.[42]

The State's failure to provide procedures for full consideration of a clemency application may cause the executive decision, to reflect an inaccurate view of the case. Such procedural inadequacies undermine the broad societal expectation that the clemency authority, as the State's last participant in the capital punishment process, will act deliberately and with care.

In the light of the above, the following guidelines are suggested for the exercise of the power of pardon:

1. Time frame - *A specific time limit should be prescribed within which the executive must exercise its power.*

2. Reasoned decision - *The Executive must give a reasoned decision. This need is compounded by the fact that there is no appeal or revision against the decision of the President.*

3. Procedures to be made public - *The procedures governing the mercy power should be made public by the Home Ministry soon after the executive decision is taken.*

4. Right to be heard - *All applicants should be entitled to a personal appearance before the decision-maker.*

5. Judicial review - *Although courts have held that the substance of a clemency decision is not subject to judicial review, limitations on the clemency power may be subject to enforcement by courts.*

6. Independent power - *Executive clemency is a constitutional power, and it is for the President and the Governor(s) to exercise it independently. The Council of Ministers should not be permitted to advise the executive heads in this issue. This is to minimise political interference to the least extent.*

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42 *See generally*, Upendra Baxi, *Clemency, Erudition and Death: the judicial discourse in Kehar Singh*, 30 JILI 501-506 (1988).

7. Advisory board *The executive may entrust the power of pardon to an Advisory Board constituted solely for this purpose. The petitioner's application for clemency should be referred to this Board, with the President as its Head. This Board may be empowered to receive reports from the police, and the probation officers to aid its decision. The determination made by the Board are likely to be more uniform in similar cases, than would be the decision of one person at different times.*

It is submitted that ultimately, only effective guidelines, ensuring fair and equal execution, can guarantee just exercise of power.