INTRODUCTION

“I have always found that mercy bears richer fruits than strict justice.”

-Abraham Lincoln

To any civilized society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the legislature, the executive and the judiciary are more sensitive to them than to the other attributes of daily existence.

The deprivation of personal liberty and the threat of the deprivation of life by the action of the state are in most civilized societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty.

The concept of pardon is an artefact of older times, when an omnipotent monarch possessed the power to punish or remit any punishment. It became a symbolic attribute of a king bearing the important equivalent to the Almighty himself, having control over his subject’s lives. The linking of punishment and pardon are at least as old as the Code of Hammurabi, where the prescription of harsh penalties was balanced by rules to limit vengeance and specify mitigating circumstances. It was exercised at any time either before legal proceedings are taken or during their pendency or after conviction.

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1 2nd year BA LLB student, National University of Study & Research in Law, Ranchi.
2 2nd year BA LLB student, National University of Study & Research in Law, Ranchi.
4 Ibid
The power of pardon remains unbridled with wide discretion provided to the executive. From the outset, the pardon was abused for personal gain.\(^6\)

This research paper shall try to introduce the reader with the whole concept of the pardoning power, emphasising on the importance of the constitutional importance of the law of pardoning power and will discuss the case scenario of the same in the Indian subcontinent.

**POSITION OF THE PRESIDENT'S POWER IN UK & USA**

The pardoning power of the president has its history from British system in which the King could bestow his mercy by pardoning.

**POSITION IN UK**

The British, though does not have an absolute power to grant pardon but they have power to grant pardon in all criminal cases. Though the power is exercised on the advice of ministers but is not put to judicial review. The power to grant power can be exercised at any time. It can be exercised before or after the conviction. The Crown also has the power to grant reprieve as well, it may just temporarily suspend the execution of the sentence; or may remit the whole or part of the penalty.

**POSITION IN U.S**

The necessity of conferring on the President of the United States the power to pardon treason was thus stated in the Federalist No.24 by Hamilton\(^7\):

“In season of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”

The power of pardon exists to prevent injustice whether from harsh or unjust law or from judgement which results in injustice; hence the necessity of vesting that power in an authority.

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\(^7\) Quoted in argument in Ex p Garland (1867) 4 Wal. 333; 18 L. ed. 366, 368
other than the judiciary has been recognized. Section 2, cl. 1 of the U.S Constitution provides that: “the President...shall have Power to grant reprieves and pardon for offence against the United States, except in cases of impeachment.” The word pardon here would mean the same as it is in America and England when the constitution was established. A pardon releases both the punishment prescribed for the offence and the guilt of the offender.

In *Ex parte Garland* it was held that the power conferred on the President of U.S by Article 2, Section 2 are unlimited and with the exception of impeachment, extend to every offence which has been mentioned in law and may be exercised at any time after its commission. The power is not subjected to legislative control and congress can neither limit the effect of the President’s pardon nor exclude from its exercise any class of offenders. Further in *Ex p United States* the Supreme court held that the judiciary has no inherent power to go against the legislature and that it cannot invade the President’s power.

**PARDONING POWER IN INDIA**

**HISTORICAL BACKGROUND:**

The power to pardon and exercise mercy towards prisoners was historically a power exercised by the Sovereign, perhaps emerging from notions of divinity of kings. Along with the power to declare war and make peace, the power to adjudicate disputes and to grant mercy to offenders has long been an essential component of sovereignty. The philosophy underlying the pardon power is that ‘every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality,

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10 Halsbury, Vol 7. 3rd ed. P. 244
11 71 U.S. 333
12 *U.S. v Klein* (1871) 13 Wal. 128, 147, 20 L.ed. 519, 526.
13 (1916) 242 U.S 27, 46, 61 L.ed. 129
and in that attribute of Deity whose judgments are always tempered with mercy." Such powers of mercy were also exercised in India by the Mughal Emperors and rulers before them as well. In the early years of the East India Company’s operation, mercy in their courts remained limited to the prerogative powers of the British King-Emperor. Subsequently some powers of mercy also appear to have been granted vide royal charter to the Governor General in Council of Fort William and the Governors in Council of the Bombay and Madras Presidencies. As Muslim criminal law largely prevailed in the mofussil territories, a scheme of pardon consistent to that law prevailed although the Governor General in council also had the power to pardon and commute sentences after the establishment of the Sadar Nizamat Adalat in 1772. Eventually with the merger of the moffusil and presidency systems, statutory clemency powers were provided for in the Indian Penal Code and the Code of Criminal Procedure that were enacted in 1860 and 1861 respectively. Although the British King-Emperor also continued his exercise his prerogative right and granted similar powers by royal charter to the Viceroy and Governor General of India, it was the statutory powers that were regularly exercised. With respect to capital cases the Indian Penal Code and Criminal Procedural Code granted clemency powers in capital cases to the local governments and the Governor General in Council equally. Mercy petitions were thus first decided by the local government and upon rejection, were sent to the Centre. As the Government’s ‘rules of business’ allowed for the delegation of such powers, at the central level mercy petitions were effectively disposed of in the Home Department without even a reference to the Viceroy. A major substantive change came about around the drafting of the new ‘Federal Constitution’ in the 1930s. The Joint Select Committee of 1933–34 suggested that the statutory determination of mercy should rest only with the Provincial Government, it bearing the primary responsibility for law and order and the similar power should be taken away from the

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16 MP Jain, Outlines of Indian Legal History, Wadhwa and Co, Nagpur: 2005 (5th ed), at 50 and 337. 18 Ibid, at 134-135
17 Noting by NA Faruqui on 17-1-40, File no. Home (Judicial) 117/39, National Archives of India (NAI)
18 The Governor General of India was empowered to make rules for the more convenient transaction of business in his Council and any order made or act done in accordance with such rules should be deemed to be the order or act of the Governor General in Council. The Viceroy Lord Northbrook however made a change in the rules and required that all mercy petitions be sent to the Governor General for disposal as he was under the impression that the prerogative of mercy vested in the Viceroy personally. This practice however ended with his departure in 1876 although the rules were amended to their previous form only in 1889. Note by HA Adamson, 4 May 1907, File no. Home (Judicial) 373/23, NAI
central government (Governor General in Council). However to maintain an appeal and the two-tiered mercy system already in place, they proposed that the mercy power should now be exercisable by the Governor General in his discretion, as the Viceroy. As a result, Section 401 was amended and a new section 402A was added in the CRPC along with Section 295(1) of the Government of India Act, 1935. The Viceroy also retained the prerogative power of pardon delegated by the letters patent. These changes came into effect from 1st April 1937. The substantive change in clemency was that at the Centre the decision was no longer a decision of the Government but of the Viceroy. With nearly 700 mercy petitions received annually, the workload of the Governor General looked to increase dramatically. To reduce the pressure, the new procedure approved by Lord Linlithgow ensured that most of the work on mercy petitions continued to be done by the Government as previously, and only the final decision was made by the Viceroy. The procedure provided that provincial governments submit mercy petitions in cases of death sentence to the Secretariat of the Governor General (Public) by whom each case was forwarded to Law Member. If the Law Member was in favour of rejecting the petition, the case was submitted directly to the Viceroy for orders. If the Law member considered that there were grounds for interference, the case was referred to the Home Member for his opinion before submission to the Viceroy for final orders. The Viceroy was however not bound by the opinions of the Law or Home Members and the eventual decision by him was sent by the Secretariat of the Governor-General.

CONSTITUTIONAL POSITION IN INDIAN LAW

CONSTITUTIONAL PROVISIONS:

Article 161 is the corresponding provision relating to the mercy jurisdiction of the President, Article 72 says that the Governor has the power to grant pardons etc., and to suspend, remit or commute the sentence of any person convicted of any offence against any law “relating to a matter to which the executive power of the State extends”. The executive power of the state

19 Provincial Governments also had the power to commute sentences on a subsequent petition filed even if the Centre had rejected the previous petition. See File no. Secretariat of the Governor General (Public), 23/9/45 - GG (B), NAI
21 Noting by EC Gaynor, Deputy Secretary (G), MHA dated 19 September 1947 in File no. Home (Public—B) 67/6/47, NAI 29 Noting by NA Faruqui, 18 October 1939 in File no. Home (Judicial) 117/39, NAI
extends to matters with respect to which the legislature of the State has the power to make laws.

Article 72(1) of the Indian Constitution confers the power on the President to grant pardons and commute sentences in the following cases:

- In all cases where the punishment or sentence is by a Court Martial.
- In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends.
- In all cases where the sentence is a sentence of death.

Article 72(1) says 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 passes by a Court Martial.

**LEGISLATIVE BACKGROUND:**

During the British rule, the Power of Pardon was vested in the British monarch. At common law, a pardon was an act of mercy whereby the king forgave any crime, offence, punishment, execution, right, title, debt, or duty. This power was absolute, unfettered and not in the Constitution of India. The law of pardon was present in Section 295 of the Government of India Act, 1935 which did not limit the power of the Sovereign. In the Constitution of India, the power of Presidential Pardon is found in Article 72. In addition to these constitutional provisions, the Criminal Procedure Code, 1973 in Sections 432, 433, 433A, 434 and 435, provide for pardon. Sections 54 and 55 of IPC confer power on the appropriate government to commute sentence of death or sentence of imprisonment for life.

Reasons behind this Article- The pardoning power is in derogation of the law. Implying that if laws could always be enacted and administered so they would be just in every circumstance

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22 Section 295: Provisions as to death sentences
23 Article 72: Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases
24 (i) Section 432, CrPC, 1973 provides power to suspend or remit sentences.
(ii) Section 433, CrPC, 1973 provides the power to commute sentence.
(iii) Section 433A, CrPC, 1973 lays down restrictions on provisions of remission or commutation in certain cases mentioned therein.
(iv) Section 434, CrPC, 1973 confers concurrent power on the central government in case of death sentence.
(v) Section 435, CrPC, 1973 provides that the power of the state government to remit or commute a sentence where the sentence is in state government only after consultation with the central government.
to which they are applied, there would be no need for the pardoning power.\textsuperscript{25} Therefore, the power to pardon is meant to be used in those circumstances where it would not be in the interest of justice to strictly apply the law even if the circumstances call for the same. Executive clemency exists to afford relief from undue severity or plain mistake in the operation or enforcement of the criminal law. The administration of justice by the Courts is not necessarily always wise or certainly understanding of circumstances, which may properly alleviate guilt. It is a check entrusted to the Executive for special cases.\textsuperscript{26}

**Wording of the Article**

It is very important to look at three words to understand the correct interpretation of the article. These three words are ‘punishment’, ‘sentence’ and ‘offence’. The first two words indicate towards the fact that the pardon by the President will save a person from the consequences of an offence and from a punishment as well. The manner in which the term ‘offence’ is used makes it quite evident that that the punishment and sentence we spoke about are in respect of the offence committed. This implies that the punishment which is supposed to be pardoned has to be in respect of an offence and not for any simple breach of a condition.\textsuperscript{27}

The reasoning that is given for the above said statement is derived from the meaning of the word offence as it is given in the General Clauses Act, 1897.\textsuperscript{28} It is difficult to say that the same definition cannot be applied to Art.72 as well. It has been said that in reality it is this definition only which is used in this Article and also that the power of pardon that has been granted, can be used in following cases:

- In respect of an act which, in the eyes of law, is an offence
- In which the offence is in respect of a matter over which the executive power of the Union extends and,
- For which punishment has already been adjudged.


\textsuperscript{27} Balkrishana, “Presidential Power of Pardon”, 13 J.I.L.I (1971) at 104.

\textsuperscript{28} The definition that has been given in the Act is,” An act or omission made punishable by law for the time being in force”

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It is a well-established principle that a person can be sentenced or punished only when he has been convicted by the court. A person is deemed to be innocent unless it is proved in the eyes of the law. Thus if a person has not been given a chance of a fair trial or a proper investigation has not been carried out against that person, then there is no reason why that person should be given a pardon, because he is still innocent. Therefore, it is important to note that the pardoning power can be exercised only in the case of a convicted person only.

However, in some of the cases the Court has said that the pardon can be granted even before conviction or trial by a Court. This principle was laid down in the case of In Re: Maddela Yerra Channugadu and Ors; it was said in the case,

“The pardon power includes not only that of granting absolute and unconditional pardons, but also that of commuting a punishment to one of a different sort than that originally imposed upon a person. It may be exercised at any time after the commission of an offence, either before legal proceedings are begun or during their pendency, and either before or after conviction.”

This decision was affirmed later in the cases of K.M. Nanavati v. State of Bombay and Ramdeo Chauhan v. State of Assam.

If the trial of a person is held not by courts but by a tribunal, can we say that the act for which the trial has taken place in the tribunal is also an offence? The general situation will be that of non-compliance of the terms of a certain contract and therefore, termination of the same. The answer would be no, as in such a case the term, ‘breach of conditions’ is used and not the word offence. To be more precise, the word offence can be used only in the case when the act done falls within the scope of the word offence as it is defined in the Indian Penal Code. It is also important to note that the person should be inquired under Code of Criminal Procedure, because if it is done under an Act which does not characterize the act as an offence, then the word punishment would not hold the same meaning as it is meant to be in Art.72. This issue

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29 Article 372, Constitution of India
30 AIR 1954 Mad 911
31 1961 SCR (1) 497
32 Appeal (crl.) 4 of 2000
has been discussed in *Maqbool Hussain v. State of Bombay*[^33]. The same issue was discussed in *S.A. Venkataraman v. Union of India*[^34]; the Court in this case held that:

“Before Article 20(2) could be invoked, it is essential that the earlier prosecution must have been under the Act which created that offence. After looking at these two cases, it is evident that before the question of the exercise of the power of the President to grant pardons can arise the person to whom pardon is granted must have been awarded punishment or sentenced by a competent court of law or judicial tribunal.”

**PARDONING POWER & JUDICIAL REVIEW**

In *Kuljeet Sungh v Lt Governor of Delhi*[^35] it was held that the President’s power under Article 72 will be examined on the facts and circumstances of each case. The Court has retained the power of judicial review even on a matter which has been vested by the Constitution solely in the executive.

But the major case in which the concept of judicial reviews of the President Powers on grounds of it its merits was that of *Kehar Singh v Union of India*[^36]. In this case the Supreme Court held that:

“It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelized guidelines for we must remember that the power under Article 72 if 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 assist by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme. The order of the President cannot be subjected to judicial review on its merit”[^37]

[^33]: 1953 AIR 325
[^34]: 1954 AIR 375
[^35]: 1982 AIR 774
[^36]: 1989 AIR 653
[^37]: Paragraph 11 of the judgement

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In Epuru Sudhakar case\textsuperscript{38} the immunity of the pardoning power of governor from judicial review came up. SC set aside a decision of then Andhra Pradesh Governor Sushil Kumar Shinde, remitting the sentence of a Congress activist who faced ten years in prison in connection with the killing of two persons including a TDP activist, the SC bench of justices S H Kapadia and Arijit Pasayat warned that the exercise of the power would be tested by the Curt against the maintenance of Rule of Law.

“Rule of Law is the basis for evaluation of all decisions (by the Court). That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent.” the bench warned.

Justice Kapadia while concurring with the main ruling delivered by Justice Pasayat sought to remind “exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty.. the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the governor as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future.

An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are fraught with discrimination”, he said. Thus this judgement reiterated the settled position of law that exercise or non-exercise of the pardoning power by the President or Governor would not be immune from judicial review.

**IMPORTANT CASE LAWS**

Article 72 empowers the President to grant pardon, reprieve, respite or remission of punishment, or to suspend, remit or commute the sentence of any person. Over a period of time, the president’s pardoning power has become diluted when the Supreme Court of India conclusively established that the power of pardon is subject to judicial scrutiny. In Maru Ram v. Union of India\textsuperscript{39}, the court observed that in any case the power under Article 72 is exercised on irrational, irrelevant, discriminatory or mala fide consideration; the court could

\textsuperscript{38} Epuru Sudhakar & Anr v Govt. Of A.P. & Ors, Writ Petition (crl.) 284-285 of 2005

\textsuperscript{39} AIR 1980 SC 2147
examine the case and intervene if necessary. There may be grounds, such as, political vendetta or party favouritism which may make the actual exercise of the constitutional power vulnerable, only in these rare cases the court will examine the exercise. In *Kehar Singh v. Union of India*

40, the Court considered the nature of the President’s power under Article 72 while dealing with a petition challenging the President’s rejection of a mercy petition by Indira Gandhi’s assassin, Kehar Singh. The court held that the President can scrutinise the evidence on record of the criminal case and come to different conclusion. It further held that “the Court provided that the pardoning power can be subject to a review where an executive decision grounds such as discrimination on the basis of religion, caste, colour or political loyalty”. Moreover the President power is a matter of discretion and it cannot be claimed as fundamental right. However, unlike *Maru Ram*, the court refrained from laying guidelines stating it seems that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision and existing case law and specific case law need not be spelled out.

The Supreme Court in the 1997 case of *Mansukhlal Vithaldas Chauhan v. State of Gujarat*

41, said that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made particularly as the Court does not have the expertise to correct the administrative actions. Furthermore in *Ranga Billa case*

42, the Supreme Court observed that the term “pardon” itself signifies that it is entirely a discretionary remedy and grant or rejection of it need not to be reasoned.

Further in the recent case *Shatrughan Chauhan & Anr. Versus Union of India & Ors* the apex court held that the death sentence of a condemned prisoner can be commuted to life imprisonment on two grounds “inordinate, undue and unexplained” delay in disposal of their mercy pleas and “non-consideration of their mental illness”. It has been noted that there is no definite time limit or rule to exercise this power of the President.

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40 AIR 1989 SC 653
41 (1997)7 SCC622
42 Kuljeet Singh @ Ranga v. Union of India & Anr, 1981 AIR 157
43 (2014)3 SCC 1
EXERCISE OF POWER BY VARIOUS INDIAN PRESIDENTS

Various Presidents have used the power conferred by the constitution differently. A total of 4802 mercy petitions were disposed by the President of India since independence. About one-third of all mercy petitions in Independent India have been commuted to life imprisonment, with a report stating that 3,534 of 5,106 petitions were rejected while 1,572 were considered. Out of the 77 mercy pleas decided by Presidents between 1991 and 2010, 69 were rejected. APJ Abdul Kalam, at the end of his five-year term, left behind over two dozen mercy pleas, having decided only two. K R Narayanan failed to decide a single mercy petition during his 1997-2002 terms. R Venkataraman (1987-1992) rejected 44 mercy pleas, the most by any President. During her 2007-2012 term, Patil, the country’s first woman President, accepted the mercy pleas of 30 death row convicts pardoning, among others, Piara Singh, Sarabjit Singh, Gurdev Singh and Satnam Singh, who killed 17 members of a family at a wedding; Govindasamy, who murdered five relatives in their sleep; and Dharmender Singh and Narendra Yadav, who killed an entire family of five, including a 15-year-old girl, whom Yadav had tried to rape, and her 10-year-old brother, whom they burnt alive.

PROCESS OF GRANTING PARDON IN INDIA

The process starts with filing a mercy petition with the President under Article 72 of the Constitution. Such petition is then sent to the Ministry of Home Affairs in the Central Government for consideration. The above mentioned petition is discussed by the Home Ministry in consultation with the concerned State Government. After the consultation, recommendations are made by the Home Minister and then, the petition is sent back to the President.

44 https://factly.in/different-presidents-different-decisions-the-tale-of-mercy-petitions-in-india/ last accessed on March 12th, 2016 at 12:12 hours
The object of pardoning power is to correct possible judicial errors, because no human system of judicial administration can be free from imperfections.

- Pardon may substantially help in saving an innocent person from being punished due to miscarriage of justice or in cases of doubtful conviction.
- It is always preferable to grant liberty to a guilty offender rather than sentencing an innocent person.

THE EFFECTS OF A PARDON GRANTED

What is the effect of the exercise of the power of pardon by the President 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\(^7\), this question came up before the Supreme Court. The Court, in order to answer the question came up before the Supreme Court. The Court in order to answer the question raised before it regarding the effect of remission of the sentence examined several authorities on the subject and came to the conclusion that a remission of a sentence did not in any interfere with the order of the Court, it affected only the execution of the sentence passed by the Court and freed the convicted person from his liability to undergo the full term of imprisonment inflicted by the Court, though the order of conviction and sentence passed by the Court still stood as it was. A distinction was drawn between reduction of a sentence done by an appellate or revisional court and an order of remission by an executive authority. The latter was held to be an executive power which could not interfere with or alter the judicial sentence, and the appellant was therefore held to be rightly disqualified under Section 7(b) of the Representation of the People Act.\(^8\)

\(^7\)1961 SCR (2) 133
The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. This ostensible incongruity is explained by Sutherland J. in *United States v Benz*[^49] in these words:

>“The judicial power and the executive power over sentences are readily distinguishable. To render judgement is a judicial function. To carry the judgement into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgement, but does not alter it qua a judgement”[^50][^51]

**REPERCUSSIONS OF THE POWER**

Keeping in mind the various advantages of this particular provision, it must be said that certain exceptions may warrant a mechanism of review of the exercise of power which are given as follows.

Violation of Fundamental rights- The fundamental rights provided for the citizens of this country given in the Indian Constitution 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. 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 categories which are as follows:

- 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

- 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.

[^49]: 282 U.S. 304 (1931)
[^50]: Judicially Reviewing the President’s Prerogative of Mercy: A Comparative Study, at http://www.bdresearch.org/home/attachments/article/nArt/292.pdf last accessed on March 13th, 2016 at 18:10 hours
[^51]: Page 282 U.S 311
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, any individual worthy of holding a position as important as the position of a President should be vested with the power to pardon. 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 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.52

CONCLUSION

In India, the processes have enough checks and balances but never the less more caution is needed to avoid political considerations and colouring the exercise of the powers of pardon as evident from the past experiences and cases. The pardoning power of Executive is very significant as it corrects the errors of judiciary. It eliminates the effect of conviction without addressing the defendant’s guilt or innocence. The philosophy underlying the mercy petition lies in saving an innocent person from being punished due to miscarriage of justice or in cases of doubtful conviction. The hope of being pardoned itself serves as an incentive for the convict to behave himself in the prison institution and thus, helps considerably in solving the issue of prison discipline. But this power of executive would not serve its purpose until and unless there are some change in its exercise. The agony, pain suffering of the people related must be taken into consideration. Therefore there is an urgent need to amendment law of pardoning to make sure that clemency petitions are disposed of quickly. Fine balance needs to be maintained by reconciling the individual human rights as well as the larger interests of the society for which some suggestions are put forward which follow.

SUGGESTIONS

- There is an urgent need to make amendment in the law of pardoning to make sure that clemency petitions are disposed of quickly which should be decided in a fixed period of time.

- Pardoning power should not be absolute as well as Judiciary should not interfere too much in exercise of this power but at the same time it should be subjected to limited judicial review as it one of the most important aspects of the Indian Constitution

- The power of judicial review should be exercised properly and not misused by executive for it will certainly prove useful to remove the flaws of the judiciary.

- The President have to keep in mind the effect of such pardon on the family of the victims, the society as a whole and the precedent it sets for the future. Clemency petition must be filed with clean hands.

- People should be made aware about the Constitutional and Statutory provisions in India in relation to clemency using various tools of media.

- Keeping in mind the tenets of Article 14 of our constitution, the provision should be exercised with equanimity towards one and all without distinctions on the basis of gender, age, caste, community, language or geography.

- The president needs an advisor who has some degree of independence from those who prosecuted the underlying criminal case; who can bring a different policy perspective and different values to bear on the matter, and whose independent political accountability can provide the president a measure of protection from public criticism.