SUPREME COURT OF INDIA

Epuru Sudhakar and Another

Vs

Government of A.P. and Others

Writ Petition (Crl.) 284-285 of 2005

(Arijit Pasayat and S. H. Kapadia, JJ)

11.10.2006

JUDGMENT

ARIJIT PASAYAT, J.

Challenge in this writ petition under Article 32 of the Constitution of India, 1950 (in short the 'Constitution') is to the order passed by Government of Andhra Pradesh, represented by its Principal Secretary whereby Gowru Venkata Reddy-respondent No.2 was granted remission of unexpired period of about seven years imprisonment. GOMs. No.170 dated 11.8.2005 in this regard is challenged.

Factual scenario as per petitioners is as follows:

Petitioner No.1 is the son of late Sh. Epuru Chinna Ramasubbaiah who was murdered along with another person on 19.10.1995. Petitioner No.2 claims to be the son of one late Sh. Tirupati Reddy who was allegedly murdered by respondent No.2 while he was on bail in the murder case of father of petitioner No.1. In the case relating to the murder of late Sh. Epuru Chinna Ramasubbaiah and one Ambi Reddy, respondent No.2 faced trial and ultimately the matter came before this Court in Criminal Appeal Nos. 519-521 of 2003 which was disposed of by this Court by judgment dated 19.11.2003 and the conviction of respondent No.2 was altered from one under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') to Section 304(1) read with Section 109 IPC and

custodial sentence of 10 years' rigorous imprisonment was imposed. Conviction relating to some other sentences was maintained. On 28.5.2003, the respondent No.3 wife of respondent No.2 submitted a representation for grant of parole to respondent No.2 and on 18.10.2003 parole was granted for a period of 15 days but the same was cancelled on 30.10.2003 by the State Government in view of the report sent by Superintendent of Police, Kurnool that on account of respondent No.2's release on parole there was a likelihood of breach of peace and law and order if the respondent No.2 visits Nandikotkur Assembly Constituency. Respondent No.3 contested the election to the Andhra Pradesh Assembly Election and on 12.5.2004 was elected as member of Legislative Assembly. On 14.5.2004 she made a representation for grant of parole to respondent No.2. Same was granted on 19.5.2004 and was extended from time to time. On 18.7.2004 fourth extension for 15 days was granted. On 10.10.2004 respondent No.3 made a representation to respondent No.1 seeking pardon to respondent No.2 by exercise of power under Article 161 of the Constitution alleging that he was implicated in false cases due to political rivalry. On 18.10.2004 during the pendency of the petition for pardon, one month parole was granted. On 11.8.2005 the Governor of Andhra Pradesh purportedly exercised power under Article 161 of the Constitution and granted remission of the unexpired sentence of respondent No.2. Director General and Inspector General of Police (Correction Services) Andhra Pradesh were directed to take action for release of respondent No.2 and in fact on 12.8.2005 the Superintendent of Central Prison, Cherlapally, R.R. District directed release of respondent No.2.

The writ petition has been filed inter alia alleging that the grant of remission (described in the writ petition as grant of pardon) was illegal, relevant materials were not placed before the Governor, and without application of mind impugned order was passed. The recommendations made for grant of remission were based on irrelevant and extraneous materials. The factual scenario has not been placed before the Governor in the proper perspective. The sole basis on which respondent No.3 asked for pardon was alleged implication in false cases due to political rivalry. In view of this Court's judgment holding the respondent No.2 guilty, the said plea could not have been even considered as a basis for grant of pardon. Since the grant of pardon is based on consideration of irrelevant materials and non-consideration of relevant materials the same is liable to be set aside.

Learned counsel for the respondent-State and respondent Nos.2 and 3 has strenuously contended that the petition is the outcome of a political vendetta. All relevant materials have been taken into account by the Governor, a high constitutional authority who passed the order granting remission. It is submitted that the petitioner has confused between pardon and remission of sentence. It is a case where materials existed which warranted the grant of remission and this Court should not interfere in the matter. Considering the limited scope for judicial review the writ petition deserves to be dismissed.

Considering the fact that in large number of cases challenge is made to the grant of pardon or remission, as the case may be, we had requested Mr. Soli J Sorabjee to act as Amicus Curiae. He has highlighted various aspects relating to the grant of pardon and remission, as the case may be, and the scope for judicial review in such matters. He has suggested that considering the frequency with which pardons and/or the remission are being granted, in the present political scenario of the country it would be appropriate for this Court to lay down guidelines so that there is no scope for making a grievance about the alleged misuse of power.

Learned counsel for the respondents on the other hand submitted that though in Maru Ram v. Union of India & Others this Court had indicated certain recommendatory guidelines, the same did not find acceptance in Kehar Singh and Another v. Union of India and Another As a matter of fact in a later decision in Ashok Kumar @ Golu v. Union of India and Ors. the alleged apparent inconsistencies in the view was highlighted and a 3-Judge Bench held that laying down guidelines would be inappropriate.

The relevant constitutional provisions regarding the grant of pardon, remissions, suspension of sentence, etc. by the President of India and the Governor of a State are as follows:

"Article 72. Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

"Article 161 Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases. The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

The provision corresponding to Article 72 in the Government of India Act 1935 (in short 'the Government Act') was Section 295 which reads as follows:

"(1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were

vested in the Governor- General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province.

Provided that nothing in this sub-section affects any powers of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a Court- Martial.

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor- General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment."

There was no provision in the Government Act corresponding to Article 161 of the Constitution.

The above constitutional provisions were debated in the Constituent Assembly on 29th December 1948 and 17th September 1949 [see Constituent Assembly Debates, Vol.7, pages 1118-1120 and Vol. 10, page 389]. The grounds and principles on which these powers should be exercised were neither discussed nor debated [See Framing of India's Constitution: A Study, 2" Edition, Dr. Subhash C Kashyap, pages 367-371 , pages 397-399].

In addition to the above constitutional provisions the Code of Criminal Procedure 1973 (in short 'Cr.P.C.') provides for power to suspend or remit sentences and the power to commute sentence in Section 432 and Section 433 respectively.

Section 433A lays down restrictions on provisions of remission or commutation in certain cases mentioned therein. Section 434 confers concurrent power on the Central Government in case of death sentence.

Section 435 provides that the power of the State Government to remit or commute a sentence where the sentence is in respect of certain offences specified therein will be exercised by the State Government only after consultation with the Central Government.

Sections 54 and 55 of IPC confer power on the appropriate Government to commute sentence of death or sentence of imprisonment for life as provided therein.

Sections 432 and 433 Cr.P.C. read as follows:

"432. Power to suspend or remit sentences. (I) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may. if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may. by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by other person on his behalf shall be entertained, unless the person sentenced is in jail and, -

(a) Where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) Where such petition is made by any other person it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in section 433, the expression "appropriate Government" means, -

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) In other cases the Government of the State within which the offender is sentenced or the said order is passed.

433. Power to commute sentence.The appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of l860);

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) A sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) A sentence of simple imprisonment for fine".

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, and in that attribute of Deity whose judgments are always tempered with mercy." [See 59 American Jurisprudence 2d, page 5].

The rationale of the pardon power has been felicitously enunciated by the celebrated Justice Holmes of the United States Supreme Court in the case of Biddle v. Perovich in these words [71 L. Ed. 1161 at 1163]:

"A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." *$*

(emphasis added)

"Pardon and Parole" as per Corpus Juris Secundum (Vol.67-A) reads as follows: (Pages 16 and 17)

"The pardoning power is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence. It may also be used to the end that

justice be done by correcting injustice, as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made in the operation or enforcement of the criminal law. Executive clemency also exists to afford relief from undue harshness in the operation or enforcement of criminal law."

Interests of society and convict

(1) Acts of leniency by pardon are administered by the executive branch of the government in the interests of society and the discipline, education, and reformation of the person convicted. III-People v. Nowak, 35, N.E. 2d 63, 387 III, II.

(2) A pardon is granted on the theory that the convict has seen the error of his ways, that society will gain nothing by his further confinement and that he will conduct himself in the future as an upright, law-abiding citizen.

Matter known to counsel

The pardoning power is set up to prevent injustice to a person who has been convicted, especially when the facts of such injustice were not properly produced in the trial court, but such power is not a proper remedy on account of failure to use any matter which was known to defendant or his counsel and was available at time of new trial motion.

Showing that convection was on perjured testimony "Pardon and Parole" as stated in AMERICAN JURISPRUDENCE (Second Edition) (Volume 59) reads as follows:

I. INTRODUCTORY

1. History of pardoning power.

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, and in that attribute of Deity whose judgments are always tempered with mercy. In England, this power has been exercised from time immemorial, and has always been regarded as a necessary attribute of sovereignty. In the United States, this power is extended to the President by the United States Constitution, and in the various states and territories it is either conferred by constitutional provision or organic act, or provided for by statute, the power usually being conferred upon the governor or upon a board of which the governor is a member. In some instances, however, the governor's power is so limited as to render an arbitrary exercise impossible.

2. Validity of contract to procure pardon; criminal liability. While the earlier cases uniformly held agreements to secure a pardon, parole, or commutation of sentence illegal irrespective of the services rendered or contemplated, the more recent decisions take the view that such contracts are valid or invalid according to the character of the services contemplated. Although there is some conflict of opinion, contracts entered into to obtain a pardon, parole, or commutation of sentence have generally been upheld where the services contemplated are not other than the proper presentation of the case before the pardoning power."

Reprieve

A reprieve, from the French word "reprendre, " to take back, is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. It is merely the postponement of the execution of a sentence for a definite time, or to a day certain. It does not and cannot defeat the ultimate execution of the judgment of the court, but merely delays it temporarily. Reprieves at common law are of three kinds:

1. Ex mandato regis, from the mere pleasure of the Crown;

2. Ex arbitrio judicis, the power to grant which belongs of common right to every tribunal which is invested with authority to award execution; and

3. Ex necessitate legis, required by law to be granted under certain circumstances, as when a woman convicted of a capital offence alleges pregnancy of a quick child in delay of execution, or when a prisoner has become insane between the time of sentence and the time fixed for execution.

In Sir William Wades' Administrative Law (Ninth Edition) the position relating to pardon is stated as follows:

"The royal prerogative

The prerogative powers of the Crown have traditionally been said to confer discretion which no court can question; and there was long a dearth of authority to the contrary. But it may be that this was because the decided cases involved discretions which are, as has been laid down in the House of Lords, inherently unsuitable for judicial review, 'such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others'. But at the same time the House of Lords held that the court could review a ministers action (forbidding trade union membership by certain civil servants) under authority delegated to him by prerogative Order in Council, so that the principles of natural justice would apply. Administrative action was held to be reviewable in proceedings against the responsible minister without distinction as to the origin of the power, whether statute or common law. In later cases it was held that the dismissal of a civil servant involved 'a sufficient public law element' to be subject to Judicial review and that an unfair

compensation award by the civil service appeal board should be quashed. So now it may be said that the royal prerogative does not per se confer unreviewable discretion, but that many of the powers contained in it will be of a kind with which the courts will not concern themselves. It may be the prerogative acts of the Crown itself, though taken on the advice of ministers are immune from review, whereas the action of ministers, though authorised by delegation of prerogative power, is reviewable.But this is an artificial distinction, and if the case were strong enough even an Order in Council might prove to be reviewable in a declaratory judgment.

These propositions are founded on the wide definition of prerogative which has been criticized earlier. The making of treaties, for example, has no effect on the law of this country, so that there is no exercise of power which can concern the courts. It might be called prerogative without power, while the employment of civil servants might be called power without prerogative. A case where there may be neither prerogative nor power is the grant and refusal of passports, which has been claimed to be wholly within the prerogative and discretion of the Crown. A passport is merely an administrative device, the grant or cancellation of which probably involves no direct legal consequences, since there appears to be no justification for supposing that, in law as opposed to administrative practice, a Citizen's right to leave or enter the country is dependent upon the possession of a passport. The arbitrary power claimed by the Crown has now been made subject to judicial review along with various other non-legal powers discussed later. Other countries were ahead of Britain in protecting this necessary civil right.

At least it is now judicially recognised that prerogative power is as capable of abuse as is any other power, and that the law can sometimes find means of controlling it. The prerogative has many times been restricted both by judicial decision and by statute. It is for the court to determine the legal limits of the prerogative, and they may include the same requirement of reasonable and proper exercise as applies to statutory powers though with this difference, that it cannot be based upon the presumed intention of Parliament. In one unusual case, where a Parliamentary basis could be found because action taken by a minister under a treaty was held to be impliedly prohibited by a statute, "

Lord Denning MR discussed the nature of the prerogative and said:

Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive.

Then after citing cases of abuse of statutory power he concluded:

Likewise it seems to me that when discretionary powers are entrusted to the executive by the prerogative in pursuance of the treaty-making power the courts can examine the exercise of them so as to see that they are not used improperly or mistakenly.

Although this last remark was said in the House of Lords to be 'far too wide', in today's atmosphere it seems clear that the court would entertain a complaint that, for example, a royal pardon had been

obtained by fraud or granted by mistake or for improper reasons. The High Court has gone so far as to review a decision of the Home Secretary not to recommend a posthumous free pardon for a youth hanged for murder forty years previously, on the ground that he considered only an unconditional pardon and failed to take account of other possibilities. Although the court made no order or declaration and merely invited the Home Secretary to look at the matter again, it clearly took a long step towards judicial review of the prerogative of mercy. For example it was clear that the Home Secretary had refused to pardon someone solely on the ground of their sex, race or religion, the courts would be expected to interfere and our judgment would be entitled to do so.

In New Zealand the Court of Appeal has held that the prerogative power of pardon is not reviewable 'at any rate at present', but that the position might change justice so required; that the prerogative character of the power did not exempt it from review; but that the existing legal and administrative safeguards were adequate so that an extension of judicial review was unnecessary.

A further question is whether the law should concern itself with the Crown's exercise of the ordinary powers and liberties which all persons possess, as in the making of contracts and the conveyance of land. It has hitherto been assumed that in this area the Crown has the same free discretion as has any other person. But where such powers are exercised for governmental purposes it is arguable that the courts should be prepared to intervene, as a matter of public ethics, as a safeguard against abuse. They do not allow local authorities to act arbitrarily or vindictively in evicting tenants, letting sports grounds or placing advertisements, for example. Those are technically statutory powers (since all local authorities are statutory), but they correspond to ordinary powers and liberties. If, as the House of Lords holds, the source of power is irrelevant, it would not seem impossible for judicial review to be extended to this 'third source' of public power which is neither statutory nor prerogative but is a remnant from the days of personal government. But the 'grotesquely undemocratic idea that public authorities have a private capacity is deeply embedded in our legal culture', and such judicial authority as there is, is not encouraging.

We shall deal with the extent of power for judicial review as highlighted by learned counsel for the parties and learned Amicus Curie before we deal with the factual scenario.

It is fairly well settled that the exercise or non-exercise of pardon power by the President or Governor, as the case may be, is not immune from judicial review. Limited judicial review is available in certain cases.

In Maru Ram's case (supra) it was held that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power.

It is noteworthy that in Kehar Singh's case (supra) the contention that the power of pardon can be exercised for political consideration was unequivocally rejected. In Maru Ram's case (supra) it was held that consideration of religion, caste, colour or political loyalty are totally irrelevant and fraught with discrimination.

In Kehar Singh's case (supra) it was held that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations delineated in Maru Ram's case (supra). The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court.

In Kehar Singh's case (supra), placing reliance on the doctrine of the division (separation) of powers it was pleaded, that it was not open to the judiciary to scrutinize the exercise of the "mercy" power. In dealing with this submission this Court held that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.

As regards the considerations to be applied to a petition for pardon/remission in Kehar Singh's case (supra) this Court observed as follows:

"As regards the considerations to be applied by the President to the petition, we need say nothing more as the law in this behalf has already been laid down by this Court in Maru Ram."

In the case of Swaran Singh v. State of U.P. 6 after referring to the judgments in the cases of Maru Ram's case (supra) and Kehar Singh's case (supra) this Court held as follows:

"We cannot accept the rigid contention of the learned counsel for the third respondent that this court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."

The factual scenario in Swaran Singh's case (supra) needs to be noted. One Doodh Nath was found guilty of murdering one Joginder Singh and was convicted to imprisonment for life. His appeals to the High Court and Special Leave Petition to this Court were unsuccessful. However, within a period of less than 2 years the Governor of Uttar Pradesh granted remission of the remaining long period of his life sentence. This Court quashed the said order of the Governor on the ground that when the Governor was not posted with material facts, the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Conversely, the impugned order, it was observed "fringes on arbitrariness".

The Court held that if the pardon power "was exercise arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it". The Court further observed that when the order of the Governor impugned in these proceedings is subject to judicial review within the strict parameters laid down in Maru Ram's case (supra) and reiterated in Kehar Singh's case (supra): "we feel that the Governor shall reconsider the petition of Doodh Nath in the light of those materials

which he had no occasion to know earlier.", and left it open to the Governor of Uttar Pradesh to pass a fresh order in the light of the observations made by this Court.

In the case of Satpal and Anr. v. State of Haryana and Ors. , this Court observed that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time at which and the occasion on which and the circumstances in which the said powers could be exercised.

Thereafter the Court held as follows:

"The said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is mala fide one or the Governor has passed the order on some extraneous consideration."

The principles of judicial review on the pardon power have been re-stated in the case of Bikas Chatterjee v. Union of lndia 2.

In Mansukhlal Vithaldas Chauhan v. State of Gujarat 1 it was inter-alia held as follows:

"25. This principle was reiterated in Tata Cellular v. Union of India in which it was, inter alia, laid down that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made particularly as the Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision which itself may be fallible. The Court pointed out that the duty of the Court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?;

2. committed an error of law;

3. committed a breach of the rules of natural justice;

4. Reached a decision which no reasonable tribunal would have reached; or

5. Abused its powers.

26. In this case, Lord Denning was quoted as saying: (SCC pp. 681-82, para 83)

"Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves embark on a rehearing of the matter. See Healey v. Minister of Health 1954 Indlaw CA 75."

27. Lord Denning further observed as under: (p. 682)

"If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere. See Padfield vs. Minister of Agriculture, Fisheries and Food 1968 Indlaw HL 16. (emphasis supplied)"

28. In Sterling Computers Ltd. v. M&N Publications Ltd. 5 it was pointed out that while exercising the power of judicial review, the Court is concerned primarily as to whether there has been any infirmity in the decision-making process? In this case, the following passage from Professor Wade's Administrative Law was relied upon: (SCC p. 457, para 17)

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended."

(Emphasis supplied)

29. It may be pointed out that this principle was also applied by Professor Wade to quasi- judicial bodies and their decisions. Relying upon decision in R. v. Justices of London 1895 (1) QB 214. Professor Wade laid down the principle that where a public authority was given power to determine matter, mandamus would not lie to compel it to reach some particular decision.

30. A Division Bench of this Court comprising Kuldip Singh and B.P. Jeevan Reddy, JJ. in U.P. Financial Corpn. v. Gem Cap (India) (P) Ltd. Observed as under: (SCC pp. 306-07, para 11)

"11. The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of

natural justice which the quasi- judicial authorities are bound to observe. It is true that the distinction between a quasi- judicial and the administrative action has become thin, as pointed out by this Court as far back as 1970 in A.K. Kraipak v. Union of India (1969 (2) SCC 262). Even so the extent of judicial scrutiny/judicial review in the case of administrative action cannot be larger than in the case of quasi- judicial action. If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities; they have a certain amount of discretion available to them. They have 'a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred'. (Lord Diplock in Secy. of State for Education and Science v. Tameside Metropolitan Borough Council 1977 AC 1014 at p.1064.) The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene." $ (emphasis supplied)

The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(a) That the order has been passed without application of mind;

(b) That the order is mala fide;

(c) That the order has been passed on extraneous or wholly irrelevant considerations;

(d) That relevant materials have been kept out of consideration;

(e) That the order suffers from arbitrariness

Two important aspects were also highlighted by learned Amicus Curiae; one relating to the desirability of indicating reasons in the order granting pardon/remission while the other was an equally more important question relating to power to withdraw the order of granting pardon/remission, if subsequently, materials are placed to show that certain relevant materials were not considered or certain materials of extensive value were kept out of consideration. According to learned Amicus Curiae, reasons are to be indicated, in the absence of which the exercise of judicial review will be affected.

So far as desirability to indicate guidelines is concerned in Ashok Kumar's case (supra) it was held as follows :

"17-In Kehar Singh's case (supra) on the question of laying down guidelines for the exercise of power under Article 72 of the constitution this Court observed in paragraph 16 as under: (SCC pp. 217-18, para 16)

"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 channelised 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 assist by prevailing occasion and passing time. and it is of great significance that the function itself enjoys high status in the constitutional scheme".

These observations do indicate that the Constitution Bench which decided Kehar Singh's case (supra) was of the view that the language of Article 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able to conceive of all myriads kinds and categories of cases which may come up for the exercise of such power. No doubt in Maru Ram's case (supra) the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution. But that was a mere recommendation and not ratio decidendi having a binding effect on the Constitution Bench which decided Kehar Singh's case (supra). Therefore, the observation made by the Constitution Bench in Kehar Singh's case (supra) does not upturn any ratio laid down in Maru Ram's case(supra). Nor has the Bench in Kehar Singh"s case (supra) said any thing with regard to using the provisions of extant Remission Rules as guidelines for the exercise of the clemency powers."

In Kehar Singh's case (supra) this Court held that:

"There is no question involved in the case of asking for reasons for the Presidents' Order".

The same obviously means that the affected party need not be given the reasons. The question whether reasons can or cannot be disclosed to the Court when the same is challenged was not the subject matter of consideration. In any event, the absence of any obligation to convey the reasons does not mean that there should not be legitimate or relevant reasons for passing the order.

In S.R. Bommai and Ors. v. Union of India and Ors. 6 in the context of exercise of power under Article 356 of the Constitution it was observed at page 109, para 87 as follows:

"When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provision of the Constitution.

Since such material would be exclusively within the knowledge of the Union Government, in view of the provision of Section 106 of the Evidence Act, the burden on proving the existence of such material would be on the Union Government."

The position if the Government chooses not to disclose the reasons or the material for the impugned action was stated in the words of Lord Upjohn in the landmark decision in Padfield and Ors. v. Minister of Agriculture, Fisheries and Food and Ors. 1968 Indlaw HL 16 at p.719:

"if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion.."

The same approach was adopted by Justice Rustam S. Sidhwa of the Lahore High Court in Muhammad Sharif v. Federation of Pakistan (PLD 1988 Lah 725) where at p.775 para 13 the learned Judge observed as follows:

"I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Articles 58 (2)(b) and 112(2)(b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer."

Justice Sidhwa's aforesaid observations have been referred to and approved in S.R. Bommai's case (supra).

Since there is a power of judicial review, however, limited it may be, the same can be rendered to be an exercise in futility in the absence of reasons.

The logic applied by this Court in Bommai's case (supra) in the context of Article 74(2) is also relevant. It was observed in paras 153 and 434 as follows:

"153-Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction.

434- Article 74(2) merely bars an enquiry into the question whether any and if so, what advice was tendered by the Ministers to the President. It does not bar the court from calling upon the Union Council of Ministers (Union of India) to disclose to the court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice."

So far as the second aspect relating to withdrawal is concerned, it is submitted that though there is no specific reference in this regard in either Article 72 or Article 161 of the Constitution yet by application of the provisions of the General Clauses Act, 1897 (in short the 'General Clauses Act') the same would be permissible. It is also highlighted that similar provisions are specifically provided in Sections 432 and 433 Cr.P.C. Merely because Article 72 and Article 161 of the Constitution have not been so provided specifically that would not mean that such power was not intended to be exercised.

Sections 14 and 21 of the General Clauses Act deal with powers conferred to be exercisable from time to time and a power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws. They read as follows:

"14. Powers conferred to be exercisable from time to time- (1) Where, by any Central Act or Regulation made after the commencement of this Act, any power is conferred then unless a different intention appears that power may be exercised from time to time as occasion requires.

(2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887.

21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws- Where, by any Central Act or Regulation, a power to issue notifications orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye- laws so issued."

The scope and ambit of Sections 14 and 21 of the General Clauses Act have been analysed by this Court in Sampat Prakash v. State of J & K . It was inter alia held in para 11 as follows:

"11 - This provision is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applied to any Central Act or Regulation. On the face of it, the submission that Section 21 cannot be applied to the interpretation of the Constitution will lead to anomalies which can only be avoided by holding that the rule laid down in this section is fully applicable to all provisions of the Constitution."

Section 432 (3) of Cr.P.C. reads as follows:

"If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may, cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the

unexpired portion of the sentence."

The position in U.S.A. is summed up in Volume 67A Corpus Juris Secundum, p.21 para 16 as follows:

"There is authority for the view that a pardon may be held void where it appears from the pardon that the pardoning power was misinformed; but there is also authority for the view that intentional falsehood or suppression of truth is necessary, and that misinformation given in good faith and in the belief in its truth is insufficient to avoid a pardon. A pardon procured by false and fraudulent representations or by intentional suppression of the truth is void, even though the person pardoned had no part in perpetrating the fraud."

Inevitable conclusion, therefore, is that if it comes to the knowledge of the Government that the pardon has been obtained on the basis of manifest mistake or patent misrepresentation or fraud, the same can be rescinded or cancelled.

In R. v. Secretary of State for the Home Department, ex parte Bentley 1993 Indlaw QBD 4 it was held:

"(1) The court had jurisdiction to review the exercise of the royal prerogative of mercy by the Home Secretary in accord with accepted public law principles since the exercise of the prerogative was an important feature of the criminal justice system and a decision by the Home Secretary which was infected with legal errors ought not to be immune from legal challenge merely because it involved an element of policy or was made under the prerogative.

(2) The Home Secretary's decision not to recommend a posthumous pardon for the applicant's brother was flawed because, in considering whether to grant a posthumous pardon, he had failed to recognise the fact that the prerogative of mercy was capable of being exercised in many different circumstances and over a wide range and had failed to consider the form of pardon which might be appropriate. Furthermore, there was no objection in principle to the grant of a posthumous conditional pardon where a death sentence had already been carried out, as the grant of such a pardon represented recognition by the state that a mistake had been made and that a reprieve should have been granted. Since the Home Secretary's failure to consider the grant of a posthumous conditional pardon when the previous Home Secretary's decision not to grant a reprieve had been clearly wrong amounted to an error of law, the court, while making no order on the application, would invite the Home Secretary to reconsider his decision."

At page 452 of the Reports it was held as follows:

"The Court of Appeal (Cooke P, Gauk and McKay JJ) dismissed the appeal but in doing so it said 1992 (3) NZLR 672 at 678, 681):

'The prerogative of mercy is a prerogative power in the strictest sense of that term, for it is peculiar to the Crown and its exercise directly affects the rights of persons. On the other hand it would be inconsistent with the contemporary approach to say that, merely because it is a pure and strict prerogative power, its exercise or non- exercise must be immune from curial challenge. There is nothing heterodox in asserting, as counsel for the appellant do, that the rule of law requires that challenge shall be permitted in so far as issues arise of a kind with which the Courts are competent to deal. In the end the issue must turn on weighing the competing considerations, a number of which we have stated. Probably it cannot be said that any one answer is necessarily right; it is more a matter of a value or conceptual judgment as to the place in the law and the effectiveness or otherwise of the prerogative of mercy at the present day. In attempting such a judgment it must be right to exclude any lingering thought that the prerogative of mercy is no more than an arbitrary monarchial right of grace and favour. As developed it has become an integral element in the criminal justice system, a constitutional safeguard against mistakes.'

"Mr Pannick relies on this passage. He argues that the prerogative of mercy is exercised by the Home Secretary on behalf of us all. It is an important feature of our criminal justice system. It would be surprising and regrettable in our developed state of public law were the decision of the Home Secretary to be immune from legal challenge irrespective of the gravity of the legal errors which infected such a decision. Many types of decisions made by the Home Secretary do involve an element of policy (eg parole) but are subject to review.

We accept these arguments, The CCSU case made it clear that the powers of the court cannot be ousted merely by invoking the word 'prerogative', The question is simply whether the nature and subject matter of the decision is amenable to the judicial process".

In "JUDICIAL REVIEW OF ADMINISTRATIVE ACTION" (Fifth Edition) by the Retired Hon'ble the Lord Woolf it has been noted as follows:

"Other former prerogative powers should not any more, however, automatically be assumed to be non-justiciable. It is noticeable that one of the prerogative powers assumed by Lord Roskill in the GCHQ case to be non- justiciable, the prerogative of mercy, has since been judicially reviewed. In R. v. Secretary of State for the Home Department. ex p Bentley, the applicant applied for review of the Home Secretary's decision not to pardon her brother who had been sentenced to death and hanged 39 years earlier. The applicant contended that the Home Secretary had erred in law in his approach to the issue in that he considered that the grant of free pardon required the finding that her brother was morally and technically innocent, where the right question to be asked was whether in all the circumstances the punishment imposed should have been suffered. It was held that the decision ought to be based upon accepted public law principles and not be immune from legal challenge, despite the element of policy in the decision. The Home Secretary's failure to consider the grant of a posthumous pardon when the previous Home Secretary's decision had been wrong was held to be a clear error of law. The court broke new ground in this case, guided only by a recent decision of the New Zealand Court of Appeal".

In "THE CONSTITUTION OF UNITED STATES OF AMERICA" (Analysis and Interpretation) "Pardons and Reprieves" have been stated as follows:

"The Legal Nature of a Pardon

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate delivered to the individual for whose benefit it is intended, and not communicated officially to the Court.... A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

Marshall continued to hold that to be noticed judicially this deed must be pleaded, like any private instrument.

In the case of Burdick v. United States, Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him was proffered by President Wilson "a full and unconditional pardon for all offenses against the United States, " which he might have committed or participated in connection with the matter he had been questioned about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. "The grace of a pardon, " remarked Justice McKenna sententiously, "may be only a pretense ... involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected." Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice. In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. "A pardon in our days, " it said, "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful. They seem clearly to indicate that by substituting a commutation order for a deed of pardon, a President can always have his way in such matters, provided that substituted penalty is authorised by law and does not in common understanding exceed the original penalty.

Coming to the factual position it is noticed that the various materials were placed before the Governor when the request for grant of pardon/remission was processed at various levels. The views of the District level officials were obtained. Since they formed the basis of impugned order, it is relevant to take note of some interesting features. The three District level officials were Superintendent of Police, the District Collector, Kunoor and the District Probation Officer. Apart from that, the views of the Superintendent of jail, Central Prison, Cherlapally were obtained. The Collector's report refers to the report given by the Superintendent of Police and reproduces the same in the report contained in letter dated 9.12.2004. He also refers the letter dated 8.12.2004 of the Revenue Divisional Officer who according to him had indicated no objection to release of respondent No.2 on premature basis as his conduct and character was good and he lead ordinary life during the period of his escort parole from 19.5.2004 to 7.8.2004 and the free parole from 20.10.2004 to 6.11.2004. Only on that basis the District Collector recommended premature release.

According to learned counsel for the State this was sufficient as the Collector had to act on some material and he acted on the reports of the Superintendent of Police and the Revenue Divisional officer. The plea is clearly unacceptable. The Collector does not appear to have made any independent enquiry on his own. The report of District Probation officer is very interesting. In his report he has stated that if he (Respondent No.2) is prematurely released his life would be safe because his wife is a sitting MLA and she is having a police security. Further he was having a strong hold in the village and there is no opposition in Bramhanakotkur village. Following portion of his report shows as to how extraneous materials which had no relevance formed the foundation of his report.

"The convict Gouru Venkata Reddy S/o Janardhan Reddy, Central Prison Cherlapalli belongs to Upper Caste Reddy's family of Brahmanakotkur (Village) Nandikotkur Mandal and Taluk. The father of the convict was Janardhan Reddy and mother was Gouru Lakshmi Devi and during enquiry it is revealed that both were dead. The grand mother of convict Smt. Ratnamma is old, aged and there is no male person in the house to look after her. She desires that the convict should come and provide medical treatment to her.

In the past the convict contested in the elections and was defeated with small margin. During enquiry it is revealed that the convict is Congress Worker and due to political conspiracy he was defeated. In the elections conducted later on the wife of convict Smt. Saritha Reddy contested and was elected. During enquiry it is revealed that the matters mentioned in the application of the wife of the convict are true. The convict has two sisters. The deceased K. Rama Subbaiah and Ambi Reddy belong to Nandikotkur village. In this murder case the convict is not involved but due to political reasons his name was implicated in the case by producing false witnesses and sent to the Jail. But later they realized their mistake and the family members of the deceased are maintaining cordial relations. During enquiry it is revealed that there is no danger to the life of the convict from the villagers and also there is no danger to the villagers from the convict if the convict is released as stated by the President of the village Shri Shaik Ziauddin, Village Secretary Sri Sanjanna, village elders Shri Nagaswamy Reddy, Sri K. Venkata Rami Reddy, Shri Khajamoinuddin and Sri Pathan Moutali etc.

As seen from the past history of the convict he is not a naxalite, dacoit, and habitual offender. He

was peacefully carrying out agricultural activities and a good Congress Worker. He used to provide employment to a number of persons through agriculture. It is also revealed that the villagers are having good opinion on the convict. " $

(Underlined for emphasis)

Apart from apparently wrong statement made that respondent No.2 was maintaining cordial relationship with the family members of the deceased, he has highlighted that he was a "good Congress Worker". Further there is an inference that he was not involved in the murder was falsely implicated and false witnesses were produced. This inference on the fact of this Court's judgment is utterly fallacious. The question of his being a "good Congress Worker" has no relevance the objects sought to be achieved i.e. consideration of the question whether pardon/remission was to be granted. Equally surprising is the statement to the effect that during enquiry it was revealed that the convict is Congress worker and by political conspiracy he was defeated in the elections conducted earlier.

The report of the Superintendent of Police is equally interesting. He has stated that there will be no reaction in Brahmana Kotkur village and Nandikotkur town if the prisoner releases on prematurely. The report is dated 6.12.2004. Before the elections, the same officer had reported that on account of respondent No.2's release on parole, there was likelihood of breach of peace and law and order if he visits Nandikotkur Assembly Constituency. The only reason why a pariah becomes a messiah appears to be the change in the ruling pattern. With such pliable bureaucracy, there is need for deeper scrutiny when power of pardon/remission is exercised.

It appears that in the petition filed by respondent No.3 there is no mention about pendency of a Criminal case No. 411 of 2000. Learned counsel for the respondent No.1-State submitted that though this fact was not mentioned by the respondent No.3 in the petition yet the State Government considered the effect of the pendency of that petition. This certainly is a serious matter because a person who seeks exercise of highly discretionary power of a high constitutional authority, has to show bona fides and must place materials with clean hands.

When the principles of law as noted above are considered in the factual background it is clear that the irrelevant and extraneous materials entered into the decision making process, thereby vitiating it.

The order granting remission which is impugned in the petition is clearly unsustainable and is set aside. However, it is open to the respondent No.1 to treat the petition as a pending one for the purpose of re-consideration. It shall be open to the Governor to take note of materials placed before him by the functionaries of the State, and also to make such enquiries as considered necessary and relevant for the purpose of ascertaining the relevant factors otherwise. The writ petitions are allowed to the extent indicated above. No costs.

Hon'ble Justice S. H. KAPADIA J.

Although, I respectfully agree with the conclusion containing the opinion of brother, Arijit Pasayat, the importance and intricacies of the subject matter, namely, judicial review of the manner of exercise of prerogative power has impelled me to elucidate and clarify certain crucial aspects. Hence this separate opinion.

Pardons, reprieves and remissions are manifestation of the exercise of prerogative power. These are not acts of grace. They are a part of Constitutional scheme. When a pardon is granted, it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment has fixed.

The power to grant pardons and reprieves was traditionally a Royal prerogative and was regarded as an absolute power. At the same time, even in the earlier days, there was a general rule that if the King is deceived, the pardon is void, therefore, any separation of truth or suggestion of falsehood vitiated the pardon. Over the years, the manifestation of this power got diluted.

The power to grant pardons and reprieves in India is vested in the President and the Governor of a State by virtue of Articles 72 and 161 of the Constitution respectively.

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. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public consideration alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriating of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of Exclusive Cognizance would not apply when and if the decision impugned is in derogation of a Constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutation.

Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an Executive action that mitigates or set aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendants guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be the subject to the Rule of Law. 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 Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, 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.

The power under Article 72 as also under Article 161 of the Constitution is of the widest amplitude and envisages myriad kinds and categories of cases with facts and situations varying from case to case. The exercise of power depends upon the facts and circumstances of each case and the necessity or justification for exercise of that power has to be judged from case to case. It is important to bear in mind that every aspect of the exercise of the power under Article 72 as also under Article 161 does not fall in the judicial domain. In certain cases, a particular aspect may not be justiciable. However, even in such cases there has to exist requisite material on the basis of which the power is exercised under Article 72 or under Article 161 of the Constitution, as the case may be. In the circumstances, one cannot draw the guidelines for regulating the exercise of the power.

As stated above, exercise or non-exercise of the power of pardon by the President or the Governor is not immune from judicial review. Though, the circumstances and the criteria to guide exercise of this power may be infinite, one principle is definite and admits of no doubt, namely, that the impugned decision must indicate exercise of the power by application of manageable standards and in such cases courts will not interfere in its supervisory jurisdiction. By manageable standards we mean standards expected in functioning democracy. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power is the flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. The Constitutional justification for judicial review, and the vindication of the Rule of Law remain constant in all areas, but the mechanism for giving effect to that justification varies.

In conclusion, it may be stated that, there is a clear symmetry between the Constitutional rationale for review of statutory and prerogative power. In each case, the courts have to ensure that the authority is used in a manner which is consistent with the Rule of Law, which is the fundamental principle of good administration. In each case, the Rule of Law should be the overarching constitutional justification for judicial review. The exercise of prerogative power cannot be placed in straight jacket formulae and the perceptions regarding the extent and amplitude of this power are bound to vary. However, when the impugned decision does not indicate any data or manageable standards, the decision amount to derogation of an important Constitutional principle of Rule of Law.

We appreciate the assistance rendered by Mr. Soli J. Sorabjee as amicus curiae in this matter.

With these words, I agree with the conclusions in the opinion of brother, Arijit Pasayat.