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**Presidential Mercy Jurisdiction: Mitigating the Severity and
Confining the Operation and Rigour of “Unjust and Partial Laws”**

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*“Go now and leave your life of sin.”***

Abstract:

The Constitutions of India and Kenya grants, limits and controls the president's power of pardon both expressly and impliedly. The Constitutional scheme should be the only yardstick for measuring the width of this function and not by continual references to the supremacy enjoyed by the British Crown. This article decisively examines a number of issues shaping the scope of the pardoning power of the President together with the stage at which it can be exercised, the offences which fall within its reach, the procedure adopted and its judicial review, the effect of a pardon on the guilt of the offender, and the fact that even though the power of pardon has survived through the ages, its range is restricted by the axioms of modern political philosophy such as Democracy, Separation of powers, and Supremacy of the Constitution.

I. Introduction

The resilience of the power to pardon offenders is a remarkable global phenomenon, in view of some seemingly powerful reasons for the disappearance of this institution. These reasons are both ideological and practical in character. The ideological grounds derive from the fact that the pardoning power appears to be an archaic survival of an earlier era, during which the State was governed by an omnipotent ruler, who might have an occasional urge to demonstrate his benevolent disposition. This seems something of an anomaly in a twentieth century constitutional democracy having a commitment, at least in principle, to a delicate separation of powers designed to ensure the independence of the judiciary. This independence would appear to be threatened by vesting in a non-judicial authority the power to pardon offenders duly convicted and sentenced in the course of a judicial process. It is no coincidence that the ideological controversy regarding the desirability of the pardoning power reached its peak during the eighteenth century, when the groundwork of much of our prevailing political theory was being laid.

If the ideological reasons for doing away with the pardoning power are rooted in constitutional theory, the practical reasons are related to the development of modern penal systems. The pardoning power has historically served a number of functions, most of which are adequately provided for today by other legal institutions which have been developed to meet these needs. For example, the avoidance of imposing criminal liability on persons lacking in mental capacity or acting in self-defence is now governed by the penal code itself. The need to assuage doubts regarding the possibility of a miscarriage of justice is now commonly met by a system of appeals, revisions and rehearing before the courts. The individualization of punishment is provided for within the framework of the sentencing discretion now generally bestowed upon the courts, and subsequent developments can be taken into consideration by parole boards. Even the most dramatic use of clemency powers, viz., the commutation of capital

sentences, has lost much of its importance in view of the sparse use of the death penalty in contemporary times.

II. Overseas Experience

The basic provisions for a pardoning power are nearly always found in state constitutions, the main deviations being “basic” or “organic” laws, which in effect take the place of a constitution. Great Britain continues to rely on the royal prerogative, a recognized feature of her unwritten constitution, and this same prerogative, as delegated, also obtains in certain jurisdictions of the British Commonwealth, such as in Australia and New Zealand. It should also be observed that in countries with a federal structure, basic provisions may be found both at the federal level and within the constitutions of the individual provinces or states. The jurisdiction of the federal pardoning authority is not, however, necessarily co-extensive with the jurisdiction of federal courts and laws (as in the United States). Thus, for example, in India the President may commute the death penalty even where state laws are involved.² In America, the presidential pardon extends only to a federal conviction and cannot relieve an individual from a state conviction;³ while any deprivation of a person’s basic civil right by a state on account of a federal conviction pardoned by the president is void.⁴

Clemency powers are vested in the heads of state be it the President or the Monarch. The vesting of the clemency powers in the head of state is consistent with the popular view of the pardon as a discretionary power entrusted to the most elevated personage in the land. Indeed, in this respect there appears to be a degree of historical continuity with the powers of the formerly autocratic monarch having been transferred to his constitutional successor, who remains the ultimate font of mercy *vis-a-vis* his erring subjects. Superimposed on this image is a picture which attributes the pardoning power to the executive arm of government, which retains the discretion to refrain in extreme cases from absolute enforcement of the laws of the land. This dual image depends upon an identity of functions of head of state and chief executive.

Thus, the Constitution of India, in keeping with modern Constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a Constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All powers belong to the people and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a Constitutional order. It is my submission that this should be the practice that ought to be emulated by the Kenyan head of state as well.

III. The Need for Mercy Jurisdiction

To any civilized society, there can be no attributes more important than the life and personal liberty of its members. This is evident from the paramount position given by the courts to Article 21⁵ of the Constitution of India. This twin attributes enjoy a deep-seated pre-eminence 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 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 judgement 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 scrutinize the validity of the threatened denial of personal liberty. The power so entrusted is a power belonging to the people reposed in the highest dignitary of the state.

IV. Is the Province of Mercy a Universal Prerogative of the Head of State?

In post-revolutionary France, the acceptance of the need for a pardoning power did not entirely dispel reservations about the wisdom of concentrating the decision-making power solely in the hands of the head of state in his capacity as chief executive. The 1802 constitution provided for the establishment of an advisory council in which all three branches of government were represented.⁶ Similarly, the 1848 constitution provided for mandatory consultation with the *Conseil d'état*, and in serious cases (*i.e.*, convictions in the High Court) the right to pardon was reserved to the National Assembly. Finally, under the constitution of the Fourth Republic, the power was vested in the President sitting in the High Council of the Judiciary, an indication that the power was not to be regarded as purely executive in nature.⁷

Clemency power is not universally regarded as the sole prerogative of the head of state. Indeed, the only clear feature emerging from an analysis of the constitutions included in the present study is that in no case is this power vested primarily in a judicial authority. Nor does the model of the head of state acting within the framework of a judicial body⁸ appear to be prevalent today. Since the role of the head of state is at times ambiguous, the fact that the head of state may be the sole repository of the clemency power does not in itself unequivocally determine the constitutional nature of the power.

V. Part of the Constitutional Scheme

In England, the power is regarded as the Royal prerogative of pardon capable of exercise on a variety of grounds, for reasons of state as well as the desire to safeguard against judicial error which exercised by the Sovereign generally through the Home Secretary. It is an act of grace issuing from the sovereign. In the United States of America, however, after the founding of the republic, a pardon by the President has been regarded not as a private act of grace but as part of the Constitutional scheme. In an opinion, astonishing for its scholarship and lucidity, *Mr Justice Holmes*, speaking for the Court in *Biddle v. Perovich*⁹ enunciated this view, and it has since been affirmed in several decisions. The power of pardon is part of the Constitutional scheme and should be treated as such in all Constitutional democracies including India and Kenya. It has been reposed by the people through the Constitution in the Head of State, and enjoys high status because it is a Constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. The power of executive clemency in America is undoubtedly derived from the practice as it had existed in England.¹⁰ In India, the power of pardon rests on the advice tendered by the executive to the President, who subject to the provisions of Article 74(1)¹¹ of the Indian Constitution must act in accordance with such advice and that the head of State is bound by the advice tendered by the government, While in Kenya, Article 133(1)¹² of the Constitution confers the power of mercy on the President¹³ where such power rests on the advice tendered by the Advisory committee on the power of mercy¹⁴ constituted under Article 133(2).¹⁵

VI. Utility of the Prerogative of Mercy

The contradictions, anachronisms and areas of uncertainty in the pardoning system arise because of the failure to distinguish between the various conceptually different uses to which the prerogative of mercy is put. Sometimes the aim of the pardoner is to be merciful by declining to exact the full penalty that the law (through the judicial process deems appropriate to the offence. For instance when the death sentence for murder was commuted in England it was usually, an exercise of mercy in this sense rather than strict legal justice¹⁶. The existence of the pardoning power is also an acknowledgement that the judicial process is fallible, and that the rules of procedure and evidence do not always give rise to a correct decision about the guilt or innocence, even when all judicial appeals are exhausted. Pardon suggests forgiveness, or the excusing of a fault and that is hardly an apt description where state necessity is in reality the justification for the use of the executive power.

The existence of the power clearly raises a number of important Constitutional issues. Principal among these is the fact that a pardon can be seen as a kind of suspending or dispensing power. This was explained by *Vaughan C.J.* thus, strictly speaking, there is a distinction between the suspending or dispensing power and power of pardon,

*"Both these powers affect the legality of the act done. They make legal what would otherwise be illegal. A pardon does not affect the legality of the act but simply frees a guilty person from the legal consequences of his illegal act."*¹⁷

If its continuance is to be tolerated at all, the greatest care is necessary to ensure that no abuse is possible. In an ideal world, no appeal to administrative machinery would be necessary for the attainment of strict justice. There are some who would argue that even in our imperfect world; the whole notion of pardon is anti-democratic and unnecessary. They would argue that administration of justice in a democracy is the province of the judiciary and that we should refine our legal procedures strictly until they are adequate to the task of dispensing justice.

But the likelihood is that so long as we persist with an adversarial process whose aim is the examination of evidence rather than the unblinkered pursuit of truth, mistakes are bound to happen and must be corrected. This happens because Judges must enforce the law whatever they be and decide according to the best of their lights; but the laws are not always just as lights are not always luminous, nor again are judicial methods always adequate to secure justice hence the necessity of vesting the pardoning power in an authority other than the judiciary has always been recognized. Again pardons are justifiable because of errors of justice which call for some method of review of the evidence. These errors are of two types. The first is the conviction in which doubt regarding guilt arises and second is the conviction in which doubt regarding the justice of penalty arises. Because of these and similar changes in legislation or decisions of Courts, or because of changes in the spirit of times, some method of modifying the actions of the Courts should be available.

For instance, until the establishment of the Criminal appeal in England in 1907, virtually the only hope for the wrongly convicted was the Home Secretary's clemency. Hitherto, the use of the prerogative to correct mistakes had been an integral part of the system of Criminal Justice, whereas after the Act, the task of seeing that justice was done was more secure in the hands of the judges.

VII. Scope of Pardoning Power

The constitutional provisions relating to pardon are usually stated in general terms, which do not indicate the precise scope of the pardoning power. Questions as to the applicability of pardons to disciplinary offences or to administrative penalties are left to supplementary legislation or judicial interpretation. On the other hand, in at least two special areas, it is not unusual to find express reference to certain categories of offence, offender or penalty. The first area is that of political crimes. Here the special provisions may apply to political offences in general, but often relate specifically to proceedings of impeachment involving members of the government. In such cases, restrictions are imposed upon the exercise of the pardoning power. Clearly a system which provides for impeachment proceedings as a means of exercising legislative control over the executive would be frustrated if the executive could simply void the proceedings at will by granting pardons. For this reason the application of the pardoning power to impeachment proceedings is often made dependent upon the initiative or the consent of the legislative body.

The other area in which special provisions are frequently found is that of the death penalty. The most usual type of provision mandates that capital punishment cases be reviewed by the body or bodies whose task it is to consider applications for pardon.¹⁸ The object of all these provisions is clearly to ensure that, where the ultimate penalty is to be inflicted, no case deserving of consideration by the

clemency authorities will be overlooked as the result of a failure on the part of the defendant to submit a petition, or for want of adequate investigation.

The institution of pardon is an ancient one, and throughout history it has served a number of functions, according to the needs of particular legal systems at particular times. It is not therefore surprising that a multitude of terms were applied to the clemency function and that their usage has not always been consistent. Thus, in the English language alone, the following terms are encountered: free pardon, full pardon, conditional pardon, commutation, remission, reprieve, respite, amnesty, clemency, mercy. The United States Constitution¹⁹ followed the English jurists in providing for *reprieves* and *pardons*. The term pardon is used in a generic sense, and apparently includes both reduction and remission of sentence as well as commutation, but not reprieves, which are specified independently. In England, on the other hand, the term "commutation" was never generally adopted. The substitution of one penalty for another was included in the rubric of the "conditional pardon."

The majority of constitutions do not directly address these questions. Instead, the precise forms which the clemency power may take are left to regular or even subsidiary legislation, or to judicial interpretation. It was the practice in British colonial legislation, however, to specify the various forms of clemency and this model can still be found in the basic provisions of India, Kenya, Nigeria, Uganda and Zambia. The forms commonly specified in these jurisdictions are (a) pardon, free or conditional; (b) respite of execution for a specified or indeterminate period; (c) substitution of a less severe form of punishment (commutation); (d) remission of the whole or part of the punishment. The last type usually specifies that remission may apply to any penalty or forfeiture incurred for any offence, and this would appear to include sanctions incurred by way of administrative proceedings.

VIII. President's Mercy Jurisdiction in India

The President of India has power to grant pardon²⁰ *inter alia*, to any person convicted of any offence in all cases where;

- (1) The punishment or sentence is by a Court Martial,
- (2) The punishment or sentence is for an offence against any law relating to a matter, to which the executive power of the Union extends,
- (3) The sentence is a sentence of death.

This provision of the Constitution of India confers upon the President the pardoning power, without prejudice to similar powers possessed by the governors, or the Military authorities under the Army Acts as regards conviction by the court martial. The words of Article 72 are very wide and do not contain any limitation as to the time at which, or the circumstances in which the powers conferred might be exercised.

Before the Indian constitution came into force, the law of pardon in India was the same as in England since the sovereign of England was the sovereign of India. However since 1861, successive Criminal procedure Codes conferred on the executive in India limited powers of clemency and conferred upon the appellate court power to suspend a sentence pending appeal.

From 1937, when the Government of India Act, 1935 came into force, the law of pardon in India was contained in Section 295 of that Act, and in Sections 401 and 402 of Criminal procedure Code 1898, the power of the appellate court being contained in Section 426, Criminal procedure Code. The result therefore was that up to the coming into force of the constitution, the exercise of the King's prerogative remained unaffected, was plenary, unfettered and exercisable as hitherto.

Section 295 ran thus, provisions as to death sentences

- (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 a sentence of any person convicted in the province provided that nothing in this sub section affects any power 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”.

IX. The Objects of a Pardon – Global trend

The object of the pardoning power is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections. It is an attribute of sovereignty, wherever the sovereignty may lie²¹ in the body politic to relieve a convict from a sentence which is mistaken, harsh²² or disproportionate to the crime.²³

The *Law Commission of India* in its 35th report has also justified the existence of the prerogative of mercy in the executive. It is stated therein:

“There are many matters which may not have been considered by the courts. The hands of the courts are tied down by the evidence placed before it. A sentence of death passed by a court after consideration of all materials placed before it may yet require reconsideration because of:

- (I) *Facts not placed before the court;*
- (II) *Facts placed before the court, but not in the proper manner,*
- (III) *Facts discovered after passing the sentence;*
- (IV) *Events which have developed after the passing of the sentence;*
- (V) *And other special features.*

*Nor can one codify and select these special features which would be too numerous to lend themselves to codification. For these reasons, we do not recommend any change in the scope of these powers.”*²⁴

The legal provisions which describe the various types of pardon rarely specify the objective for which each type is intended. In most legal systems clemency provisions are designed to facilitate a post-convictional modification of judgment, usually because of changes in the offender's personal conduct or circumstances, or possibly because of doubts relating to the propriety of his conviction. The last consideration is more evident in jurisdictions influenced by the common law, since a "free pardon" implies some form of corrective to the conviction itself.

The necessity of conferring on the president of the United States of America the power to pardon treason was thus stated by *Hamilton*,

*“In seasons of insurrection or rebellion, there are often crucial moments when a well timed offer of pardon to the insurgents of rebels may restore the tranquillity of the commonwealth and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature or one of its branches for the purpose of obtaining its sanction would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal.”*²⁵

The French *grâce*, on the other hand, is concerned exclusively with the punishment. The main reason for this difference between the two systems is that the French legal system developed a separate remedy for suspected miscarriages of justice: *revision*, or retrial. This is a special form of court proceeding which may be instigated for specified reasons. This institution is generally foreign to the common-law countries, which rely on the pardoning power to accomplish this purpose.

Another objective of the pardon reflected in the clemency provisions of some countries²⁶ relates to the role of criminal accomplices. These clemency provisions state that an accomplice who provides information leading to the conviction of the principal offender may be pardoned. This type of pardon appears to be confined exclusively to countries influenced by the common law. It reflects a practice which was considered the mainstay of the English criminal justice system during the end of the eighteenth and the beginning of the nineteenth centuries. It was thought that only by making such an offer to the accomplice could the principal be apprehended and convicted. This practice, however, was the subject of much controversy and has since fallen into disuse. The modern system of "turning King's (State's) evidence" is no longer conditional on the grant of a pardon. Nevertheless, as noted, many hitherto colonial jurisdictions still retain this form of pardon, at least formally. It should be observed that this type of pardon, apart from being controversial as a matter of policy, also has an unusual feature from the formal point of view. It is the only form of pardon designed specifically for offenders-or rather for suspects-who have not yet been convicted by the courts. Most other jurisdictions preclude any exercise of clemency prior to conviction; and even some jurisdictions providing for the pardon of accomplices (*e.g.*, New Zealand) do not allow for pre-convictional pardon in any other case.

Another purpose of the pardoning power in some jurisdictions is to remove the stigma of past convictions. Here the clemency power is usually invoked a considerable period of time after the sentence has been served, and the offender has had an opportunity to prove that he has earned his reinstatement as a first-class citizen.

X. Pardoning Power and Judicial Review

In India as in England, the exercise of the pardoning power by the executive shall be guided by political and mercy considerations and being discretionary shall not be subject to judicial review on merits.²⁷ A court has no right to inquire on what basis or information the executive has exercised the power in any case.²⁸ However, 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 to determine.

This discretion has to be exercised on public consideration alone. The presidential power acts as a safety valve in exceptional cases where the legal system fails to deliver a morally or politically acceptable result and hence secures public welfare. It is also the only way virtually that a sentence, once final, can be reconsidered and, in appropriate cases reduced. The President and the Governors in case of the Indian Federation are the sole judges of the sufficiency of facts and of appropriateness of granting pardon 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 the Constitutional provisions, and this is the basic working test to be applied while granting pardons, remissions and commutations." It is no longer to be said that prerogative power is *ipso facto* immune from judicial review. An undue exercise of power is to be deprecated. Considerations of caste, religion or political loyalty are irrelevant and fraught with discrimination and hence are prohibited grounds. The 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 subject to the Rule of Law and that Rule cannot be compromised on the ground of political expediency.

The power is of the widest amplitude and the court thought providing guidelines was perhaps unnecessary, since Article 72 itself provide sufficient guidelines. It was further observed that to spell out specific guidelines may not be able to conceive of all myriad kinds and categories of cases which may come up for exercise of such power.²⁹ In the above circumstances, one cannot draw guidelines for regulating the exercise of the power.³⁰

The power conferred by Article 72 of the Indian Constitution as in Article 133 of the Kenyan Constitution is an executive function to be exercised by the Head of the State after taking into consideration various matters which may not be germane for consideration before a court of law inquiring into the offence.³¹ The court is accordingly, precluded from examining the wisdom or expediency of the exercise of the power in a particular case.

It follows that; (a) It must be presumed that the President acted properly and carefully after an objective consideration of all aspects of the matter.³² (b) No court can ask for the reasons why a mercy petition has been rejected.³³ If, however, reasons are given in the President's order, and these are held to be irrelevant, the court would interfere.

But the court has admitted judicial review on some specified grounds. e.g. –

- (a) To determine the scope of the President's power under Article 72.³⁴
- (b) The court can interfere where the President's exercise of the power is vitiated by self denial on erroneous appreciation of the full amplitude of the power conferred by Article 72, e.g., where the President rejected a mercy petition on the erroneous ground that he could not go behind the final decision of the highest court of the land.³⁵
- (c) To determine whether there has been an inordinate delay in disposing of a mercy petition which prolongs delay in execution of the death sentence, for no fault of the accused and thus inflicts additional penalty by way of worry and suspense over and above the sentence of death as awarded by the court.³⁶ In case of inordinate delay, the Supreme Court would, under Article 32, substitute the sentence of death into one of imprisonment for life for inflicting additional penalty by way of worry and suspense over and above the sentence of death by delaying its execution as was held by the Supreme Court of India in *Triveniben and Others v. State of Gujarat and Others*.³⁷ A far more progressive and compassionate approach on the subject of delay is evident in the United States of America in *People v. Anderson* where the Supreme Court of California was there concerned with whether the death sentence violated Article 6 of the State's Constitutional prohibition against cruel or unusual punishment. In holding that it did, *Wright CJ* stressed the torturousness of delay involved in the carrying out of the death penalty.

*"The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanising effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalising to the human spirit as to constitute psychological torture. Respondent concedes the fact of lengthy delays between the pronouncement of the judgement of death and the actual execution, but suggests that these delays are acceptable because they often occur at the instance of the condemned prisoner. We reject this suggestion. An appellant insistence on receiving the benefits of appellate review of the judgement condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription."*³⁸

The Supreme Court of Zimbabwe was called upon in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General*³⁹ to decide the constitutionality of the dehumanizing and degrading factor of prolonged delay in execution of capital punishment against Section 15(1) of the Zimbabwe Constitution which provides that no person shall be subjected 'to torture or to inhuman or degrading punishment or other treatment'. The bulk of the opinion by *Gubbay CJ*

concerned the construction of section 15(1) and the attitude of diverse courts toward the factor of delay in executing a sentence of death. The Court said that Section 15(1),

“Is a provision that embodies broad and idealistic notions of dignity and decency...Any punishment or treatment incompatible with the evolving standards of decency that mark the progress of a maturing society.... is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances.”

- (d) In India, an order of the President under Article 72 or by the Governor under Article 161,⁴⁰ as the case may be, can be judicially reviewed on the following grounds:
- (i) That the order has been passed without application of mind.
 - (ii) That the order is *mala fide*.
 - (iii) That the order has been passed on extraneous or wholly irrelevant consideration.
 - (iv) That the relevant materials have been kept out of consideration.
 - (v) That the order suffers from arbitrariness.⁴¹

I submit that the above grounds form set forth the cog that can be described as international good practice and therefore recommend that Kenya's pardoning power be subjected to such standards to ensure that justice is not only done but appears to be done through due process of law against any whims of man.

It was held that the exercise or non exercise of the power of pardon by the President is not immune from judicial review. Though the circumstances and criteria to guide exercise of this power may be infinite, one principle is “definite and admits no doubt, namely, that the impugned decision must indicate the exercise of power by application of manageable standards and in such cases courts will not interfere in its supervisory jurisdiction. Manageable standards mean standards expected in functioning democracy. A pardon obtained by fraud or granted by mistake or granted for improper purpose or reasons would invite judicial review”. Where the decision does not indicate any data or manageable standards, the decision amounts to derogation of an important constitutional principle of Rule of Law.

XI. Part of a Constitutional Scheme not Personal Grace – Kenya's Case

It is submitted here that this is a good course for the republic of Kenya to follow in particular because of its tradition in which the President releases convicts during national holidays or exercises the power as a weapon of political repression to gain electoral mileage as in the case of *Charles Njonjo* by the regime of President *Moi*, reports that some of the prisoners released after President *Uhuru Kenyatta* exercised the Constitutional Power of Mercy on *Mashujaa* Day have run afoul of the law shining light on the need for and the criteria used to receive clemency,⁴² the claim that the process of identifying those who qualify for amnesty in Kenya is marred with corruption as in 2016 has open a can of worms with serious allegations that about half of the names forwarded for release by President *Uhuru Kenyatta* were substituted after he officially announced that he had pardoned thousands of petty offenders⁴³ indicate that corruption, non application of mind and extraneous considerations of populism, give mercy jurisdiction a colour of benevolence or personal grace of the President rather than a part of the constitutional scheme legitimate only for public good. It goes without mentioning that the Supreme Court of India has emphasized that although the power to pardon is very wide, “it cannot run riot”, but then all public power- “all power, however majestic the dignitary wielding it, shall be exercised in good faith with intelligent and informed facts and honesty for the public need.”⁴⁴

In *Maru Ram v. Union of India*,⁴⁵ it was stated that the power to pardon, grant remission and commutation being of the greatest moment for the liberty of the citizen cannot be a law unto itself and

must be informed by the finer canons of Constitutionalism. The court explained that there may be grounds, such as political vendetta or party favouritism which may make the actual exercise of the constitutional power vulnerable. The order which is the product of extraneous or *mala fide* factors will vitiate the exercise and likewise capricious criteria will void the exercise. The power under Article 72 is not to be exercised on wholly “irrelevant, irrational, discriminatory or *mala fide* considerations”. If the President is found to have exercised the power himself without being advised by the government, or if he transgresses the jurisdiction in exercising the same or it is established that he has passed the order without application of mind or that the order in question is *mala fide* or has been passed on some extraneous considerations, the same is amenable to judicial review.

Even though the convict need not be informed about the reason why his clemency petition is rejected, it does not mean that there should not be legitimate or relevant reasons for passing the order. Since there is a power of judicial review, the same can be rendered as an exercise in futility in the absence of reasons.⁴⁶ The Supreme Court has held that the power under Article 72 is absolute and cannot be fettered by any statutory provisions, cannot be altered, modified or interfered with in any manner whatsoever though the power has to be exercised on the advice of the Council of Ministers. However clemency power though discretionary, is subject to certain standards. It is not a matter of privilege but a matter of performance of official duty vested in the president not only for the benefit of the convict but for the welfare of the people who may insist on its performance.⁴⁷

XII. Conclusion

Although the pardon is used to temper justice with mercy, it is also used as a regular device of the scheme of criminal justice, remedying the inaccuracies that the judicial system is likely to create from time to time. Once that hypothesis is established, certain conclusions follow as a matter of course. Most important of these is that the system, like the judicial process itself, must be an open one, as accountable as is well-suited with the responsibility of the President or Governor as the case may be for its function. As long as misfiring of justice persists, standards must be crafted to avoid them by humanizing the judicial process. Assuagement of the rule on the admission of new evidence tied with better invocation of the power to order a retrial would appear to be an apparent adjustment for the better humanization of the criminal justice system.

But amend as we may, we are improbable ever to be able to act exclusive of the protection as a safety net of the executive arm of state as an antidote in neutralising the intermittent injustice. There is persuasive evidence suggesting that the current system is not functioning as well as it should and that too many guiltless souls are being erroneously locked behind bars. New mechanisms to inform and aid the President and Governor in his exercise of the prerogative of mercy are the need of the hour. Whether we are equipped to countenance the outlays of such a new system is a quality of the worth that we situate on the annihilation of injustice from our system of criminal justice.

As this function is not a sanctuary provision for the head of state to pleasure in eccentrically or in instants of operational surplus but is about a very old though ingeniously reincarnated standard of a sovereign's prerogative to pronounce offences against the milieu of its circumstances, not legalistically but civilisationally. It is an occasion for the sovereign, now our democratically elected Head of State, to scrutinize a transgression committed by a fellow citizen against another, which has attracted the respective retribution, to see if that punishment is justified, fitting, fair, just and, above all, free from any error of finding by those entrusted and assigned to adjudge it.

In another way, the authority to pardon is not about punishment but emancipation. Adjudging people to death has been acknowledged by human societies, ever since the chances to perpetrate crimes and the power to chastise those have been known. But millennia after the capital sentence has found mention in our penal and punitive realization, the higher fibres of the human brain were actuated by

India's Apex Court ruling in 1980 which declared that the death sentence was to be awarded only in "*the rarest of rare cases*". This assertion was as practical as it was stirred by the planetary movement against what was beginning to be seen as "judicial murder".

When probing the power of pardon, we should be aware of four factors about it which form its gist that they gain the eminence of four righteous truths about a civilizational order of human conduct in which the sovereign is one step ahead of the social order on the collective process. First, mercy is not an entrance which the head of state may unfasten to let mislaid clemency through; rather it is one he may induce to be unfastened to see if justice has been choked-up at its doorstep. Second, pardon is not a gift the President may deluge upon the offender; as an alternative it is an authority that "*We the people*" of India just as Kenya have conferred on the head of state of the respective nations to make use of once rigid codes usurp justice to ransom. Third, compassion, when entreated for by one sentenced to death, it does not only concern a felon's scream for life in the setting of its judicial annihilation, but also pertains to the ingredient of humanity's expedition headed for a ideal state governed by law. Fourth, dispensation of compassion under the Constitution is not about the law, but it is the sovereign's impression of the human condition caught up in capital crime, that mirrors in it that which the law cannot contemplate or appraise, only the democratically elected keeper of the nation can, and then again, not to inundate the law's appetite, but the hunger of society's human sensibilities.

The power to pardon as given under Article 72 of Indian Constitution as Article 133(1) of the Kenyan Constitution is a given conceptualisation of so many words which each copy of the Constitution must regurgitate in almost unerringly the same voice. The president is however, a being, not a written manuscript. From diverse forerunners and from discernible heirs, each Head of State is a rational, contemplating human being, with persuasions, reminiscences, constraints and inclinations. He or She can, for that matter, bring a given viewpoint to bear on the issue or, possibly, nothing. The President uses his measured influence to either decline the plea and thereby spin the denunciation into a noose or accept it, as a measure of his assurance that the ends of justice are served through the slighter chastisement of a life term in prison.

Piling up mercy pleas is forsaking. But tossing away recommendations for denial in the mode of ingestion-egestion cannon is automation. Articles 72 and 133 of the Constitutions of India and Kenya respectively, are neither meant to be switched off nor put on a perpetual workout. It is imperative that a person be deprived of his life and liberty by due process of law or by laws which are just, fair and reasonable. Consequently, the Presidential power is a people's function that should be discharged in accordance with the due process of law. To become so certain, changes are suggested. Firstly, it is required that in the spirit of democracy and transparency should be maintained in taking decisions on the mercy petitions. The President and Governors or those who indirectly exercise these powers through advice need to have objective criteria to process the petitions and the rationale behind each decision should be made clear through a speaking order. Secondly, keeping in mind the tenets of Equality before the Law and Equal protection of Law under the living law of the Constitution, the provisions should be exercised with equanimity towards all without distinctions on the basis of gender, age, caste, community, language or geography.

In a democracy, ultimate sovereignty lies with the people and through them vests in their representatives. Hence, exercise of such power by the political executive by advising the Head of State to grant pardon is legitimate. On the outset, there exists enough checks and balances but nevertheless, more caution is needed to avoid political and other exigencies which colour the exercise of the powers of pardon with discrimination, corruption and favouritism as evident from the past experiences and case law.

A time limit needs to be understood as reasonable time as it is now settled law that it is not practicable to set a dead line for mercy petitions for the processing and final disposal of a mercy petition

which would bring relief to the death row convicts since the agony of waiting to be executed traumatizes and kills the convict many more times than the actual execution. The President desires for a consultant with wielding a given measure of autonomy from those who pursued the case under consideration; so as to fetch a changed outlook and diverse ideals to put up with on the theme and whose autonomous political responsibility can afford the President a level of guard from public condemnation.

Furthermore, there should be equality before the law and equal opportunity to all so that even the poor and illiterate should be assisted in drafting, and pursuing their mercy petitions. It should be made a matter of policy that those prisoners who seem to have atoned and reformed should be pardoned in appropriate cases and suitably rehabilitated to encourage criminal offenders to turn their lives around and start afresh. Lastly, judicial review of administrative action has crystallized as a basic structure of the Constitution and limited in its application though it may be in the mercy jurisdiction, it is inevitable to check arbitrariness and unreasonableness in the exercise of power of the last resort as a safeguard of personal liberty.

Reference

** The Holy Bible, John 8:11.

² The President of India has the power to grant pardon under Article 72 of the Constitution *inter alia*, to any person convicted of any offence in all cases where (a) The punishment or sentence is by a court Martial, (b) The punishment or sentence is for an offence against any law relating to a matter, to which the executive power of the Union extends, and (c) where the sentence is a sentence of death.

³ US – US v. Donofrio 450 F 2d 1054 (5th Cir 1971)

⁴ US – Bjerkan v. US 529 F 2d 125 (7th Cir 1975)

⁵ The Right to life and personal liberty, “No person shall be deprived of life or personal liberty except according to procedure established by law.” See also 5th and 14th Amendments of the American Constitution.

⁶ J. Monteil, *La Grâce en Droit Français* 22 (1959)

⁷ Under an earlier proposal the decision would have belonged to the High Council of the Judiciary, presided over by the President who would have had equal voting rights. The proposed constitution containing these provisions, however, was rejected by the French people. See J. Monteil, *ibid*.

⁸ Under the constitution of France's Fifth Republic, the President no longer sits on the High Council of the Judiciary when it issues clemency decisions. He may, however, consult with the High Council.

⁹ 71 L Ed 1161

¹⁰ US – Soles bee v. Balkcom, 339 US 9, 70 S ct. 457, 941, Ed 604 (1950)

¹¹ After the 42nd Amendment, 1976 of the Indian Constitution, Article 74(1) reads thus, “There shall be a council of Ministers with the Prime Minister as its Head to aid and advice the President who shall, in exercise of his functions act in accordance with such advice.”

¹² Article 133(1), Power of Mercy: On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2)

¹³ *Ibid*, (a) Granting a free or conditional pardon to a person convicted of an offence; (b) Postponing the carrying out of a punishment, either for a specified or indefinite period; (c) Substituting a less severe form of punishment; or (d) Remitting all or part of a punishment.

¹⁴ The constitution of the Advisory Committee on the power of mercy tendering advice to the President finds mention in the Constitutions of Nigeria, Uganda and Zambia, while in Chad such a role is granted to the Supreme Court itself.

¹⁵ There shall be an Advisory Committee on the Power of Mercy, comprising—

(a) the Attorney-General;

(b) the Cabinet Secretary responsible for correctional services; and

(c) At least five other members as prescribed by an Act of Parliament, none of whom may be a State officer or in public service, and the Power of Mercy Act No. 21 of 2011.

¹⁶ It was used in this sense by Lord Diplock in *de Freitas v. Benny* (1976) A.C. 239, 247, in an aphorism “mercy is not the subject of legal rights. It begins where legal rights end”

¹⁷ *Thomas v Sorrell*, (1974) Vaughan 330: 124 ER. 1098. See also Holdsworth, *History of English Law* (1924) Vol. 6, at 217.

- ¹⁸ This applies for example to the Advisory Committees on the prerogative of mercy in Kenya, Malawi, Uganda and Zambia.
- ¹⁹ US Const. Article 2, Clause 1 provides that, "The president..... Shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."
- ²⁰ Indian Const. Article 72
- ²¹ Nanavati v. State of Bombay, AIR 1961 SC112 (128); (1961) 1SCR 497; (1961) 2 SCJ 100
- ²² Ex Parte Grossman, (1924) 267 US 87
- ²³ Biddle v. Perovich (1926) 274 US 480
- ²⁴ Report on Capital Punishment, p 317 – 18 (1967)
- ²⁵ Hamilton, Federalist No.74.
- ²⁶ New Zealand, Singapore and Sri Lanka
- ²⁷ Kehar Singh v. Union of India, AIR 1989 SC 653; (1989)1 SCC 204.
- ²⁸ Ashok Kumar v. Union of India 1991 Cr LJ 2483 (SC) AIR 1991 SC 1792; (1991) 3 SCC 498.
- ²⁹ Ashok Kumar v. Union of India, (1991) 3 SCC 498.
- ³⁰ Epuru Sudhakar v. Govt. of A.P., AIR 2006 SC 3385; (2006) 8 SCC 161.
- ³¹ Chennugadu, In re., ILR (1955) Mad 92
- ³² Kuljit v. Lt. Governor of Delhi, AIR 1982 SC 774; (1982) 1 SCC 417
- ³³ Triveniben v. State of Gujarat (III), (1990) Cr LJ 1341 (Para. 8) (Guj).
- ³⁴ Kehar Singh v. Union of India, AIR 1989 SC 653; (1989) 1 SCC 204
- ³⁵ Supra note at 30.
- ³⁶ Sher Singh v. State of Punjab, AIR 1983 SC 465; (1983) 2 SCC 344 (Para. 11) Triveniben v. State of Gujarat (I), (1989) 1 SCC 344 (CB); Jumman v. State of U.P., (1991) 1 SCC 752.
- ³⁷ It has been universally recognized that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and there is no primitive torture...As between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there was every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence to be executed (1989) 1 S.C.J. 383. As the Supreme Court of India has done in the Rajiv Gandhi assassination case, by substituting the death sentence of the convicts to that of life, because of the delay in its execution.
- ³⁸ Supreme Court of California 493 p. 2d. 8880 (1972)
- ³⁹ Supreme Court of Zimbabwe, 1993 Judgement No. S.C. 73/93, 14 Hum. Rts. L.J. 323 (1993)
- ⁴⁰ The power of the State Governors to exercise the power of mercy under the Indian Constitution.
- ⁴¹ Epuru Sudhakar v. Govt. of A.P., AIR 2006 SC 3385; (2006) 8 SCC 161
- ⁴² This case concerns released inmates who were allegedly caught stealing church offering during a Sunday service and in yet another case a freed man was caught with a stolen sheep and later found in possession of narcotics. @<https://www.standardmedia.co.ke/article/2000221151/a-mockery-of-presidential-pardon>. A mockery of presidential pardon, The Standard Updated Thu, October 27th 2016. Visited last on 21/02/2017.
- ⁴³ Hudson Gumbi, 'No mercy: Did hard-core convicts buy Presidential pardon from warders?' Standard Digital Saturday, Dec 10th 2016 @ <http://www.sde.co.ke/thenairobi/article/2000226398/no-mercy-did-hard-core-convicts-buy-presidential-pardon-from-warders>. Visited last 21/02/2017.
- ⁴⁴ Kehar Singh v. Union of India, AIR 1989 SC 653; (1989) 1 SCC 204
- ⁴⁵ Maru Ram v. Union of India, AIR 1980 SC 2147
- ⁴⁶ Epuru Sudhakar v. Govt. of A.P., AIR 2006 SC 3385; (2006) 8 SCC 161; but see Govindaswamy v. The President of India, (2000) 1 CTC 432 (Mad)
- ⁴⁷ State of Punjab v. Joginder Singh AIR 1990 SC 1396; (1990) 2 SCC 661