IN THE SUPREME COURT OF INDIA

WP (Crl.) No. 284-285/2006

Epuru Sudhakar & Anr.
vs.
Government of Andhra Pradesh & Ors.

Written Submissions of Senior Counsel
Soli Sorabjee as *Amicus Curiae*

I. 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 was section 295 which read 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 of 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 of India Act 1935 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 not discussed nor debated [*see Framing of India's Constitution : A Study, 2nd Edition, Dr. Subhash C Kashyap, page D 367-371, page 397-399*].

II. In addition to the above constitutional provisions the Criminal Procedure Code 1973 provides for power to suspend or remit sentences – Section 432 and the power to commute sentence [*see Section 433*].

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 the IPC confer power on the appropriate government to commute sentence of death or sentence of imprisonment for life as provided therein. For the sake of convenience a comparative table showing the provisions relating to pardon and commutation of sentence is enclosed.

III. 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].

In the case of *Kehar Singh* v. *Union of India* [1989 (1) SCC 204] these observations of Justice Holmes have been approved [*see at 211*].

The classic exposition of the law relating to pardon is to be found in *Ex parte Philip Grossman* where Chief Justice Taft stated:

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments." [69 L. Ed. 527]

The dicta in *Ex parte Philip Grossman* were approved and adopted by the apex Court in *Kuljit Singh* v. *Lt. Governor of Delhi* [1982 (1) SCC 417]. In actual practice, a sentence has been remitted in the exercise of this power on the discovery of a mistake committed by the High Court in disposing of a criminal appeal. [*see Nar Singh* v. *State of Uttar Pradesh*, AIR 1954 SC 457].

IV. From the foregoing it emerges that power of pardon, remission can be exercised upon discovery of an evident mistake in the judgment or undue harshness in the punishment imposed.

V. However the legal effect of a pardon is wholly different from a judicial supersession of the original sentence. In *Kehar Singh*'s case this Hon'ble Court observed that in exercising the power under Article 72 "the

President does not amend or modify or supersede the judicial record. … And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him" [see *Kehar Singh*, supra at 213]. The President "acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it".

This ostensible incongruity is explained by Sutherland J. in *United States* v. *Benz* [75 L. Ed. 354] in these words:

> "The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, <u>but does not alter it qua a judgment</u>" [emphasis added] [*see page 358*].

According to the Report of the U.K. Royal Commission pardon can be granted where the Home Secretary feels that despite the verdict of the jury there is a "scintilla of doubt" about the prisoner's guilt.

VI. Judicial decisions, legal text books, reports of Law Commission, academic writings and statements of administrators and people in public life reveal that the following considerations have been regarded as relevant and legitimate for the exercise of the power of pardon.

Some of the illustrative considerations are:

(a) interest of society and the convict;

(b) the period of imprisonment undergone and the remaining period;

(c) seriousness and relative recentness of the offence;

(d) the age of the prisoner and the reasonable expectation of his longevity;

(e) the health of the prisoner especially any serious illness from which he may be suffering;

(f) good prison record;

(g) post conviction conduct, character and reputation;

(h) remorse and atonement;

(i) deference to public opinion.

> It has occasionally been felt right to commute the sentence in deference to a widely spread or strong local expression of public opinion, on the ground that it would do more harm than good to carry out the sentence if the result was to arouse sympathy for the offender and hostility to the law [*see Law Commission Report, page 328, para 1071*]

It is necessary to keep in mind the salutary principle that:

> "To shut up a man in prison longer than really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss to the community."

as quoted in *Burghess, J.C. in (1897), U.B.R. 330 (334)*

VII. The power under Article 72 as also under Article 161 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 facts and circumstances of each case and the necessity or the justification for exercising that power has therefore to be judged from

case to case. According to the Law Commission in its aforesaid report stated that it would not be desirable to attempt to lay down any rigid and exhaustive principles on which the sentence of death may be commuted.

This Hon'ble Court in *Kehar Singh*'s case did not accept the petitioners contention that in order to prevent an arbitrary exercise of power under Article 72 this Court should draw up a set of guidelines for regulating the exercise of the power. The Court opined that specific guidelines need not be spelled out and it may not be possible to lay down any precise clearly defined and sufficiently channelised guidelines [*see Kehar Singh, page 217*].

It is respectfully submitted that in view of the passage of time since the ruling in *Kehar Singh*'s case and having regard to various instances of arbitrary exercise of power of pardon it is desirable that this Hon'ble Court should lay down broad principles or criteria to guide the exercise or non-exercise of the pardon power, it is submitted that though the circumstances and the criteria for exercise or non-exercise of pardon power may be of infinite variety one principle is well settled and admits of no doubt or debate, namely that the power of pardon "should be exercised on public considerations alone. An undue exercise of the pardoning power is greatly to be deplored. It is a blow at law and order and is an additional hardship upon society in its irrepressible conflict with crime and criminals". [*see 59 American Jurisprudence 2d, page 11, para 13*].

VIII. **Constitutional position regarding exercise of pardon power.**

This Hon'ble Court in the case of *Maru Ram* v. *Union of India* [1981 (1) SCC 107] ruled that the President and the Governors in discharging the functions under Article 72 and Article 161 respectively must act not

on their own judgment but in accordance with the aid and advice of the ministers [*see page 146, para 61*]. This legal position was re-affirmed by this Hon'ble Court in the case of *Kehar Singh* v. *Union of India* [1989 (1) SCC 207 at 211].

It was held in *Maru Ram*'s case that the constitutional power under Article 72 and Article 161 cannot be fettered by any statutory provision such as sections 432-433 and 433-A of the Criminal Procedure Code and the said power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or prison rules.

IX. Judicial review of exercise of pardon power under Articles 72 and 161.

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

(a) This Hon'ble Court in the case of *Maru Ram supra,* held that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guide-lines for fair and equal execution are guarantors of the valid play of power. [*see page 147, para 62*]

It is noteworthy that this Hon'ble Court has in *Kehar Singh*'s case unequivocally rejected the contention of the Attorney General that the power of pardon can be exercised for political consideration [*see Kehar Singh, para 12, pages 215-216*]. This Hon'ble Court in *Maru Ram* ruled that consideration of religion, caste, colour or political loyalty are totally

irrelevant and fraught with discrimination [*see Maru Ram, op cit, page 150, para 65*].

(b) This Hon'ble Court in *Kehar Singh's* case ruled that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram* v. *Union of India*. 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. [*see page 214, para 11*]

(c) It was also submitted on behalf of the Union of India, in *Kehar Singh's* case, placing reliance on the doctrine of the division (separation) of powers, that it was not open to the judiciary to scrutinize the exercise of the "mercy" power [*see page 216*]. In dealing with this submission on behalf of the Union of India this Hon'ble 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 [*see para 14, page 217*].

(d) As regards the considerations to be applied to a petition for pardon/remission in *Kehar Singh's* case this Hon'ble 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." [*see page 217*]

(e) In the case of *Swaran Singh* v. *State of U.P.* [1998 (4) SCC 75] after referring to the judgments in the cases of *Maru Ram* and *Kehar Singh* this Hon'ble 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. [*see page 79, para 12*]

In *Swaran Singh's* case the 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 the Supreme 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 Hon'ble 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 "fringes on arbitrariness" [*see page 79, para 13*].

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" [*see Swaran Singh, op cit, page 79*].

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* case and reiterated in *Kehar Singh* case: "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.", [*see page 79*] and left it open to the Governor of Uttar Pradesh to pass a fresh order in the light of the observations made by this Hon'ble Court. [*see page 80*]

(f) In the case of *Satpal* v. *State of Haryana* [2000 (5) SCC 170] this Hon'ble Court observed that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. [*see page 174*]

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." [*see page 174*]

The principles of judicial review on the pardon power have been restated in the case of *Bikas Chatterjee* v. *Union of India* [2004 (7) SCC 634 at 637].

X. It is submitted that on a proper reading of the aforesaid judgments of this Hon'ble Court it is clear 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) the order has been passed on extraneous or wholly irrelevant considerations;

(d) that the order suffers from arbitrariness

This Hon'ble Court in its decision in *Government of A.P.* v. *M.T. Khan* [2004 (1) SCC 616] stated that if the government consider it expedient that the power of clemency be exercised in respect of a particular category of prisoners the government had full freedom to do so and also for excluding certain category of prisoners which it thought expedient to exclude. The Court further observed that "to extend the benefit of clemency to a given case or class of cases is a matter of policy and to do it for one or some, they need not do it for all, as long as there is no insidious discrimination involved" [emphasis added] [*see page 622, para 6*].

XI. **Judicial Review in Commonwealth Countries:**

The Court of Appeal of New Zealand in the case of *Burt* v. *Governor General* [1992 (3) NZLR 672] held as follows:

> "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 to, 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. … 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" [emphasis supplied] [*see page 678, 681*].

The aforesaid judgment of the New Zealand High Court was referred to with the approval in the case of *R* v. *Secretary of State , ex p Bentley* [1993 (4) All ER 442]. Dealing with the plea that the power of

pardon is a royal prerogative of mercy and immune from judicial review, the Court of Appeal held that "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". The Court further ruled that "the CCSU case made it clear that the powers of the court cannot be ousted merely by invoking the word 'prerogative'. [*see page 452*].

The Court of Appeal in England concluded that "the Home Secretary failed to recognise the fact that the prerogative of mercy is capable of being exercised in many different circumstances and over a wide range and therefore failed to consider the form of pardon which might be appropriate to meet the facts of the present case. Such a failure is, we think, reviewable" [*see page 453*].

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Supplemental Written Submissions of Senior Counsel Soli Sorabjee as *Amicus Curiae*

1. Whether it is open to rescind or cancel an order of pardon which has been granted on a basis which is subsequently found to be unfounded or which has been obtained by misrepresentation or fraud.

    a. Articles 72 and 161 do not expressly provide for rescission or cancellation of an order of pardon. However, recourse can be had to section 14 and section 21 of the General Clauses Act, 1897, in appropriate cases. Section 14 and section 21 of the General Clauses Act, are set out in these terms:

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

b. The aforesaid rule of interpretation as embodied in section 14 and section 21 of the General Clauses Act, 1897, has been applied to the Constitution of India in *S.V.G. Iyengar v. State of Mysore AIR 1961 Mysore 37* and *Sampat Prakash v. State of J & K AIR 1970 SC 1118*. In *Sampat Prakash v. State of J & K* it was held that [see p. 1124]:

> "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."

Reference is invited to the Division Bench Judgement of the Mysore High Court in *S.V.G. Iyengar v. State of Mysore AIR 1961 Mysore 37* where it has been held that section 14 and section 21 of General Clauses Act, 1897, by virtue of article 367 of Constitution apply to exercise of powers under the Constitution as well [see para 17 at p. 40].

"It is clear from the proviso to Article 309 that the rules which shall be effective until the appropriate Legislature makes a law are not only the rules made for the first time under that provision but include also those which are made from time to

time in the exercise of power conferred by S. 14 of the General Clauses Act, 1897 and also those rules as modified, amended or varied in the exercise of the power conferred by Sec. 21 of the General Clauses Act."

Accordingly, if subsequently it comes to the knowledge of the President or the Governor, i.e., the Central or State Government, that pardon has been obtained on the basis of a manifest mistake, or patent misrepresentation or fraud, the same can be rescinded and cancelled.

c. Attention is invited to section 432 of the Code of Criminal Procedure, 1973, which lays down the consequence for non-fulfillment of any condition on which remission has been granted.

Section 432 (3): -

(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.

d. The position in U.S.A. is summed up in 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."
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> See also 59 American Jurisprudence 2d para 42 at p. 28:
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> "It has often been broadly stated that a pardon obtained by fraud is void, as, for instance, where it may be reasonably inferred from the language of a pardon, considered in connection with the record of the cause in which it was granted, that the executive was deceived or imposed upon by those procuring it, by false statements or omissions to state relevant facts, or by the suppression of the fact that the judgment of conviction has been appealed from. Other courts, however, hold that the term "void" as thus used means simply that a pardon obtained by fraud may be declared to be void in a proceeding authorized by law, before a court having jurisdiction for the purpose, with ample opportunity to the person holding the pardon to defend."

2. Judicial review when no reasons are assigned for granting pardon

   a. In *Kehar Singh's* case this Hon'ble Court has made an observation at p. 216 that,

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

      It is respectfully submitted that this observation must be understood in the context of the contention that the petitioner or party must be given reasons. The question whether reasons can or cannot be disclosed to the Court when the order is challenged was not

discussed. In any event, it is submitted that absence of obligation to convey reasons to the petitioner does not mean that there should not be legitimate and relevant reasons for passing the order.

b. Obligation to give reasons to a party is entirely different from obligation to apprise the Court about the reasons for the action when the action is challenged in court. This aspect was considered by this Hon'ble Court in the case of *S.R. Bommai [(1994) 3 SCC 1]*, in the context of exercise of power under article 356 of the Constitution. Attention is drawn to the observations at p. 109, para (g) and (h) and at p. 110, para (a) of the judgment which are 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." [emphasis supplied.]

c. 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 Others v. Minister of Agriculture, Fisheries and Food and Others.* [(1968) 1 All E.R. 694] 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.."

d. 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 the learned judge observed as follows at p. 775, para 13:

> "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*." [emphasis supplied].

Justice Sidhwa's aforesaid observations have been approvingly referred to in the Supreme Court decision in *S.R. Bommai, supra,* at p. 98, paras (f) – (g).

e. Justice Hansaria as a judge of the Gauhati High Court in the case of *Vamuzzo v. Union of India (1988) Gauhati Law Journal 468* adopted the approach of Justice Sidhwa, at p. 517. The learned judge gave time to the Government of India to inform the Court about the materials upon which the President's Proclamation under article 356 was passed in the case of the State of Nagaland.

The relevant portion of para 47 at p. 517 is set out below:

> "For this purpose we grant 10 days' time. If the (sic) within this period they would fail to produce the material we shall have to render our opinion on the basis of the materials made available to us. If they would fail to do so, this Court would have no other alternative but to decide the matter on the basis of the materials placed before it. In this connection reference may be made to what was stated by Rustam Sidhwa J. in the aforesaid case of Lahore High Court [*Muhammad Sharif v. Federation of Pakistan PLD 1988 Lah 725*].

It may be mentioned that Justice Hansaria's views were not shared by the other judge, Chief Justice A. Raghuvir. It is significant that Justice Hansaria's view has been approved by this Hon'ble Court in *S.R. Bommai, supra,* see page 284, para (a) – (b) and (d):

> "Hansaria, J., however, took a contrary view. The learned Judge held that the material which formed part of 'other information' but has not been produced before the court, does not form part of the advice tendered by the Council of Ministers to the President. The court is, therefore, entitled to see the said material and for that purpose the Union of India must be given ten days' time for producing the same. If, however, they decline to do so, the court would have no alternative but to act upon the present material and the Union of India will have to take consequences of such a course…..the view taken by Hansaria J. (as he then was) must be held to be the

correct one and not the view taken by the learned Chief Justice."

f. It is respectfully submitted that if the government chooses to maintain an inscrutable face of the sphinx in a case where the court on account of surrounding facts and circumstances is *prima facie* satisfied that impugned action is apparently not in conformity with the constitution, the burden shifts on the Government and if it fails to give reasons or disclose the material on which the impugned action is based, "it is their pigeon" .

The court's power of judicial review which is a basic feature of the Constitution cannot be incapacitated by a studied and deliberate silence on part of the government.

g. Article 74(2) does not debar disclosure of relevant material on which the order is based. See *Bommai, supra,* p. 148, para 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.

See also conclusion (6) at 297, para 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." [emphasis supplied.]

3. Scope of judicial review regarding power of remission

    a. It is submitted that the grounds on which an executive decision under article 72 or article 161 can be challenged, have been authoritatively laid down in *Maru Ram v. Union of India* and *Kehar Singh v. Union of India*. In view of this settled legal position the contention that administrative law principles are inapplicable to exercise of powers under article 72 and article 161 is futile.

    b. It is submitted that the exercise of power of remission is subject to judicial review to the same extent and manner as exercise of the power of pardon. The contention that as remission is different from pardon and therefore, different considerations ought to apply, is fallacious and would lead to an inconsistent application of constitutional provisions. Acceptance of this submission will permit the executive to grant a pardon in effect and substance under the guise of remission or reprieve. Such a contention should therefore be rejected.

4. Non–exercise of the power of pardon

    a. Articles 72 and 161 confer a power or discretion coupled with duty and obligation. As pointed out hereinabove in the main Written Submission, para 3 at pp. 3 – 4, public welfare and the welfare of the convict are guiding principles for the exercise of both the grant and non – grant of pardon.

    b. If in a given case where public welfare and the welfare of the convict require, rather necessitate that pardon be given, non –grant of pardon

would tantamount to failure to perform duty and obligation in article 72 and 161. For example, suppose if a convict has substantially served term of imprisonment, is of advanced age and is suffering from a critical illness and there is no material whatsoever, that if this convict is released, he will be a menace to society, then in such a situation, the non – grant of pardon would amount to a failure to perform duty and obligation in article 72 and 161.

c. It is well settled principle of law that when a capacity or power is given to a public authority there may be circumstances which couple the power with a duty to exercise it [see *Alcock Ashdown and Company Limited v. The Chief Revenue Authority AIR 1923 PC 138* at p. 144. This statement of law was approved by the Supreme Court in *The Chief Controlling Revenue Authority v. The Maharashtra Sugar Mills Limited AIR 1950 SC 218* at p. 221, para 8.

   In a given case, the Government may not grant pardon, though it is eminently required for vindictive and political reasons.

d. As pointed out in the main submissions, the Court of Appeal in New Zealand in *Burt* v. *Governor General* [1992 (3) NZLR 672], held that non – exercise of power of pardon is not immune from judicial review, see Submission para 11 at p. 12.