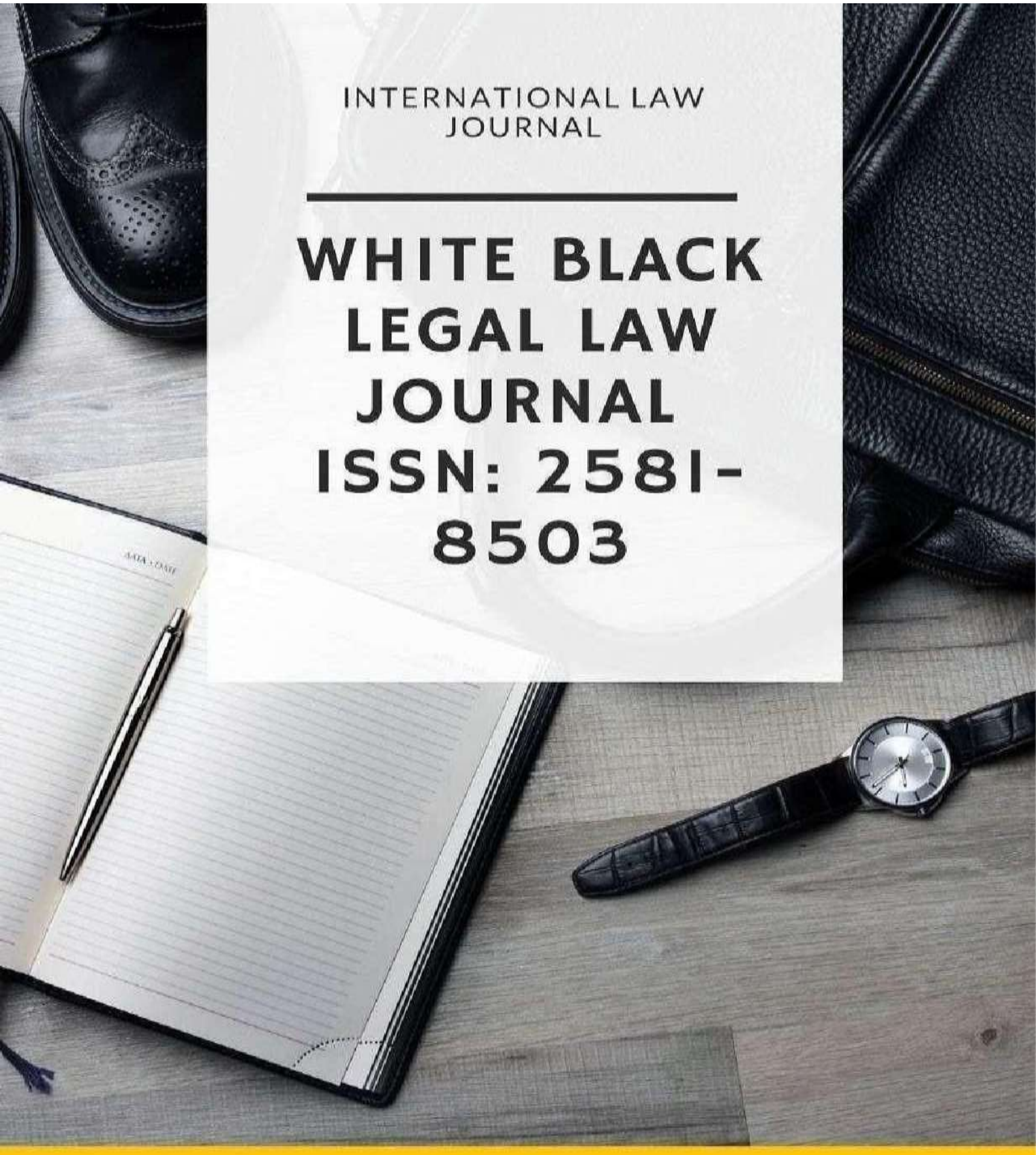

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

JUDICIAL REVIEW OF THE PARDONING POWER OF EXECUTIVE IN INDIA- AN ANALYSIS

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Abstract:

In the Constitution of India, Article 72 empowers the President to grant pardons and Article 161 grants powers to the governor to pardon the sentence except in a few cases. It can be granted to individuals who have been convicted of any offence against a law or sentenced by a court martial (military court) and for sentence of death. The object behind the pardoning power of the executive is to correct judicial error or miscarriage of justice for no human system of judicial administration can be free from imperfections. Miscarriage of justice is a failure of a Court or judicial system to attain the ends of the justice, especially one which results in the conviction of an innocent person. To ensure fair justice to all the executive order must be reviewed by the judiciary.

INTRODUCTION:

The pardoning power is conferred upon the chief executives enabled throughthe Constitutional scheme under Articles 72 and 161 to the President of India and to theGovernor of the States respectively. In this study an attempt was made to find out the extent of judicial review to maintain fairness in exercise of the pardoning power by the executive.

Judicial review is the power of the courts of a country to scrutinize the actions of the legislative, executive, and administrative arms of the government and to find out whether such actions are constant with the constitution. Activities judged inconsistent are stated unconstitutional and, therefore, null and void. The organization of judicial review in this sense depends upon the presence of a written constitution. The usage of the term judicial review could be more accurately described as "constitutional review," because there also exists a long practice of judicial review

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of the actions of administrative actions that require neither that courts have the power to declare those actions unconstitutional nor that the country have a written constitution. Such "administrative review" assesses the purportedly questionable actions of administrators against standards of reasonableness and abuse of decision. When Judges confronted administrative actions to be irrational or to involve abuses of discretion, those actions are declared null and void.

JUDICIAL REVIEW OF PARDONING POWER:

The nature and scope of the power of pardon and the extent of judicial review over such power has come up for consideration in a catena of cases and the said cases are analyzed below to find out whether the judiciary has role to play in checking the fairness in exercise of pardoning power by President or Governor.

In *Kehar Singh*[2] the Court considered the nature of the President's power under Article 72 while dealing with a petition challenging the President's rejection of a mercy petition by Indira Gandhi's assassin, Kehar Singh. The Court explicitly held in that "Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review". However the Court qualified this finding by holding that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in Maru Ram. What are these limitations? Considerations that are arbitrary or wholly irrelevant, irrational, discriminatory or mala fide." However in Kehar Singh the Court declined to lay down guidelines for the exercise of the power under Article, stating that there is sufficient indication in the terms of Art.72 and in the history of the power enshrined in that provision as well as existing case law. The decisions in Maru Ram Kehar Singh still hold the field and thus the present position is that Presidential Pardon under Article 72 is subject to judicial review on the grounds mentioned in *Maru Ram v Union of India*.[3]

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[4]:

[2] *Kehar Singh v. Union of India*, 1989 (1) SCC 204.
[3] 1981 (1) SCC 107.
[4] 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".

In the case of *Kehar Singh v. Union of India*[5] these observations of Justice Holmes have been approved. 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 alwaysbeen 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."[6]

The dicta in Ex parte Philip Grossman were approved and adopted by the apex Court in *Kuljit Singh v. Lt. Governor of Delhi*[7] 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.[8]

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. However the legal effect of a pardon is wholly different from a judicial supersession of the original sentence. In Kehar Singh"s case the 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".[9] The President "acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the

[5] 1989 (1) SCC 204
[6] 69 L. Ed. 527
[7] 1982 (1) SCC 417.
[8] *Nar Singh v. State of Uttar Pradesh*, AIR 1954 SC 457.
[9] *Kehar Singh v. Union of India*, 1989 (1) SCC 204.

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*[10] 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, but does not alter it qua a judgment".

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. 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.

The Governor's power of pardon under Article 161 runs parallel to that of the President under Article 72 and thus several cases based on the same have a bearing on the Presidential Power under Article 72. Moreover judgments dealing with Article 72 have simultaneously deal with Article 161 and vice-versa. In the early case of *K.M. Nanavati v State of Bombay*[11] the a reprieve granted by the Governor under Article 161 was held constitutionally invalid since it conflicted with the rules made by the Supreme Court under Article 145. In *Swaran Singh v State of U.P.*[12], the Governor of Uttar Pradesh remitted the whole of the life sentence of an MLA of the State Assembly who had been convicted of the offence of murder within a period of less than two years of his conviction. The Supreme Court found that Governor was not posted with material facts such as the involvement of the accused in 5 other criminal cases, his unsatisfactory conduct in prison and the Governor's previous rejection of his clemency petition in regard to the same case.

[10] 75 L. Ed. 354.
[11] (1961) 1 SCR, p. 541.
[12] 1998 (4) SCC 75.

It is necessary to keep in mind the salutary principle that[13]:

"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."

In *Satpal v State of Haryana*[14], the Supreme Court quashed an order of the Governor pardoning a person convicted of murder on the ground that the Governor had not been advised properly with all the relevant materials. The Court spelt out specifically the considerations that need to be taken account of while exercising the power of pardon, namely, the period of sentence in fact undergone by the said convict as well as his conduct and behaviour while he underwent the sentence. The Court held that not being aware of such material facts would tend to make an order of granting pardon arbitrary and irrational. The Court also noted the fact that the accused was a member of a political party and had committed the murder during election year. In the recent judgment of *Epuru Sudhakar and Anr. v Government of Andhra Pradesh and Ors*[15] the Court set aside a remission granted by the Governor of Andhra Pradesh on the ground that irrelevant and extraneous materials had entered into the decision making. The Report of the District Probation Officer which was one of the materials on which the decision was based, highlighted the fact that the prisoner was a Good Congress Worker and that he had been defeated due to political conspiracy. Similarly the Report of the Superintendent of Police reached a conclusion diametrically opposite to the one it had reached before elections were conducted.

The Court observed in this context,

"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."

Thus in these judgments concerning the Governor‟s exercise of pardon, the Court seems to have widened the grounds for judicial review by enumerating specific grounds on which the grant of pardon can be considered arbitrary. Among these are non-consideration of relevant factors such as length of the sentence already undergone, the prisoner‟s behaviour and involvement in other crimes and consideration of extraneous or irrelevant grounds such as political affiliation. Yet another aspect of the President‟s power of pardon that has been subject to judicial scrutiny is the

[13] As quoted in Burghess, J.C. in (1897), U.B.R. 330 (334).
[14] 2000 (5) SCC 170.
[15] Writ Petition (crl.) 284-285 of 2005.

time taken for exercising the same. In *Shivaji Jaising Babar v State of Maharashtra*[16] a delay of 4 yrs in taking a decision on the exercise of this power on the prisoner's mercy petition was held to be sufficient ground to alter the prisoner's sentence.

The principles of judicial review on the pardon power have been restated in the case of *Bikas Chatterjee v. Union of India*[17] The former Attorney-General, Soli Sorabjee, expressed the view that a terrorist who has declared war on the nation is in essence no different from enemy soldiers whose duty and mission it is to maim and kill the country's citizens. Enemy soldiers and personnel, he said, are killed in war not by way of reprisal but for the sake of the nation. Seen in this light, terrorist-convicts may not, after all, deserve mercy. Janak Raj Jai, a writer and a legal expert, suggests that capital punishment may perhaps be reserved only for terrorists. Jai, who has written a book on death penalty, was invited by President Kalam for a discussion in August. Jai suggested to him that a convict whose mercy petition had been accepted by the President could continue to be in jail beyond 14 years - the minimum sentence meant for life imprisonment - if he could not be reformed and rehabilitated within that period.

Under the Constitution, the President can return a recommendation to the Cabinet for reconsideration only once; if the Cabinet sends the recommendation back, the President is bound to act on that advice. However, there are a few areas where the President can exercise his discretion, independently of the aid and advice of the Cabinet. Is Article 72 one of those areas where the President can exercise unfettered discretion?

Former Chief Justice of India P.N. Bhagwati was the lone Judge who dissented in the Bachan Singh case.[18] He is of the view that the President enjoys absolute powers under Article 72. According to Jai, advice by the Home Ministry is bound to be political and will not inspire confidence. His contention is that as the state is the prosecution agency in all cases of murder, it cannot be expected to decide on a mercy plea objectively and upset a judicial verdict.

The theory that the President or the Governor, while deciding on mercy petitions, acts with the aid and advice of the Council of Ministers has led to bizarre situations. The President, in practice,

[16] AIR 1991 SC 2147.
[17] 2004 (7) SCC 634 at 637.
[18] 1980 (2) SCC684.

is asked to submit to the opinion of a Joint Secretary in the Department of Justice or the Home Minister, in their individual capacities. The Council of Ministers headed by the Prime Minister, with whose aid and advice the President exercises his powers in most other matters, does not collectively apply its mind to the merits of every mercy petition.

If the President disagrees with the Home Ministry's advice, he has the option in practice to avoid taking a decision on these petitions, as some of his predecessors have done. The Supreme Court has held in the Triveniben case (1989) that inordinate delay in taking a decision on mercy petitions by the President could itself be a ground for commuting a sentence of death, since it causes so much mental torture for the convict. Although it is debatable whether the convicts see the delay caused by executive indecision in their favour as it extends their lives, the prolonged anxiety is sure to neutralise any quantitative addition to their lives.

In a decision the Supreme Court in *Government of A.P. v. M.T. Khan*[19] stated that if the government considers 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"

In *Jagdish v. state of Madhya Pradesh*[20] court held that the power of the President and Governor to grant pardon etc. under Articles 72 and 161, though couched in imperative terms has nevertheless to be exercised on the advice of the executive authority. In this background it is the government, which in effect exercises that power.

In *Bani Kanta Das and another v. State of Assam*[21] and others court held that the reason for the commutation of a sentence must be given by the Governor. In this case court set aside the impugned order of commutation of death sentence to life imprisonment and directed the reconsideration of the application filed by accused for commutation of sentence. In the impugned

[19] 2004 (1) SCC 616.
[20] (2009) 9 SCC 495
[21] (2009)15 SCC 206

order no reason was indicated as to why the Governor decided to commute the death sentence to that of life imprisonment, when the accused was guilty of heinous abominable crime. Accused had murdered brutally four persons of a family.

In *Shatrughan Chauhan & Anr vs Union Of India & Ors*[22] taking a firm view of inordinate delay in deciding mercy petitions the Supreme Court upheld that an inordinate delay in deciding the Mercy Petition by the executive is a fit case for Limited judicial Review, wherein an unexplained, inordinate delay in deciding the mercy petition keeping the Condemned convict in a suspense of his life and death has been held to be an infringement of his Fundamental Right as guaranteed under Article 21. The court had examined each of the individual death row cases and commuted the death penalty of the petitioner to imprisonment for life. The court held that

"It is well established that exercising of power under Article 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values. Remember, retribution has no Constitutional value in our largest democratic country. In India, even an accused has a de facto protection under the Constitution and it is the Court's duty to shield and protect the same. Therefore, we make it clear that when the judiciary interferes in such matters, it does not really interfere with the power exercised under Article 72/161 but only to uphold the de facto protection provided by the Constitution to every convict including death convicts".

In view of the above it is evident that there is an urgent need to make an amendment in the law of pardoning or to frame rules regarding the pardoning power to make sure that clemency petitions are disposed of quickly. There should be a fixed time limit for deciding on clemency pleas.

[22] (2014) 3 SCC 1

CONCLUSION:

The pardoning power should not be absolute as well as Judiciary should not interfere too much in the exercise of this power. As the judicial review is a basic structure of our Constitution, pardoning power should be subjected to limited judicial review. If this power is exercised properly and not misused by the executive, it will certainly prove useful to remove the flaws of the judiciary. It is remarkable that the pardoning power of the executive is very tough in its nature. It is to be exercised for public interest or welfare of the people, upon the reformative capability of the offender, the welfare of the family and consider upon error or lack of proportionality in the punishment without upsetting the rule of law. On the other hand the Separation of powers and the system of checks and balances are meant to ensure that the pardoning power would be a broad final check on the entire legal and judicial system and it is intended at the founding of the nation that the President or the Governor would always be responsible to the public for their decisions.