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Pardoning Powers of President under the Constitution of India: Judicial Interpretations

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Abstract

Presidential pardons have been the subject of increased public and judicial scrutiny and the focus of news media both electronic as well as print media. The power to grant pardon is expressly included in the modern written Constitutions of nearly all countries. The rationale underlying executive pardons are twofold:

- (1) It is to prevent the miscarriage of justice. The judges are not infallible and at times while enforcing the criminal laws, the courts can end up making mistakes, which then require correction.
- (2) It is for public welfare. It is in the interest of the society, the laws and sentence fixed by the judgment are not strictly applied and the punishment inflicted is reduced.

The philosophy of punishment rests on four tenets. It can be a deterrent and work by creating fear. It can be retributive, making one pay for it. It can also be preventive, to strengthen the human character. It is the last theory that inevitably works behind clemency. As Abdul Kalam says "law is also a medium of reform." Article 72 and 161 of Indian Constitution entrusted this power in the president of India and Governors of the state. In this paper an attempt has been made to analyze constitutional provisions with regard to pardon and nature and scope of pardoning power of president as well as the important cases and judicial decisions of Supreme Court with regard to clemency and pardoning powers of president of India.

Introduction

Every Constitutional order in the Common Law contains a Provision for executive clemency or pardon in criminal cases. A pardon is an act of grace, proceeding from the power entrusted with the execution of laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is God's grace, a gift to the mankind which gives all an equal chance to mend ways and to correct a deviant behavior. It is the forgiveness of a crime and the cancellation of the

relevant penalty; it is usually granted by a head of state such as a monarch or president or by a competent church authority. A pardon keeps a judicial record of a conviction separate and apart from other criminal records, and gives law abiding citizens an opportunity to reintegrate into their society. Authority removes all information about the conviction for which an individual received the pardon from the authority. This might be why every civilized state has had a provision to pardon offenders in their criminal justice system to be exercised as an act of grace and humanity in proper cases.

This power has been provided to the heads of various nations. In monarchies this power is vested with the kings who supposed to the sole source of justice. It has been exercised for centuries but with the passage of time and changing nature of law it has taken a new form. In earlier times it was used by the kings for their political gains, it also helps them in generating revenues. Prior to the sixteenth century, the common law treated all homicides as felonies while the modern day understanding and use of pardoning power is more often associated with notion of mercy and fairness, this analysis will demonstrate that it also remains a political arena called pardon, amnesties, clemency, grace or mercy etc. Now this pardoning power has been given as a statutory cloth so that any countries justify this power through law.

Without such a power of clemency, 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. As noted Jurist Seervai observes [1]:

Judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws are not always just and the lights are not always luminous. Nor, again are judicial methods always adequate to secure justice. The power of pardon exists to prevent injustice whether from judgments which result in injustice; hence the necessity of vesting that power in an authority other than judiciary has always been recognized. It is also one of the powers conferred on the executive in India. Art.72 confers this power on the president and Art. 161 do the same on Governor. Apart from these constitutional provisions, *section 432, section 433A, section 434, section 435 of Criminal procedure code [1] and section 54 and section 55 of Indian penal code [2]* also conferred power to the executive for pardoning of any person punished of any offence. In this paper an attempt has been made to analyze constitutional provisions with regard to pardon and nature and scope of pardoning power of president as well as the important cases and judicial decisions of Supreme Court with regard to clemency and pardoning powers of president of India.

In a society with no other means of flexibility, the pardon served as the sole instrument of justice for those who should not be punished. This pardon power is included in the written constitution of nearly all the countries. The main objective behind this is to correct possible judicial errors, for no human system of judicial administration can be free from imperfection.

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in the modern written Constitutions of nearly all countries. The rationale underlying executive pardons are twofold:

1. It is to prevent the miscarriage of justice. The judges are not infallible and at times while enforcing the criminal laws, the courts can end up making mistakes, which then require correction.
2. It is for public welfare. It is in the interest of the society, the laws and sentence fixed by the judgment are not strictly applied and the punishment inflicted is reduced.

The philosophy of punishment rests on four tenets. It can be a deterrent and work by creating fear. It can be retributive, making one pay for it. It can also be preventive, to strengthen the human character. It is the last theory that inevitably works behind clemency. As Abdul Kalam says "law is also a medium of reform".

Presidential pardon in other countries

The pardoning power of the executive has its roots in England where the British Crown from time immemorial enjoyed the special privilege to grant pardon to any criminal. Meanwhile the American theory is established upon the principle that all governmental power is inherent in the people and the people alone can be bestowed mercy by pardon and subsequently this power went to the executive head or board whichever found fit. To understand the concept of president's power in India it is important to look at the pardoning power of England and America.

England

The power to grant pardons and reprieves in the United Kingdom is known as the royal prerogative of mercy. It was traditionally in the absolute power of the monarch to pardon and release an individual who had been convicted of a crime from that conviction and its intended penalty. Pardons were granted to many in the 18th century on condition that the convicted felons accept transportation overseas, such as to Australia. The first General Pardon in England was issued in celebration of the coronation of Edward III in 1327. In 2006 all British soldiers executed for cowardice during World War I were pardoned, resolving a long-running controversy about the justice of their executions. There are significant procedural differences in the present use of the royal pardon, however. Today the monarch only grants pardons

on the advice of government minister: the Justice Secretary within England and Wales, the First Minister of Scotland, or the Northern Ireland Secretary. The Defense Secretary is responsible for military cases. It is government policy to only grant pardons to those who are "morally" innocent of the offence, as opposed to those who may have been wrongly convicted by misapplication of the law. Pardons are generally no longer issued prior to conviction, but only after conviction. A pardon is no longer considered to remove the conviction itself, but only removes the penalty which was imposed. Use of the royal prerogative of mercy is now rare, particularly since the establishment of the Criminal Cases Review Commission and Scottish Criminal Cases Review Commission, which provide a statutory remedy for miscarriages of justice.

United States

In the United States, the pardon power for federal crimes is granted to the President of the United States under Article II, Section 2 of the United States Constitution which states that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment" [3]. The Supreme Court of the United States has interpreted this language to include the power to grant pardons, conditional pardons, commutations of sentence, conditional commutations of sentence, remissions of fines and forfeitures, respites and amnesties. All federal pardon petitions are addressed to the President, who grants or denies the request. Typically, applications for pardons are referred for review and non-binding recommendation by the Office of the Pardon Attorney, an official of the United States Department of Justice. The pardon power of the U.S. President extends only to offenses cognizable under federal law. However, the governors of most of the 50 states have the power to grant pardons or reprieves for offenses under state criminal law. In other states, that power is committed to an appointed agency or board or to a board and the governor in some hybrid arrangement (in some states the agency is merged with that of the parole board, as in the Oklahoma Pardon and Parole Board).

India

Before the commencement of the Indian Constitution, the law of pardon in British India was the same as in England since the sovereign of England was the sovereign of India. The Govt. of India Act 1935 recognized and saved the right of the crown or by delegation to Governor General to grant pardons,

reprieves, respites or remissions of punishment. Section 295 of the Government of India Act, 1935 had conferred on the governor general acting in discretion power to suspend, remit or commute sentences of death. The prerogative of the crown was also delegated to the Governor General by the letters patent creating his office, empowering him to grant to any person convicted by any criminal offence in British India, a pardon either free or subject to such conditions as he thought fit. However, after commencement of the Constitution in 1950 this power was entrusted to the President under Article 72 and to the Governors of respective states under article 161. The Article 72 and to the Article 161 were debated in Constituent Assembly on 29th December 1948 and 17th September 1949 but the grounds and principles on which these powers should be exercised were not discussed nor debated rather accepted with some modification of whatever present in section 295 of Government of India Act 1935. The Article 72 of the Indian Constitution is 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 1[***] of a State under any law for the time being in force.

Four important words have been used in the provision. Meanings of these words are as follows:

- *Reprieves*: Meaning thereby temporary postponement or cancellation of punishment for example if petition is pending for proceeding of pardon or commutation.
- *Respites*: Meaning thereby awarding lesser punishment on some special ground. This word

came into discussion very prominently in *Rajiv Gandhi assassination case* after awarding death penalty to one of the accused *Nalini* she was found pregnant. And on the basis of pregnancy her punishment has been converted from death penalty to life imprisonment.

- *Remission*: Meaning thereby reduction of amount of punishment without changing its character. For example in the case of *Abdul Karim Telgi* when all the property has been attached by the court then he requested to the court for remission.
- *Commutation*: Meaning thereby exchange of punishment awarded into one form to another. For example, Rigorous imprisonment to simple imprisonment.

When Pardon is granted?

It is very much important to look at three words here to understand the correct interpretation of article 72. These three words are 'Punishment', 'Sentence' and 'Offence'. The first two words show that the pardon by the president will save a person from the consequences of an offence and from punishment as well. The word offence makes it quite evident that the punishment and sentence must be in respect of such offence committed; this also implies that the punishment which is supposed to be pardon has to be in respect of offence and not of simple breach of condition. This reasoning derived from the meaning of offence given in general clauses Act 1897. The power of pardon can be used in following cases:

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

It is well established rule that a person can be sentenced and punished only when he was convicted by the court. A person is deemed to be innocent unless it is proved in the eyes of law beyond doubt. Thus if a person has not been given a chance of fair trial or proper investigation has not been carried out against that person then there is no reason why that person should be granted pardon because he is still innocent. Therefore it is important here to note that the pardoning power can be exercised only in the cases of convicted persons. But in some cases, court clearly said that the pardon may be granted before, during or after trial. In the case of *Maddella Yerra Chammugadu and others* [4], the Supreme Court said that the power to grant pardon is unconditional and absolute which can

be granted at any time either before, during or after trial. This decision has been affirmed in later cases such as in the case of *K.M Nanavati vs. State of Maharashtra* [4] & *Ramdeo Chauhan vs. State of Assam* [5].

Trial of a person is not done by court but by tribunal

The word offence can be used only in cases when act done clearly fall within the word defined in the Indian Penal Code. In addition to this it is important to note here that the person should be inquire under code of criminal procedure code and if it is done under any other Act it does not characterized as an offence and then the punishment would not hold the same meaning as it is meant to be in Art. 72. This issue has been discussed by Supreme Court in the case of *Maqbool Hussain vs., State of Bombay* [6] and *S.A. Venkataraman vs., Union of India* [7]. The Court concluded that the pardon can be granted by the President to those people punished or sentenced by the Competent Court of Law or Judicial Tribunal.

Scope of pardoning power of president

Judicial Review of pardoning power of president

In the case of *Kuljeet Singh vs., Lt. Governor of Delhi* [8] Supreme Court declared that the exercise of the pardoning power of president to commute death sentence would have to be examined according to the case to case and facts and circumstances of each case. Though Supreme Court didn't use judicial review term but through this decision it opened the door of the court for the mercy petitioner. However, in the leading case of *Maru Ram vs., Union of India* [9] Supreme Court clearly said that the power of pardoning is *absolute one* and cannot be hampered by any statutory provision but President or Governor must act while exercising this power in accordance with the aid and advice of council of ministers which shall never be arbitrary and mala fide. Then another leading case came before the Supreme Court *Kehar Singh vs., Union of India* [10]. The Five Judges Bench of Supreme Court ruled that the order of the President cannot be subjected to judicial review on the merits except within the strict limitation given in the case of *Maru Ram vs. Union of India*. By referring this case Supreme Court affirmed the judgment. This observation of *Kehar Singh case* the Supreme Court has taken clue from the U.S. case *Biddle vs. Perovich And Ex-parte Phillip Grossman* [11] in which Justice Holmes and Justice Taft clearly quoted that the executive clemency exist to afford relief from undue harshness or evident mistake in the operation or the enforcement of 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 essential in the government as well as monarchies, to vest some other authority than courts to ameliorate or avoid such particular judgment.

In the case of *Swarn Singh vs., State of U.P.* [12] referring the judgment of *Kehar Singh* and *Maru Ram* case the Supreme Court of India said that “we cannot accept the rigid contention of the learned counsel for the third respondent that this court has no power to touch the order of pardoning. If such power is passed by arbitrarily and mala fide or disregard to finer canon of constitutionalism the byproduct order cannot get the approval of law and in such cases judicial hand must be stretched to it.” In the subsequent case Supreme Court extended the power of court regarding pardoning power. In the case of *Satpal Singh vs., State of Haryana* [13] the Supreme Court said that the judicial review of pardoning power of president is possible but with some limitation if such pardoning power has been passed *without application of mind*. In the subsequent cases of *Bikash Chatterjee vs., Union of India* [14], *Government of Andhra Pradesh vs., M.T. Khan* [15] and finally in the case of *Epuru Sudhakar and Anr. vs., Govt. of Andhra Pradesh and others* [16], honorable Supreme Court made it clear that judicial review of the order of the president or Governor under Art. 72/161 as the case may be possible on the following ground:

- That the order has been passed without application of mind.
- That the order is passed mala fide.
- That the order has been passed on extraneous or wholly irrelevant consideration.
- That the order suffers from arbitrariness.
- That the order passed on religion, caste and race or region basis.

Thus the Article 72 of the Constitution gives the president absolute and unfettered power to grant pardon, suspends, remit or commute sentences even in death penalty. But he has to act on the advice of the council of ministers. The president also has to examine the merits of a case himself as upheld in the case of *Kehar Singh* of 1999. The power of president to grant pardon is premised on the assumption that it works in public interest. But if pardoning powers are found to be ‘perverse or mala fide’ the judiciary has the right to review. In that sense, the power of pardon is neither absolute nor unfettered.

Provision of pardoning power: Constitutional provisions and actual practice

Since Rajiv Gandhi’s assassination case it is

always question arises that whether the pardoning power of President or Governor given under Art. 72 and 161 serve its purpose or it is started to use as a weapon by the politician. From the earliest time if when we look at the situation of pardoning power, it was the sole power of church or monarchy. They were using it for political and diplomatic gain but as far as nation states started to adopt welfare State concept and human rights generation, the purpose has been changed and this provision clothed in the form of statutes. The Study conducted by Bikram Jeet Batra [17] shows that until 1980, mercy petitions were decided within a minimum of 15 days and a maximum of ten to eleven months. From 1980 to 1988, the time taken for the disposal of mercy petitions gradually increased to an average of four years. At present the delays extend up to 12 years. Presidential Pardons have been the subject of increased scrutiny and the focus of news media with a voracious appetite for scandal. As the legendary American Jurist Oliver Wendel Holmes pointed out that in modern democracy the power to punish death rests with the Judiciary and the power to spare life with the executive. It is for the Judiciary to find a person guilty or not and their job ends there. As Justice Verma says “mercy is entirely an executive process for the President to decide. The Judiciary should stay out of it”. The purpose of Articles 72 and 161 is to provide a human touch to the judicial process. If this human touch is not exercised properly, the very purposes of mercy provisions are defeated.

Notes

¹ Code of Criminal Procedure, 1973

² Indian Penal Code, 1860

³ United State Constitution

⁴ AIR 1981SC 112

⁵ (2001) 5 SCC 714

⁶ AIR 1953 SC 325

⁷ AIR 1964 SC 375

⁸ AIR (1978) 2 SC 774

⁹ AIR (1981) 1 SCC 107

¹⁰ AIR 1989 SC 653

¹¹ (1924) 69 LAW ED 527 (F)

¹² (1998) 4 SCC 75

¹³ AIR 2000 SC 170

¹⁴ AIR 2004 SCC 634

¹⁵ AIR (2004) 1 SCC 634

¹⁶ AIR 2006 SCworking paper, center for the study of law and
Governance, JNU, New Delhi, 2009, reprint 2012.¹⁷Bikram Jeet Batra, Court of Last Resort: A study of
Constitutional clemency for capital crimes in India,

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