

PRESIDENTIAL POWER TO PARDON IN INDIA: AN OVERVIEW

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Abstract

The power to pardon is a constitutional scheme which has been reposed by the people in the head of the State who enjoys high status and such power rests on the advice tendered by the Executive to President. The lack of any standards or checks on the exercise of the clemency power has not stood the Indian system of justice in good stead. Today's changing political climate underscores the need for principled exercise of the clemency power. Harsher sentencing standards and growing public sentiment in favour of capital punishment have resulted in an increasing number of death penalty cases finding their way into the clemency process.

The article provides constitutional framework and a brief overview of the origin and nature of pardoning power and seeks to examine several issues determining the scope of the pardoning power of the President under the Indian Constitution

1. Introduction

The pardoning power is an indispensable element of even the most perfect system of laws. The pardon is the instrument of mercy and the way to correct those grave injustices either on their facts or by unanticipated operation of the criminal laws that simply must be remedied.

Pardon is an act of grace from the governing power that mitigates the punishment demanded by the law for the offence and restores the rights and privileges lost on account of the offense. It is also an act of justice, supported by a public policy. It is granted by a head of the State, such as a Monarch or President, or by a competent Church authority. It affects both the punishment prescribed for the offence and the guilt of the offender.

The power of pardon remains unbridled with wide discretion provided to the executive. Moreover, from times immemorial the power of pardon has not so much been an act of grace as a tool of monetary and political aggrandizement. From the outset, the pardon was abused for personal gain.

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2. Historical Genesis of the Concept of Pardon

Historically, the institution of clemency seems to have had more to do with power than justice. Justice Holmes accurately characterized the earliest pardons as 'private act(s) of grace from an individual happening to possess power'¹. The ancient Greeks used a form of clemency, but that power rested with the people rather than with the sovereign. Before a person could obtain clemency under the Greek process they needed a petition supported by at least 6,000 people in a secret poll². Because of the difficulty in getting the required support for such a petition, clemency was not often granted. The Ancient Greeks made more frequent use of amnesty where, for example, in 403 B.C., there was a general amnesty for all the citizens who had participated in the Athenian Civil War.

In Ancient Rome, the clemency power was often used for political reasons rather than justice or mercy. The executive would pardon a person to enhance his own popularity or to appease the people. A well-known example of this is the Biblical story in which Pontious Pilate pardoned Barabbas rather than Jesus.

Another ancient practice similar to the power of pardon existed in ancient Rome, where instead of executing an entire army of transgressors, the Romans would execute every tenth condemned troop member

Nevertheless the possible analogies that may be drawn to the above-mentioned ancient practices of pardoning accused individuals, the concept of pardon as enshrined in the Indian Constitution can most realistically be said to be derived from the British tradition of granting mercy. Granting mercy has historically been the personal prerogative of the Crown, exercised by the monarch on the basis of advice from the Secretary of State for the Home Department.

This practice is based on the understanding that the sovereign possesses the divine right and hence, can exercise this prerogative on the ground of divine benevolence. While under the British system, the monarch is the Head of the State, under the Indian Constitution, it is the President who is deemed to be the Head of the State, which would explain the reason why the power to grant pardon has been vested in him, along with the Governors of States, who act in a manner similar to the President at the level of the states.

3. Pardoning power in UK and USA

To understand the concept of president's pardon power in India it is important to look at the pardoning power in England and also in the United States of America.

At Common law, pardon was an act of mercy whereby the king 'forgave any crime, offence, punishment, execution, right, title, debt, or duty.' This power was absolute, unfettered and not subject to any judicial scrutiny³. There is no time specified to grant pardon, it can be done before conviction as well as after it. The Crown also has the power to grant reprieve as

¹Biddle v. Perovich, 274 U.S. 480, 486 (1927)

²Kumar, Parul *The Executive Power to Pardon: Dilemmas of the Constitutional Discourse*, 2NUJS L.Rev.(2009)

³ Coke, Edward. *The Third Part of the Institutes of the Laws of England*. 4th ed. London (1669)

well, it may just temporarily suspend the execution of the sentence; or may remit the whole or part of the penalty⁴. However, it could hardly survive in its unrestrained nature in the democratic systems of State. Over a period of time, it became diluted in the U.K to a limited extent through the exercise of judicial scrutiny. At present in UK, the Constitutional monarch exercises the power on the advice of the Home Secretary⁵. The Home Secretary's decision can in some situations be challenged by judicial review.

Article II, Section 2 of the United States Constitution provides, in pertinent part, the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." The framers drafted the clause in its present form to make clear the power was only to extend to offenses against the United States, and added the same limitation that existed in English law, that the power did not extend to impeachments. The United States Supreme Court has clarified on more than one occasion that the term 'pardon' should be given the same meaning under the United States Constitution as was given to it in England. The history of the executive pardoning power shows consistent reliance on English practices.

4. Pardoning power in India

4.1. Pre-Constitutional scheme

Before the Constitution of India 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.

From 1935 onwards, the law of pardon was contained in Section 295⁶ of the Government of India Act which did not limit the power of the Sovereign. The result was up to the coming into force of the Constitution, the exercise of the King's prerogative was plenary, unfettered and exercisable as hitherto.

4.2. Constitutional Scheme

In India, the power to pardon is a part of the Constitutional scheme.

⁴ Naveen Thakur, *President's Power to Grant Pardon in Case of a Death Sentence- Whether it is to be Unfettered Discretion?*, 1999 Cri LJ 101

⁵ See Ross Harrison, *the equality of Mercy, in Jurisprudence Cambridge Essays*, ed. By Hyman gross and Ross Harrison(oxford: Clarendon Press, 1992), p.107

⁶(1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province. Provided that nothing in this sub-section affects any powers of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court-martial

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment. There was no provision in the Government of India Act 1935 corresponding to Article 161 of the Constitution.

The Constitution of India conferred the power on the President of India and the Governors of the States by Articles 72 and 161 respectively.

Having regard to the language used in Article 72 and 161 of the Indian Constitution, the framers of the Indian Constitution intended to confer on the President and the Governors, within their respective spheres, the same power of pardon both in the nature and effect, as is enjoyed by the Sovereign in Great Britain and the President in the United States. Therefore, in India also the pardoning power can be exercised before, during or after trial⁷. A pardon may be full, limited or conditional. (i) A full pardon wipes out the offence in the eyes of law and rescinds the sentence as well as the conviction, and frees the convicted person from serving any uncompleted term of imprisonment or from paying any unpaid fine⁸. (ii) A pardon is conditional where it does not become operative until the grantee has performed some specified act, or where it has become void when some specified event happens.

Article 72 of the Constitution gives that the President shall have the power to grant pardon⁹, reprieve¹⁰, respite¹¹ or remission¹² of punishment and to suspend, remit or commute¹³ the sentence of any person convicted of an offence in (a) a case tried by court martial (b) a case relating to a law to which the executive power of the Union extends. (c) The sentence awarded is of death.

Under Article 161 the Governor enjoys similar and concurrent powers in all matters pertaining to a law to which the executive power of the State extends, or a case in which the death sentence has been awarded.

By the virtue of these articles the President and Governor can grant pardon but the materialistic fact is that whether such power is an absolute one because the word "Shall" in clause (1) of the Article is ambiguous. Apart from it was also held that this power of pardon shall be exercised by the President and Governor on the advice of Council of Ministers.

4.2.1. Object of the Pardoning power

The object of pardoning power is to correct possible judicial errors, for no system of judicial administration can be free from imperfections. It is an attribute of sovereignty wherever the sovereignty may be to release a convict from a sentence which is mistaken, harsh or disproportionate to the crime¹⁴

To cure such a situation this power has been granted to an independent organ of the Government free from any sort of restraints. 'Fiat justitia per eat mundus' -which means let

⁷Channugadu, Re, A.I.R. 1954 Mad 911, 917

⁸Durga Das Basu, *Commentary on the Constitution of India*, Eighth Edition, LexisNexis Butterworths, New Delhi, 2008 at p. 4457

⁹ Completely absolves the offender

¹⁰ Temporary suspension of the sentence

¹¹ Awarding a lesser sentence on special ground

¹² Reducing the amount of sentence without changing its character

¹³ Substitution of one form to another

¹⁴Basu, D.D: *Commentary on the Constitution of India*: Vol.: 255 (1981)

justice be done even if the world shall perish would have remained a maxim only in absence of pardoning power being vested in the executive. 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.

The pardoning power is founded on consideration of public good and is to be exercised on the ground of public welfare, which is the legitimate object of all punishments, will be as well promoted by a suspension as by an execution of the sentences.

5. Nature and Extent of Pardoning Power

The power to pardon, vested in the President and the Governors of State, is an Executive power. This is an important power which is based on a wide form of discretion. Discretion neither can nor should be eliminated in the course of exercising pardoning power. The essence of discretion is choice. An authority in which discretionary power is vested has range of option at his disposal and he exercises a measure of personal judgement in making the choice. Yet, discretion is not arbitrary judgement, but rather the ability to discern correctly.¹⁵

An ordinary reading of these provisions shows that there is complete silence regarding the factors which must be taken into account by the President and the Governor while exercising the power to pardon. It is reasonable to assume that this silence was deliberate, since the power to pardon has historically been in the nature of a prerogative. It requires to be examined how this prerogative of the executive can be reconciled with the functioning of the other branches of the State, namely the legislature and the judiciary, and whether there are any areas of conflict. Though a textual interpretation of the Constitution fails to convince that the framers of the Constitution intended for the advice of the Council of Ministers to be binding on the President and Governors while exercising their pardoning powers, the judicial interpretation of the Constitution suggests an entirely different proposition. The Supreme Court in *Samsher Singh v. State of Punjab*¹⁶ a seven-judge bench stated that the satisfaction of the President or the Governor required by the Constitution is not their personal satisfaction, but the satisfaction of the Council of Ministers on whose aid and advice the President and the Governor exercise their powers and functions. The Hon'ble Supreme Court in the case of *Maru Ram v. Union of India*¹⁷ 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. This legal position was re-affirmed by this Hon'ble Court in the case of *Kehar Singh v. Union of India*.¹⁸

Judicial interpretation of the provisions to the effect that the President and Governors are bound to act as per the advice of the Council of Ministers while exercising their pardoning powers. This restricts the discretionary power and makes the ultimate Constitutional authority handicapped. On the other hand, a question cropped up what happens if an unconstitutional

¹⁵P.J Dhan, *Justiciability of the President's Pardon Power*, 26 Indian Bar Review, 1999

¹⁶ (1974)2 SCC 831

¹⁷ (1981)1 SCC 107

¹⁸ AIR 1989 SC653

advice has been tendered by the council of Ministers? For example, in the case of Kehar Singh¹⁹ the accused in relation to whom pardon was sought was the assassin of Ms. Indira Gandhi, a former Prime Minister of India. In such a situation, the possibility of the advice of the Council of Ministers, which comprised ministers from the same political party as the former Prime Minister, suffering from bias or a lack of objectivity cannot be precluded. Further, in the era of coalition Governments, there is a chance that the advice given to the Council of Ministers would not reflect a 'true, just, reasonable and impartial opinion'²⁰ and would instead be based wholly on political motivations.

With regard to the guidelines for the exercise of pardoning power under Article 72, the judiciary has been reluctant to impose guidelines on the executive for exercising the power to pardon in most cases, with a few exceptions. In *Kuljit Singh v. Lt. Governor of Delhi*²¹ the Supreme Court expressed the view that the pardoning power of the President is a wholesome power that should be exercised 'as the justice of a case may require', and that it would be undesirable to limit it by way of judicially- evolved constraints. In *Kehar Singh*,²² the Supreme Court stated that the power under Article 72 should be construed in the widest possible manner without the Court interfering to lay down guidelines of any sort. However, the Court went on to state that the power to pardon may be exercised to correct judicial errors, and for 'reasons of state'.

In India, it may be noted that the vesting of this power in the President and Governors, as opposed to the Prime Minister or Legislatures, may have been deliberate, so as to prevent the grant of pardon being made open to any sort of legislative debate.

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.

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".

The President while exercising the power under Article 72 can go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by the Supreme Court. The power under Article 72 enables the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. He can, on scrutiny of the evidence on record in the criminal case, come to a different conclusion from that accorded by the Court with regard to the guilt of, and sentence imposed on the accused. In doing so, the President does not amend or modify or supersede the judicial record which remains intact, and undisturbed. Therefore, there is no interference with the functions of the judiciary.

¹⁹ *ibid*

²⁰ Naveen Thakur, *President's Power to Grant Pardon in Case of a Death Sentence- Whether it is to be Unfettered Discretion?*, 1999 Cri LJ

²¹ (1982)1 SCC 417

²² *Supra* note 9

It may be emphasised that the power of the president and the Governor under Art. 72 and 161 are essentially executive powers and functions and there is absolutely no question of principle of natural justice being followed. This means that there is no obligation on the president or the Governor to hear the party concerned or his Counsel.

6. Executive power to pardon and Judicial Review

Nevertheless, the Supreme Court has been of the consistent view that the executive orders under Article 72/161 should be subject to limited judicial review based on the rationale that the power under Article 72/161 is per se above judicial review but the manner of exercise of power is certainly subject to judicial review. 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 now, it is well settled that the exercise or non-exercise of pardon power by the President or Governor is not immune from judicial review. The power of pardon under Article 72 was reviewed in the two landmark cases of Maru Ram v Union of India and Kehar Singh v Union of India

Supreme Court in Maru Ram v. Union of India said that the power of pardon, commutation and release under Article. 72 and 161 “shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal executions are guarantors of the valid play power.

In Kehar Singh v. Union of India it was said that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in Maru Ram’s case. Looking at these cases, the Court did not actually call for judicial intervention.

However, in Swaran Singh v. State of U.P.²³ the Supreme Court invalidated the remission of sentence by the Governor because some material facts were not brought to the knowledge of the Governor. Not only this, the Supreme Court had asked the President to reassess his decision when it was of the view that the decision of the President was totally arbitrary and unfair, a three-Judge Bench held 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, malafide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it.”

The 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 Bombay²⁴ 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 of the Constitution.²⁵

²³AIR 1998 SC 2026

²⁴ AIR 1961 SC 112

²⁵ Subject to the provisions of any law made by parliament the Supreme Court may from time to time, with the approval of the president, make rules for regulating the practice and procedure of the court.

In *Satpal v State of Haryana*²⁶ 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 “not being aware of such material facts would tend to make an order of granting pardon arbitrary and irrational”.

In *DhananjayChaterjee v State of West Bengal*²⁷ the Supreme Court held that an order passed by the Governor under Article 161 is subject to judicial review and he shall not be deprived of an opportunity to exercise his powers in a fair and just manner because court felt that all material facts including the mitigating factors were not placed before the Governor. The Court directed the respondent authorities to put up the mercy petition again to the Governor and bring all relevant facts to the notice of the Governor.

Later in *EpuruSudhakar v. Government of Andra Pradesh* ²⁸Pasayat, J. has laid down that judicial review under Articles 72 and 161 is available on the following grounds:-

(a) That the order has been passed without application of mind; (b) That the order is mala fide; (c) That the order has been passed on extraneous or wholly irrelevant considerations; (d) That the order suffers from arbitrariness.

He also emphasized that for effective exercise of judicial review reasons for the exercise of power under these articles must also be provided. Besides, he held that pardon obtained on the basis of manifest mistake or fraud can also be rescinded or cancelled.

Thus, the exercise of President’s power under Article 72 and Governor under Article 161 is subject to judicial review like any other power of the executive

In *Jagdish v. state of Madhya Pradesh*²⁹ 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 *BaniKanta Das and another v. State of Assam and others*³⁰ 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 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

²⁶ AIR 2000 SC 1702

²⁷ (2004) 9 SCC 751

²⁸ AIR 2006 SC 3385

²⁹ (2009) 9 SCC 495

³⁰ (2009)15 SCC 206

7. Conclusion

The pardoning power of Executive is very significant as it corrects the errors of judiciary. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The process of granting pardon is simpler but because of the lethargy of the Government and political considerations, disposal of mercy petitions is delayed. Therefore, there is an urgent need to make amendment in law of pardoning to make sure that clemency petitions are disposed quickly. There should be a fixed time limit for deciding on clemency pleas.

There should be a time frame within which the executive should be asked to decide over cases in order to prevent undue trauma to the applicant and his family members and back logging of cases. The clemency power can be refined to operate as a principled means of correcting some of the flaws extant in our penal system. There should be establishing an independent commission with the requisite expertise which is directed to focus on justice-enhancing reasons for remitting punishment

Regarding the judicial review debate, pardoning power should not be absolute as well as Judiciary should not interfere too much in exercise of this power. As 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 executive, it will certainly prove useful to remove the flaws of the judiciary