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AN IN-DEPTH ANALYSIS OF THE PARDONING POWER OF THE PRESIDENT

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Abstract

The constitution of India conferred a discretionary power to pardon to the President of India and Governors of respective states. This article focuses on understanding the entire concept of pardoning power. It commences with discussing about the historical events of exercising such power by different countries along with the development of this power with time. This article also elaborates and explains the literature used in article 72 and 161 of the Indian constitution for a precise understanding of the same and further discusses the constant tussle between the judiciary and executive branches by referring to the landmark judgments, helping one to understand the concept of judicial review regarding the executive matter of granting pardon.

Keywords *– Presidential pardon, Article 72, Article 161, Clemency powers of president*

Introduction

Granting pardon to a person is an important function of the President of India and the Governors of respective states under the Constitution of India. This paper seeks to understand such pardoning power by examining certain primary aspects and issues related to it. For a better understanding and convenience this [paper is divided into three parts. First part of this paper deals with the historical development of pardoning power by discussing different instances in history when this power was exercised by different countries. Second part of this paper deals with the interpretation of article 72 and 161 by explaining the important terms and qualifying sub-clauses and determining the relevance of these terms and sub-clauses in respective articles. Third part of this paper is focused on judicial interference in in executive power of granting pardon by means of judicial review and is concerned with the understand of the same through different landmarks judgments of different countries. This article will help one to understand this power to pardon in a precise manner as it clarify every basic aspect of this power which can

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be misunderstood easily.

Historical Development of Clemency power

Before introduction of pardoning power in the Constitution of India there are many records that denotes the exercise of pardoning power by the head of the state in countries like Rome, U.S., England etc. and the instance of the exercise of such power can be traced back from around 403 BC for example: "*In ancient Rome, circa 403 B.C., a process known as 'Adeia' facilitated a democratic pardon for individuals, such as athletes, orators and other powerful figures, who were successful in obtaining the approval of at least 6000 citizens by way of secret ballot."*[2]

Although all such powers exercised by different states at different points of time are similar to the concept of the pardoning power enriched in the Indian Constitution, but on factual basis, it can be said that this concept is derived from the clemency power of the British monarchy and is imbibed in the Constitution of India. "*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."*[3] *"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."*[4]

Even though this concept is borrowed from the British Constitution, it cannot be interpreted in terms of British constitution as the Indian constitution is fundamentally different from British constitution. The Indian constitution has a federal structure while British constitution is unitary in nature. Unlike the British crown the President of India is elected as the head of the state and is conferred with his powers and functions by the constitution of India. The crown of England on the other hand is a hereditary monarch and the powers of the same are more or less a function of history. Therefore, it will be misleading to say that power of mercy exercised by the crown of England and power of pardon exercised by the President of India are same, in my opinion, the correct approach would be to understand the written provision of the constitution of India and giving due consideration to the historical circumstances of India when such provision was being embodied into the Constitution of India.

[2] R. Nida & R. L. Spiro, The President as His Own Judge and Jury: A Legal Analysis of the President's Self-Pardon Power, 52 OKLA. L. REV. 197 (1999).
[3] B. V. Harris, Judicial Review of the Prerogative of Mercy, PUBLIC LAW 386 (1991).
[4] G B. Wolfe, I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts, 27 B.C. Third World L.J. 417 (2007).

Interpretation of Article 72 and 161 of India Constitution

As the Indian Constitution has a federal structure, the executive power has to divided between the centre and the state which is done by the constitution of India through article 72 and 161, providing power to grant pardon to the President of India and Governors of the states respectively. The pardoning power is conferred to the President of India by article 72 which is as follows:

"(1) The President shall have the power to grant pardons, reprieves, or remissions of punishment or suspend, or 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 any 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 the sentence of death exercisable by the Governor of a State under any law for the time being in force."[5]

For a precise interpretation of this article, three words are of extreme importance. These words are 'punishment', 'sentence', and 'offence'. Clause (1) (a) of this article makes it clear that a pardon can be granted by the President either to save a person from the consequences of the offence committed by him or from the punishment of that offence. The word 'offence' plays an important role in this article with respect of understanding the power conferred by this article. The manner in which it is used in clause (1) (b) of this article creates a precise understanding that the words 'punishment' and 'sentence' in clause (1) are in respect with the term 'offence' as clause (1) (b) states 'punishment or sentence is for an offence against any law relating to a matter to which the executive power of the union extends'.

Therefore, it is manifested that such pardoning of a punishment must be in respect with an offence and not merely a breach of condition. This is because the General Clauses Act, 1897

[5] INDIA CONST. art. 72

defines the term offence as " Act or omission made punishable by law for the time being in force", and by the virtue of article 367 of the constitution of India, the General Clauses Act, 1897 applies to the interpretation of the same. Therefore the term 'offence' has to be interpreted in the same sense as mentioned in the General Clauses Act, 1897 as there is nothing mentioned in article 72 to show that the same meaning of 'offence' is not intended to be in this article. Hence, it is established that the power to pardon granted under article 72 can only be used in respect of an act which is an offence in the eyes of law and such offence must come within the matters over which the executive power of the union extends to come under the ambit of article 72 and for such matters the punishment or sentence is already granted by the judiciary.

A sentence or a punishment can only be imposed on a person when such a person is found guilty and is convicted for an offence. In the current legal system of this country a person is deemed to be innocent until such person is proven guilty and is convicted of an offence. This principle is known as 'presumption of innocence' and is established in this country during the British regime and by the virtue of article 367 is till prevailing. This principle of presuming a person to be innocent until he/she is proven guilty, beyond any reasonable doubt, is a very prominent part of our jurisprudence. Therefore, because of this principle of presumption of innocence, a person against whom a proper investigation is not carried out for being accused of an offence, who is not given a full and fair trail and is not proven guilty beyond any reasonable doubt by a competent court will be deemed as innocent and the question of granting pardon to such person cannot arise.

This makes it clear that the President's power of pardoning a person can only be used against a person who is convicted of an offence and cannot be used against a person who is only accused for committing an offence. The primary motive behind granting such power to the executive head of the state is to repair any mistakes or inadvertence by the judiciary while sentencing an accused as judiciary being a human institution is likely to cause errors. The above mentioned reason for granting the pardoning power to the executive head is discussed by the Supreme Court of India and U.S. in the cases like Nanavati vs. State of Bombay, Biddle vs. Perovich etc. the above understanding can be aptly stated as:

"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 crime."[6]

Hence, we can precisely conclude that the president's power of pardoning can only be exercised when a person is convicted of an offence as the primary motive of this power is to rectify any mistakes on the part of judiciary.

The President of India can only grant pardon to a person when such a person is held guilty for an offence and is convicted by the judiciary, but sometimes a situation occurs when the government in power experiences an open revolt and in such situation the President makes a proclamation the rebels who will surrender will be granted pardon for the crime committed by them. In this situation the President does not have the power to grant pardon as the rebels are not held guilty for any offence nor are convicted by any court but have only surrendered. The question that comes in our mind is that how can the President make such a proclamation of granting pardon to the rebels who surrendered, without having power of doing the same.

Here the point to be focused on is that the Head of the state or the President is merely giving a promise that whatever actions could be taken against them for their felonies will not be taken against them and is not exercising the power conferred to him under article 72. Therefore merely using the word 'pardon' in the proclamation does not amount to granting pardon factually. The matter for granting pardon for punishments will not arise until such rebels are held guilty and are sentenced for a particular punishment. So notwithstanding with the words used in the proclamation, in factual sense such proclamation is merely a promise of not taking action against such rebels. Secondly, considering the sense in which the term 'grant of pardon' is used in article 72 a pardon must be granted to a specific individual and the promise to grant pardon o surrendering is given to an unspecified number of people which creates a difference between granting of pardon and amnesty.

"The pardoning power should be distinguished from amnesty, while a pardon remits the punishment imposed by a court upon an offender; amnesty overlooks the offence and absolves the offender from penalty."[7]

In respect with understanding the language employed in article 72 it must be urged that the

[6] 2 D.D. Basu, The Constitution of India 402 (5 ed. 1965).
[7] *Id.* at 482.

expression 'The president shall have the power to grant pardons, reprieves, respites or remission of punishment' must be read separately from its qualifying clauses and sub-clauses as this complete expression is taken from article 295 (2) of the Government of India Act, 1935. This expression was kept in the Government of India Act, 1935 in connection with the Crown of England which made the crown a sovereign over legal system as this expression was not followed by any qualifying clauses or sub-clauses providing the power to grant pardon even for the matter under the jurisdictions of different states. The Government of India Act, 1935 provided sovereignty to the Crown of England over all the central and local authorities established by law and these authorities were subjected to his control as per law. Because of this Act the Crown had the control not only on the Governors but Governor General as well and had the power to grant pardon for the punishments awarded under central as well as state laws.

Such kind of sovereign power cannot be entirely vested with the President of India as such power to control and obligate the authorities made by law can only be vested in the constitution of India. It is precisely reflected in the nature of this article that the term 'punishment' is not only inserted but is placed in connection with the term 'pardon' so that the power to grant pardon under this article is restricted to criminal obligations, i.e. if the term 'pardon' was not kept in connection with the term 'punishment' then this power of granting pardon conferred with the President of India could be exercised in respect with civil obligations as well. Therefore, sub-clauses (a), (b), and (c) were added along with the term 'punishment' in sub-clause (b) when this article was imbibed in the Constitution of India and by the virtue of federal polity, the pardoning power was distributed between the centre and the state based on the jurisdictions of the same respectively. Keeping such distribution in mind article 161 was introduced in the Indian constitution providing power to grant pardon to the governors of each state.

The governor is granted with the same power of pardoning as the President of India under article 161 of the constitution of India which says that:

"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."[8]

Under article 161 the Indian constitution conferred the power to pardon, respite, reprieve or remission of a punishment or to remit, commute or suspend the sentence of a person who is convicted for an offence, to the Governors of different states. Considering the above, can it be said that the governors are granted with an unlimited power to grant pardon?. If this would have been the case then the governor of Rajasthan could have granted pardon in the matter under the jurisdiction of Maharashtra. But by virtue of the term 'to which the executive power of the state extends' in article 161 this power is restricted to the jurisdiction of that particular state. Neither the President nor the Governors can have the soverign powers, firstly because of the restriction imposed on this power by article 72 and 161 in the form of clauses, sub-clauses and qualifying terms and secondly, because of the federal polity and democratic nature of India along with a right of judicial review over the President's / Governors' exercise of power to grant pardon.

Power to Pardon and Judiciary

It may seem that the pardoning power of the executive is overruling or superseding the judiciary by not executing the dictum passed by it, but in this cannot be the case because while exercising the power to grant pardon, the President is not overruling or superseding the judicial decision but is merely not using his executive powers in that particular matter as the supreme court held in the case of Kehar Singh vs. Union of India that:

"We are of the view that it is open to the President in the exercise of the power vested in him by Art. 72 of the Constitution to scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in 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. The judicial record remains intact, and undisturbed."[9]

While exercising this power the President is acting as an executive head of the state and is acting under a constitutional power which is completely different from judicial powers. "*The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with*

[8] INDIA CONST. art. 161.
[9] Kehar Singh v. Union of India, (1989) 1 SCC 204.

the discretion contemplated by the context.[10] *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. 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."*[11]

The exercise of pardoning power does not supersede any judicial decision nut only looks a matter for a different perspective which cannot be taken into consideration by judiciary as judiciary is a body bound by law. Thus exercising of this power is merely an executive act which does not overrule a judicial order, as stated by the supreme court of United States in the case of U.S. v. Benz that:

"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."[12]

The reason behind providing such pardoning power to the head of the states is that in a democratic country like India, right to life and personal liberty of the citizens are considered of paramount importance as is granted as a fundamental right by the constitution under article 21. Therefore the matters concerning the same needs to be scrutinised not only by application of law into a given set of facts, which is done by judiciary, but also needs to be scrutinised from different aspects which are not relevant to the judiciary for deciding on any matter. The same is mentioned by the Supreme Court in the case of Kehar singh vs. Union of India that:

"All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working cut, maintaining and operating a constitutional order. The Preambular statement of the Constitution begins with the significant recital:

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic .. do hereby adopt, enact and give to ourselves this Constitution."

[10] *Ibid.*
[11] *Ibid.*
[12] US v. Benz, 282 U.S. 304 (1931)

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the Courts to Art. 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and recourse, either under express constitutional provision or through legislative enactment, is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty."[13]

While the head of the state is scrutinising a case from an executive point of view, the petitioner does not have the right to insist an oral presentation of the facts as the manner of considering the facts of a case lies with the President. The proceedings of a case in front of the President are of executive nature, therefore the petitioner cannot insist on an oral hearing of his case. This was said by the Supreme Court in the case of Maru ram vs. Union of India[14] as:

"The manner of consideration of the petition lies within the discretion of the President, and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the issues which he considers pertinent, and he may, if he considers it will assist him in treating with the petition, give an oral hearing to the parties. The matter lies entirely within his discretion."[15]

It is submitted that the facts and the reasons to be considered by the President while execrsising this power must be those reasons which are not concerned or are not relevant to the judiciary. While deciding the guilt of an accused the judiciary is primarily concerned with the facts of the

[13] Kehar Singh v. Union of India, (1989) 1 SCC 204.
[14] Maru Ram v. Union of India, (1981) 1 SCC 107.
[15] Kehar Singh v. Union of India, (1989) 1 SCC 204.

case and the law(s) applicable to the same. Thus the facts or reasons to be considered by the head of the state while exercising his power to pardon must be related to the promotion of the general welfare or the facts relevant after the conviction of an accused like behaviour and conduct of the accused while serving his/her sentence sactioned upon him by a court. Further, only executive has the power to give effect to the public accountability by upholding the opinion of the public at large as in a democratic country like India, the people are sovereign and the opinion of the same is important.

It may be apparent that the pardoning power of the President is overlapping the Judicial dictums and is providing a sovereign characteristic to the executive, but this is not the case in today's India. The Governor – general of India and provincial Governors of British India were conferred with a clemency power with no certain restriction. In the case of Balmukund vs. King Emperor in 1915, it was observed by the Privy Council that act of granting clemency is purely executive in nature and therefore it shall not be subjected to the judicial review, making head of the executive a sovereign of the state. But today, this is not how this power functions in India as the presidential power of granting pardon is subjected to certain restrictions as discussed before, and is also subjected to judicial review as the Supreme Court of India held in the case of Shatrughan Chauhan vs. Union of India[16] that pardoning power of the President is subjected to a Judicial review like any other power of the executive. In the case of Maru Ram vs. Union of India, it was observed by the Supreme Court that:

"Consideration for exercise of power under Articles 72/161 may be myriad and their occasion protean, and are left to the appropriate government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or malafide. Only in these rare cases will the court examine the exercise."[17]

The Supreme Court makes it precise in the case of Epuru Sudhakar vs. Government of A.P. that when judiciary can exercises its power of judicial review in the matter of President's / Governors' exercise of pardoning power. In this case, Hon'ble Justice Arijit Pasaya was of the opinion that:

"The exercise or non-exercise of pardon power by the President or Governor, as the case may be, is not immune from judicial review. Limited judicial review is available in certain cases."[18]

[16] Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1
[17] Maru Ram v. Union of India, (1981) 1 SCC 107.
[18] Epuru Sudhakar v. Govt. of A.P., (2006) 8 SCC 161

While Hon'ble Justice S.H. Kapadia had a different and more precise perspective regarding the same,

"Exercise or non-exercise of the power of pardon by the President or the Governor is not immune from judicial review. Though, the circumstances and the criteria to guide exercise of this power may be infinite, one principle is definite and admits of no doubt, namely, that the impugned decision must indicate exercise of the power by application of manageable standards and in such cases courts will not interfere in its supervisory jurisdiction. By manageable standards we mean standards expected in functioning democracy. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power is the flexible power and its exercise can and should be adapted to meet the circumstances of the particular case."[19]

The Surpeme Court in the case of Epuru Sudhakar vs. Union of India, made it clear that the presidential power to pardon is not immune to judicial review. The court stated that the presidential decision of granting pardon would invite judicial review if such pardon is granted by mistake or is obtained by fraud or is arbitrary in nature or is based on improper reasons. In the matter of Swaran Singh vs. State of U.P.[20] observed that the governor of the sate remitted a part of a person's sentence for life imprisonment who was convicted for murder, because of which the person came out of prison within two years. The court found that the accused was also involved in several other cases, his conduct and behaviour in prison was far from satisfactory, and the accused was also granted parole during a large portion of his sentence. The governor, while exercising his power under article 161, was not posted with the above mentioned facts and therefore his exercise of granting pardon was not just. Hence the court advised that the matter must be sent back to the Governor of U.P. for reconsideration.

The Supreme Court has precisely mentioned in several cases that the power of President/Governors of granting pardon is not immune to judicial review and has also mentioned reasons behind the same. Doing the best it can for a better understanding of the same, the court has listed down the grounds on which judicial review on such matters can be exercised, these ground were listed in the case of Epuru Sudhakar vs. Government of A.P. which is as follows:

[19] *Ibid.*
[20] Swaran Singh v. State of UP (1998)4SCC 75.

"The position, therefore, is undeniable 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) That the order has been passed on extraneous or wholly irrelevant considerations;

(d) That relevant materials have been kept out of consideration;

(e) That the order suffers from arbitrariness."[21]

These decisions of the Supreme Court tells us that the judicial review over the matters of granting pardon by the President of India or by the Governors of respective states is beneficial for the country as it upholds the security if the fundamental right to life and personal liberty. Secondly, the judiciary must be empowered to oversee that if any undue political influence is exercised on the executive for getting an unjust decision or not, which can only be endorsed by judicial review.

Conclusion

In conclusion, I would like to submit that in a democratic system like India a feudal prerogative of British Crown cannot survive but it is also expected of a democratic system that every branch of government is able to provide limits to one's jurisdiction as any undue interference of any branch in the functioning of another branch will demean the authority of that branch. Although the interference of article 72 and 161 in judicial matters and interference of judiciary in executive matter of granting pardon by means of judicial review is justified by the reason of upholding the very fundamental right of life and personal liberty. As per 'Social Contract Theory', protection of life and personal liberty was the primary reason why the people came into an agreement and form a government and it is the duty of the government to protect this right every citizen because of which such an interference of executive and judiciary into each other's jurisdiction is justified and is proven to be beneficial for Indian polity.

[21] Epuru Sudhakar v. Govt. of A.P., (2006) 8 SCC 161