



PARDONING POWER OF PRESIDENT OF INDIA: A CRITICAL REVIEW

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Abstract--Indian Constitution under 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 of pardoning power is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections. Pardoning is an act of kindness that reduces the punishment conferred under the law for the offence and restores the rights and privileges lost on account of the offence. The present paper envisages to critically reviewing the pardoning powers exercised by the President of India who has been granted the responsibility and authority to protect the Constitution.

Keywords: Article 72, Pardoning Power, President of India

INTRODUCTION

The power of pardon is an important component of executive powers, which allows the President to intervene and grant pardon, as a way of “dispensing the mercy of government” in exceptional cases where the legal system fails to deliver a morally or politically acceptable result. It exists to protect citizens against possible miscarriage of justice, occasioned by wrongful conviction or excessive punishment. Nevertheless, in recent times, this power has, in practice, become a personal prerogative of the President, a remnant of tribal kingship generally reserved for the well-heeled or well connected. The power of pardon is virtually unfettered and unchecked by formal constraints in most jurisdictions, thereby rendering it susceptible to abuse. However, in some jurisdiction there are conventionally specified criteria which guide the grant of pardon. The pardoning power is the most sacred and difficult of all executive functions. Though it is regarded as a prerogative, based solely on presidential or executive discretion, there ought to be checks and guiding principles to avoid injustice in the quest for equity. By that, public interest shall be better served, reform of the prisoners more attained and welfare of the family and community advanced by a liberal but discrete use of the pardoning power. Ultimately, the ability of the President to use the pardon power fairly and dispassionately will, to a large extent, depend on his personal integrity and sense of responsibility.

POWER OF PRESIDENT TO GRANT PARDONS ETC.

The relevant constitutional provisions regarding the grant of pardon, remissions, suspension of sentence, etc. by the President of India and the Governor of a State are as follows:

Article 72- Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases –

- (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –
 - (a) In all cases where the punishment or sentence is by a Court Martial;
 - (b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
 - (c) In all cases where the sentence is a sentence of death.



(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.”

Article 161 Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases –

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.”

The provision corresponding to Article 72 in the Government of India Act 1935 was section 295 which read as follows:

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

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.

There was no provision in the Government of India Act 1935 corresponding to Article 161 of the Constitution. The above constitutional provisions were debated in the Constituent Assembly on 29th December 1948 and 17th September 1949.¹

In the Constitution of India, the power of Presidential Pardon is found in Article 72. It empowers the President to grant pardons, reprieves, respites or remissions of punishment in all cases where the punishment is for an offense against any law to which the executive power of the union extends. The same is also available against sentences of courts-martial and sentences of death. A parallel power is given to the Governor of a state under Article 161 of the Indian Constitution. A pardon may be absolute or conditional.

The power of pardon under Article 72 was reviewed in the two landmark cases of Maru Ram Vs Union of India² and Kehar Singh Vs Union of India.³ In Maru Ram the Court while deciding upon the validity of 433A of the Code of Criminal Procedure examined the power of pardon under Article 72. It observed:

“Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favouritism cannot but be interlopers in this area. The order which is the product of extraneous or mala fide factors will vitiate the exercise....For example, if the Chief Minister of a State releases everyone in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the Constitution to let such madness survive.”

¹ See Constituent Assembly Debates, Vol.7, pages 1118-1120 and Vol. 10, page 389.

² 1981 (1) SCC 107

³ 1989 (1) SCC 204



In addition to the above constitutional provisions the Criminal Procedure Code 1973 provides for power to suspend or remit sentences – Section 432 and the power to commute sentence.⁴

In *Kehar Singh*⁵ 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.

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

- (a) interest of society and the convict;
- (b) the period of imprisonment undergone and the remaining period;
- (c) seriousness and relative recentness of the offence;
- (d) the age of the prisoner and the reasonable expectation of his longevity;
- (e) the health of the prisoner especially any serious illness from which he may be suffering;
- (f) good prison record;
- (g) post conviction conduct, character and reputation;
- (h) remorse and atonement;
- (i) deference to public opinion.

Thus in these judgments concerning the President'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.

IS THE POWER DISCRETIONARY IN NATURE?

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.⁶ He is of the view that the President enjoys absolute powers under Article 72. According to Jai,

⁴ See Section 433, Cr. P. C., 1973

⁵ 1989 (1) SCC 204

⁶ 1980 (2) SCC 684



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, 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.

In a decision the Supreme Court in *Government of A. P. Vs M. T. Khan*⁷ stated that if the government consider it expedient that the power of clemency be exercised in respect of a particular category of prisoners the government had full freedom to do so and also for excluding certain category of prisoners which it thought expedient to exclude. The Court further observed that “to extend the benefit of clemency to a given case or class of cases is a matter of policy and to do it for one or some, they need not do it for all, as long as there is no insidious discrimination involved.”

CONCLUSION

A worrying trend in respect of the President's power of pardon is the growing tendency of successive Presidents to disregard the advice of the Council of Ministers in the exercise of this power. Former President A.P.J. Abdul Kalam inherited 12 pending mercy petitions from his predecessor which grew to 20 in his tenure. Despite recommendations for rejection of the same by the Home Ministry, he rejected only 1 petition in his 5 yr tenure – that of Dhanonjoy Chatterjee's case⁸ whose mercy petition had already been rejected by two former Presidents, Shankar Dayal Sharma and K.R. Narayan. The Supreme Court has held in *Maru Ram and Kehar Singh* that the power under Articles 72 and 161 of the Constitution is to be exercised by the Central and the State Governments and not by the President or Governor on their own. A move by successive Presidents to act on their own jeopardizes the Constitutional scheme and the Court may soon be called upon to decide whether such action furnishes an additional ground for judicial review.

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

Given the bizarre twist that our polity has taken in recent times, it seems to be self-evident that the only protection we have from complete insanity is judicial review. If someone with political connections kills someone, the police will not act to begin with. If you get the police to act, the accused can tamper with the evidence (disappearing guns, magic bullets, evaporated forensic reports inclusive). Even if the evidence survives, witnesses can be intimidated into silence. The pardoning power is the most sacred and difficult of all executive functions. Though it is regarded as a prerogative, based solely on presidential or executive discretion, there ought to be checks and guiding principles to avoid injustice in the quest for equity. By that, public interest shall be better served,

⁷ 2004 (1) SCC 616

⁸ 1994 (2) SCC 220



reform of the prisoners more attained and welfare of the family and community advanced by a liberal but discrete use of the pardoning power. Ultimately, the ability of the President to use the pardon power fairly and dispassionately will, to a large extent, depend on his personal integrity and sense of responsibility. While the President should be allowed wide latitude in the exercise of his power of pardon, the prescription of some guidelines for granting pardon, as obtainable in India and South Africa, is also desirable. This, of course, cannot prevent the abuse of presidential pardon power, but it would go a long way in curbing the incidence of abuse.

SUGGESTIONS

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 guilt of the offender. 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 principal 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 their clemency process. Thus, while the trend towards greater judicial scrutiny of the power of pardon is undoubtedly a welcome one, the judiciary must leave the executive with a window of discretion in the exercise of the same. If we do not combine democratic governance with firm governance, we shall have no one except ourselves to blame for lawlessness resulting from the abuse of the provisions relating to pardon by criminals guilty of heinous crime. 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 debate, pardoning power should not be absolute as well as judiciary should not interfere too much in exercise of 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 the executive, it will certainly prove useful to remove flaws of the judiciary. 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. Indeed, the grant of pardon in all cases should be rational and aimed at serving some public policy purpose in order to justify the President's interference with the judicial determination of guilt and punishment. For Nigeria, in particular, it is recommended that the advice of the Council of State on the grant or refusal of pardon to applicants should be made binding on the President in all cases; instead of the current situation where such advice is only binding in respect of cases involving military officers and discretionary in respect of all others.