



## Exercising the Pardoning Power and Role of Judiciary in India

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ABSTRACT

Forgiveness, as we all know, is considered to be divine. In matters pertaining to public welfare, it becomes necessary to see whether granting pardon overturns the intention of the conviction. The Constitution of India permits any convict who is sentenced to death to appeal for mercy. The constitution vests in the president and the governors of various states with the power to grant reprieves and pardons through its articles 72 and 161 respectively in addition to the commutation of sentences which may be also appropriated by the government under the provisions of CrPC and IPC. The presidential power acts as a safety valve in exceptional cases where the legal system fails to deliver a morally or politically unacceptable result and hence secures public welfare. The nature of the pardoning power has lead to various petitions asking for judicial review of the same.

### KEYWORDS

Pardoning power, judicial review, mercy, forgiveness.

### INTRODUCTION

Forgiveness is considered to be divine. In matters pertaining to public welfare, it becomes necessary to see whether granting pardon overturns the intention of the conviction. The Constitution of India permits any convict who is sentenced to death to appeal for mercy. The constitution vests in the president and the governors of various states with the power to grant reprieves and pardons through its articles 72 and 161 respectively in addition to the commutation of sentences which may be also appropriated by the government under the provisions of CrPC and IPC. The Presidential power acts as a safety valve in exceptional cases where the legal system fails to deliver a morally or politically unacceptable result and hence secures public welfare. However, the President and the Governors are not obliged to accept every mercy plea. They are supposed to take their decisions on the basis of the advice given by the cabinet. Clemency is a useful tool for prison administrators to reward good conduct and accomplishments by prisoners. The power of pardon has sometimes been regarded as an unprincipled and unwelcome intrusion in the law's enlightened process as it leads to an overlap between the functions of judiciary and executive. The large political influence on the pardoning power has further marred it with controversies. This nature of the pardoning power has lead to various petitions asking for judicial review of the same. To start with, is there a conflict between judicial power to pass a punishment authorised by law and the pardoning power? Does the pardoning power of the executive undermine the judicial decisions? Only when we have answers to these questions we will be able to evaluate the role of judiciary in regulating the pardoning power which is the main point of discussion in this article.

### PROCESS OF GRANTING PARDON IN INDIA:

The process starts with filing a mercy petition with the President under Article 72 of the Constitution. Such petition is then sent to the Ministry of Home Affairs in the Central Government for consideration. The abovementioned petition is discussed by the Home Ministry in consultation with the concerned State Government. After the consultation, recommendations are made by the Home Minister and then, the petition is sent back to the President.

### PURPOSE OF GRANTING PARDON:

The object of pardoning power is to correct possible judicial errors, because no human system of judicial administration can be free from imperfections.

- Pardon may substantially help in saving an innocent person from being punished due to miscarriage of justice or in cases of doubtful conviction.
- It is always preferable to grant liberty to a guilty offender rather than sentencing an innocent person.

### ROLE OF JUDICIARY IN EXERCISING THE PARDONING POWER:

There has always been a debate as to whether the power of the executive to pardon should be subjected to judicial review or not. Supreme Court in a catena of cases has laid down the law relating to judicial review of pardoning power.

In *Maru Ram v. Union of India*<sup>1</sup>, the Constitutional Bench of Supreme Court held that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the head of the Republic.

In *Dhananjay Chatterjee alias Dhana v. State of West Bengal*<sup>2</sup>, the Supreme Court reiterated its earlier stand in *Maru Ram*'s case and said: "The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the state."

The Supreme Court in *Ranga Billa* case<sup>3</sup> was once again called upon to decide the nature and ambit of the pardoning power of the President of India under Article 72 of the Constitution. In this case, death sentence of one of the appellants was confirmed by the Supreme Court. His mercy petition was also rejected by the President. Then, the appellant filed a writ petition in the Supreme Court challenging the discretion of the President to grant pardon on the ground that no reasons were given for rejection of his mercy petition. The court dismissed the petition and observed that the term "pardon" itself signifies that it is entirely a discretionary remedy and grant or rejection of it need not to be reasoned.

In the early case of *K.M. Nanavati v. State of Bombay*<sup>4</sup>, Governor granted reprieve under Article 161 which was held unconstitutional as it was in contrast with the Supreme Court rulings under Article 145.

In a landmark judgment *Epuru Sudhakar & Anr v. Govt. of A.P. & Ors*<sup>5</sup>, it was held by the Supreme Court that it is a well-set principle that a limited judicial review of exercise of

clemency powers is available to the Supreme Court and High Courts.

#### **Rajiv Gandhi Assassination case<sup>6</sup>:**

The Rajiv Gandhi assassination case has witnessed several twists and turns during past 23 years. Though all 26 accused were awarded death penalty by a TADA court near here in 1998, the Supreme Court confirmed capital punishment only in the case of Murugan, Santhan (both Sri Lankan Tamils), A G Perarivalan and Nalini, wife of Murugan. Nalini escaped the noose following a Tamil Nadu Cabinet decision and the Governor's assent to it in 2000. The clemency petitions of the other three were rejected by the President.

It is a fallacy to believe that the power of granting pardon given to the President and the Governor under the Constitution is an act of grace or mercy. The convict has a constitutional right to have his or her petition considered by the President or the Governor on relevant grounds, including miscarriage of justice. And it should be decided expeditiously. But it doesn't mean that these criminals are to go free due to executive delay. Because, if it ever happens then those responsible for the delay should go to jails. Although, Mrs. Sonia Gandhi is ready to forgive the convicts, but would it be justified because she alone is not the victim. Thus, there is no way around this.

#### **Granting of clemency by the President or Governor can be challenged on the following grounds:**

- The order has been passed without application of mind.
- The order is mala fide.
- The order has been passed on extraneous or wholly irrelevant considerations.
- Relevant material has been kept out of consideration.
- The order suffers from arbitrariness.

Now, it is a well settled principle that power under Articles 72 and 161 is subject to judicial review. In an apparent message in the midst of the controversy over clemency to Mohd Afzal Guru<sup>7</sup>, Supreme Court held that the powers of President and Governor to grant clemency is open to "judicial review" and extraneous considerations like political loyalty, religion and caste cannot be grounds for granting pardon to a convict.

#### **CONCLUSION**

In India, the processes have enough checks and balances but never the less more caution is needed to avoid political considerations and exigencies colouring the exercise of the powers of pardon as evident from the past experiences and cases. 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 amendment law of pardoning to make sure that clemency petitions are disposed of quickly. Fine balance needs to be maintained by reconciling the individual human rights as well as the larger interests of the society.

#### **SUGGESTIONS**

- There is an urgent need to make amendment in law of pardoning to make sure that clemency petitions are disposed of quickly.
- There should be a fixed time limit for deciding the clemency pleas.
- Pardoning power should not be absolute as well as Judiciary should not interfere too much in exercise of this power.
- Pardoning power should be subjected to limited judicial review as judicial review is a basic structure of our Constitution.
- The power of judicial review should be exercised properly and not misused by executive. Then it will certainly prove useful to remove the flaws of the judiciary.
- The President and the Governor have to keep in mind the effect of such pardon on the family of the victims, the society as a whole and the precedent it sets for the future.
- Clemency petition must be filed with clean hands.
- Objective criteria should be adopted to grant pardons.
- Last but not the least; people should be aware about the Constitutional and Statutory provisions in India in relation to clemency.

#### **REFERENCES**

- American jurisprudence, 2d, 5 as cited in written submissions of Soli Sorabjee as Amicus Curie in the case of Epuru Sudhakar and anr vs. Government of Andhra Pradesh AIR 2006 SC 3385. | ▪ Biddle v. Perovich (71 L. Ed. 1161 at 1163). | ▪ Ex Parte Philip Grossman (69 L. Ed. 527) approved and adopted by apex court in Kuljeet Singh v. Lt Governor of Delhi. | ▪ G. Krishna Goud v. State of Andhra Pradesh (1976) 2 SCR 73. | ▪ Kuljeet Singh v. Lt. Governor, Delhi and anr (1982) 1 SCC 11 C.J Pathak in Kehar Singh v. Union of India (1989 SCC (1) 204) remarked that the power of pardon rests on advice of the executive which is subject to provisions of article 74(1) of the constitution. | ▪ Maru Ram v. Union of India and others (1981) 1 SCC 107. | ▪ Seervai H.M., Constitutional Law of India, Vol. II, ed. 4th, Universal Book Traders, New Delhi, India, 1999. |