



Use and Abuse of Pardoning Power

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ABSTRACT

Pardon an extraordinary power that can undo years of criminal investigation and prosecution at the stroke of a pen, is in fact a necessary power that shall be conferred on the head of the State. At the same time it is also a reality that this power can be misused. Therefore the researcher tried to study the issues and challenges of this power to grant pardon.

KEYWORDS

Pardon, clemency, remission.

To maintain law and order in a civilised society it is necessary that if a person commits a crime he deserves to be penalised accordingly. But at the same time it is also true that prevention is always better than cure. The offenders are also human beings and they may also become good and useful citizens. *Balmiki*¹ is the major example of the same. Therefore it is necessary to find out some mechanism for the conversion of these offenders into normal human beings. To achieve this goal pardon may play a great role. Public purpose will be better served by providing one more opportunity to an offender to rehabilitate himself in the society like a normal human being. The proper use of pardon may do miracles in the field of rehabilitation of offenders.

Pardon is the forgiveness of a crime and the penalty associated with it. It is granted by a [sovereign](#) power, such as a [monarch](#) or [chief of the state](#). The term pardon includes each and every act of clemency such as a pure pardon that completely exonerates a convict from all consequences of the crime committed by him, a reprieve that can stay the execution of sentence for a temporary period of time such as till the pendency of mercy petition, a respite that may postpone the punishment of a criminal on some special grounds such as pregnancy, insanity etc. or a commutation of sentence that can replace a sentence into a less severe sentence e.g. death sentence commuted to life imprisonment or rigorous imprisonment of the offender is commuted to simple imprisonment. It also includes a remission of a sentence that is basically a premature release of the convict from the prison e.g. if a person has been punished for 5 years imprisonment he may be released from the prison earlier if remission is granted to him.

The executive head of a State enjoys all types of pardon mentioned herein above. This power basically originated from the family itself where the head of the family was having power to forgive the family member if he committed any wrong against the wishes of the family. Later with the development of the society the King started the use of this power. Initially it was exercised for the purification of the offender. Under the Hindu law it was termed as *Prayaschita* (expiation). This *Prayaschita* or expiation is the oldest method of corrective measures for criminals. In the beginning it was exercised by the sinner himself. The *Vedas* contains so many measures for *Prayaschita*. Austerity, sacrifices, fasting and gifts were the main or principle measures. These methods remained in force even after the emergence of statehood. Thereafter the observation of this *Prayaschita* did not remain the subject matter of the sweet will of the wrongdoer only but the sovereign or a *Parishad* also imposed *Prayaschita* for the purpose of the purification of the wrongdoer.

Therefore it is clear that the power to grant pardon had been exercised by the King himself for the betterment of the person concerned. With the passage of the time the law was codified. Before the era of codification of law the power to grant pardon was being exercised as a corrective measure. The basic purpose or objective remained same throughout this period of time. Such powers of mercy were also exercised in India by the Mughal Emperors and rulers.

It is not only India where this power to grant pardon has been recognised. Almost all civilised countries make use of some forms of pardon power to give flexibility to the administration of justice in criminal cases. In England this power historically is vested in the crown. It is one of the prerogatives which have been recognised since time immemorial as being vested in the sovereign. Whether the sovereign happened to be an absolute monarch or a popular republic or a constitutional king or queen, sovereignty has always been associated with the source of power - the power to appoint or dismiss public servants, the power to declare war and conclude peace, the power to legislate and the power to adjudicate upon all kinds of disputes. The King, using the term in a most comprehensive sense, had been the symbol of the sovereignty of the State from whom emanate all power, authority and jurisdictions.

Just like England, in the United States, the power to grant pardon has been conferred on the head of the State i.e. the President. Although here the provision is contained in the Constitution but this power has been conferred upon the President on the norms and conventions that remained in existence in the soil of United Kingdom. As a matter of fact it has been accepted by the Supreme Court of United States that by choosing to repose the clemency power in the chief executive alone, the framers of the Constitution of United States aligned themselves with a vision of the power that was decidedly British in nature. Just like United States, in India when the Constitution was framed the Constitutional Fathers were well aware of the position of the pardoning power in these two countries and they adopted the same pattern that was applicable in these two countries.

There are different philosophies underlying the pardoning power. The main philosophy as per the American Jurisprudence 2d, is that every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. 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.

However, in another rationale felicitously enunciated by the celebrated *Justice Holmes*, of American Supreme Court, a pardon is not a private act of grace from an individual happening to possess power, rather it is a power of the constitutional scheme which when granted, is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. These observations of *Justice Holmes* have also been approved by different benches of Judges of the Supreme Court of India.

Keeping in mind the same rationale of public welfare *Justin Miller* one of the great jurists, called it as 'crime treatment' and imposed the duty of treatment on the authorities. He believes that in the field of crime treatment the persons who are charged with the custody and control of persons convicted of crime occupy much the same position as do the pathologists in the field of treatment of disease.

The other exposition known as classic exposition of the law relating to pardon is to be found in the judgment of *Justice Taft* of the Supreme Court of America. According to him the executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the 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 been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

The legal effect of a pardon is wholly different from a judicial suppression of the original sentence. The partial effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. The other effect is that a pardon reaches both the punishment prescribed for the offence and the guilt of the offender and when the pardon is full, it releases the punishment and blots the existence of guilt, so in the eyes of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction, from attaching if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man and gives him a new credit and capacity.

Not always but occasionally it has been felt right to commute the sentence on the ground that it would do more harm than good to carry out the sentence. The reason for the arousal of such feelings is that pardoning power is founded on considerations of the public good, and is to be fair, which is the legitimate object of all punishments and will be well promoted by a suspension of an execution of the sentence. It may also be used to correct injustice, if discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made in the operation enforcement of the criminal law.

So far as the position of pardoning power in India is concerned the power to grant pardon is contained in so many different legislations. These legislations confer the power to grant pardon on different authorities. The very first legislation containing power to grant pardon is the Constitution of India. The Article 72 of the Constitution confers the power on the President of India to grant pardon, reprieve, respite, remission or commute sentence of any person convicted of any offence in all cases where the sentence is by a court martial or where a sentence is for an offence under a central law or where the sentence is a sentence of death. The Governors can also exercise the same power under Article 161, but only in cases of offences falling under the state laws.

In addition to these above constitutional provisions the other statutes that contain the power to grant pardon are the Criminal Procedure Code, 1973 that provides for the exercise

of power by the Courts and the appropriate government, the Indian Penal Code and the Prison Act that confer this power on the appropriate government. The Probation of Offenders Act also contains this power and it empowers the Court to exercise this power in certain specific cases. Beside these the power to grant pardon can also be exercised under as many as five legislations relating to the Armed forces. These legislations empower the central government and some officers to exercise the power to grant pardon.

The power to grant pardon conferred by these different statutes on the executives other than the Court is based on the same principle on which the constitutional power to grant pardon can be exercised. But the objective behind conferring the power to grant pardon on the Court is different. In cases of pardon to an accomplice the court aims at punishing the main criminals in a case with the help of such accomplice. But in case of release of offender on probation, the court keeps an eye on the objectives of rehabilitation of the offender.

Thus on the basis of the above discussions it is evident that basic objective or purpose of the power to grant pardon generally remained the purification of the sinner but presently it is called to be the rehabilitation of the offender. Although initially it was known and recognised as an act of grace but with the passage of time the Courts termed it to be a part of constitutional scheme that is to be used only for the public welfare. The other object of this power is to correct a possible judicial error. It is also useful for protection from unjust or harsh law. Thus it can be said that the power to grant pardon can be exercised by the head of the state for rehabilitation of the offender keeping in mind the public welfare and to provide relief from judicial error or harsh laws.

But despite these noble causes this power remained a matter of controversy because of the misuse and abuse of this power for political or other wrongful purposes. The history of United States is full of the examples of misuse of this power. In United States this power has been exercised to provide relief to rich, politically influential persons and the terrorists as well. In fact the possibilities of the abuse and misuse of power are inherent in the pardon power.² The common causes of misuse of the power are as under:

Political Influence:

The political influence is the major factor behind the abuse or misuse of the pardon power. The biggest example of the same lies in the United States which is the most criticised and objected pardon of the former *President Richard Nixon* as it represented the ultimate cover up of the "*Watergate Scandle*."³ The main reason behind the criticism was that the order prevented the operation of the investigator and judicial system from obtaining the truth with regard to the involvement of *Richard Nixon* in *Watergate Scandle*.⁴

At times the Executive may exercise the power of pardon on grounds as political vendetta or party favouritism that may make the actual exercise of the power of pardon vulnerable. *Justice Shankaran* of Kerala High Court referred to successive (State) Governments exercising the power of pardon which according to him, tantamount to "legalised discrimination."⁵ Such a situation may create a feeling among the followers of a political party that they can easily get pardon and remission when their party comes into power. In fact, granting of pardon in such type of politically motivated cases destroys the deterrent effect of the punishment as well. Even the Supreme Court of our country took a serious note of the misuse and abuse of the pardoning power and in a recent judgment the court observed that:

An undue exercise of this power is to be deplored. Consideration of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule

of Law. That rule cannot be compromised on the ground of political expediency.⁶

Economic Reasons:

When the entire world is suffering from the problem of bribe in each and every field then how the power to grant pardon can remain untouched. The rich persons who commit a crime may influence the decisions of executives. The major example of such an influence lies in United States. In the year 1993 George Herbert Walker Bush pardoned Cox.⁷ Eleven months after the pardon, oil magnate Edwin Cox the father of Cox pardoned by Bush, donated a huge amount to the Presidential library.⁸

Status of Victim:

Status of victim may also become a cause for the misuse or abuse of the power to grant pardon. If the convict committed the crime against some strong and well established person then it will be quite difficult for him to obtain a pardon. A few thinkers quote the example of the assignation of Mrs. Indira Gandhi. In this case one of the convict was of 21 years of age. It has been alleged that although the young age is one of the grounds on which the President of India may exercise the power to grant pardon under Article 72 of the Constitution of India, but in this case the young age of the convict was not taken into consideration while deciding his mercy petition. But the researcher does not agree with this view because a bodyguard can never be expected to do such type of a crime. The allegation could have been true if in place of bodyguards it were the normal human beings.

The victim may play a great role. It is not possible to rule out completely the influence of the status of the family of the victim. For example if a person kills the ward of a Prime Minister of a country then he can never expect for mercy in that case from the same government. The family or friends of victim, in order to make it sure that the offender shall be punished, will definitely take care of the case in the court of law and the President's office as well.

Lack of Accountability:

The power to grant pardon conferred on the head of state is a discretionary power and generally it is out of the scope of judicial review. It is a well known fact that the power corrupts and the absolute power corrupts absolutely. If we will permit a power to run riot then definitely it is going to cross the limits. Therefore, this lack of accountability is a major cause of concern. It is because of this nature of pardoning power that some of Presidents of America abused the power so many times.

Lack of Procedure and Guidelines:

The power to grant is suffering a lot because of lack of proper procedure and the guidelines. In absence of guidelines there are high chances of misuse and abuse of the pardoning power. Even in our country no specific statutory guidelines have been framed for the purpose of the exercise of the power under the constitution.

Misrepresentation by convict:

It is quite possible that in order to obtain an order of pardon the convict may misrepresent the facts before the authority. Although the law provides for the revocation of pardon if found to be based on misstatements, misinformation or misrepresentations.⁹ The presence of law for punishing the criminals cannot prevent the criminals from making the misrepresentations as it is inevitable.

Role of Media:

In today's world, media has made a very special place for itself in our lives. Especially it plays a crucial role in shaping a healthy democracy. It is the backbone of a democracy. Media makes us aware of various social, political and economical activities happening around the world. It is like a mirror, which shows us or strives to show us the bare truth and harsh realities of life. It may affect the decision of the authority. There-

fore in cases of pardon its role can be crucial as well by producing a clear picture before the public.

Conclusion:

The power to grant clemency, to remit punishment and pardon offences, is ancient and recognised today in almost every nation. As a matter of fact pardon is a mysterious alien presence that hovers outside the legal system. It is capable of undoing years of criminal investigation and prosecution at the stroke of a pen, but it is of questionable present-day relevance even for criminal law practitioners. Pardon is like a lightning strike or a winning lottery ticket, associated with end-of-term scandals and holiday gift-giving. It is also been called as capricious, unaccountable, inaccessible to ordinary people, easily corrupted, and regarded with deep suspicion by politicians and the public alike. To the extent that scholars think about it, pardon is regarded as a constitutional anomaly, not part of the checks-and-balance package, a remnant of tribal kingship tucked into the Constitutions of almost all civilised countries that has no respectable role in a democracy. One of pardon's few friends in the academy has called it "a living fossil" as well.

The researcher is of the view that it is better to frame certain guidelines for the exercise of pardoning power. Each and every pardon shall be covered under the same guidelines. Without guidelines it will not be possible to control this power. This power is useful but at the same time it is dangerous because there is no control over it.

1. Valmiki is the author of the epic story, Ramayan. But before he was a best selling author, he was a thief. Once, as he was about to steal a gold pot from the home of a yogi, the yogi appeared. The yogi did not stop Valmiki from taking the gold pot. But on his way home, Valmiki realised his sin. It was the turning point of his life. Now a days he is known as one of the biggest saints of our country.
2. P.J. Dhan, "Justiciability of the President's Pardon Power", 26(3&4) IBR 75 (1999).
3. Mondale, F. Walter, "Harnessing The President's Pardon Power", 4(1-4) JBCI 135 (1975).
4. Available at: http://en.wikipedia.org/wiki/Watergate_scandal, (Visited on January, 2016).
5. V.D. Mahajan, Constitutional Law of India 492 (Eastern Book Company, Lucknow, 1991).
6. Eperu Sudhakar v. Government of Andhra Pradesh, AIR 2006 SC 3385 at 3402.
7. United States Department of Justice, Pardons and Commutations Granted by President George H. W. Bush, available at: <http://www.usdoj.gov/pardon/bushgrants.htm>, (Visited on January, 2016).
8. Presidential Library, a Big Donation, available at: <http://www.time.com/time/nation/article>, (Visited on January, 2016); for details see, infra head note Development of pardoning power in United States.
9. Supra note 6 at 3398.