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CLEMENCY IN INDIAN LAW: THE CONSTITUTIONAL FRAMEWORK

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ABSTRACT

Clemency is a pardoning power that is vested in the Executive of the State. In India, clemency is recognized under Article 72 and Article 161 of the Constitution. The President and the Governors are empowered to grant pardon, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. Such power however suffers from the vices of curtailment on the discretion of the President and the Governor, wherein advise of the Council of Ministers is shadowed. The Researcher seeks to analyze the concept of clemency and the powers conferred upon the President and Governor in India.

I Introduction

The power of the executive wing of the State to grant pardons finds mention in the Constitution of India in two forms: first, the power of the President to grant pardon under Article 72 of the Constitution and second the power of the Governor to grant pardon under Article 161 of the Constitution. The power to pardon covers the power to suspend, remit, and commute sentences.

II Clemency: Terminology

It is important to note that the terms clemency and mercy are not used in the Constitution of India, however, it refer to pardons, reprieves, respites and remissions, suspension, and commutation. The difference between the terms is explained below:

Pardon sometimes also referred to as a 'free pardon' refers to an order that 'clears the person from all infamy and all consequences of the offence'.

Reprieve means to 'take back or withdraw the judgment for a time' and respite also similarly means delaying the punishment till a later date while a sentence beginning at a later date is covered by suspension.

Remission means the reduction of the quantum of the sentence awarded by the court without changing its character (e.g. a term of 10 years reduced to 5 years).

Commutation refers to the alteration of one kind of sentence to a lesser kind of sentence i.e. death sentence reduced to a term of imprisonment.¹

The present paper follows the practice of using the terms clemency and mercy (interchangeably) to include the various modes of reduction or change of sentence that are available in the constitutional provisions and discussed above.

III The Constitutional Structure

A. The Power of the President to Grant Pardons

Article 72 of the Constitution of India states:

(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.²

B. The Power of the Governor to Grant Pardons

Article 161 states: '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.'³The Constitution of India has conferred concurrent powers of granting pardon upon the President of India and Governor of the States. Although the powers are concurrent, as per the procedure the initial mercy petition must be sent to the Governor of the State. Only once it has been rejected is the mercy petition to the President even considered. Where the Governor grants clemency, the President does not have the power to overturn the decision on sit in appeal against it. Where however the President has rejected a mercy petition, a subsequent mercy petition should not be admitted by the Governor, instead it should be sent by the State Government to the Central Government.⁴

IV A Comparative Analysis of the Scope of Article 72 and Article 161

A plain reading of the Constitution of India would, by itself, reveal that the nature of the power of pardon granted to the President under Article 72 is far superior to the power of pardon granted to the Governor under Article 161. Two points of comparison that may be assessed from the explicit wording of Articles 72 and 161 might be stated in this regard: first, the power of the President to grant pardon extends to the power of pardon to sentences granted by a Court Martial, whereas there is no comparable power vested in the Governor of any state; and second, the President is expressly granted the power to consider *all* cases where the sentence of death has been granted. In practice, clemency is exercised not by the President but by the government. When the Constitution came into force, Article 74(1) merely read '(t)here shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President'. There had thus been dispute whether the President was bound by advice. As President of the Constituent Assembly Dr. Rajendra Prasad had sought clarity on the point that was referred to Attorney General Setalwad. He expressed the view that the Indian Constitution was based on the British parliamentary system and thus the President was bound by the advice of the Council of Ministers.⁵This position was eventually endorsed up a seven-judge constitution bench of the Supreme Court in *Samsher Singh v. Union of India*.⁶ that amended Article 74' Article 74(1) now reads: 'There shall be a Council of Ministers with the functions, act in accordance with such advice.' Thus for all practical purposes, the decision on a mercy petition is arrived at within the Ministry of Home Affairs (MHA) as the subject has been allocated to the Department of Home, MHA vide the second schedule of the Government of India (Allocation of Business) Rules 1961.⁸ A memorandum on the case is prepared by a junior official in the Ministry and on the basis of the same, a Joint Secretary or an Additional Secretary 'recommends' a decision to commute the death sentence or reject the mercy petition. This 'recommendation' is considered by the MHA who makes the final 'recommendation',

on behalf of the Cabinet of Ministers, to the President. The proviso to Article 74(1) provides the President with only one opportunity to return the 'recommendation' for the decision to be reviewed. If no change is made, the President has little option but to sign his assent.

VA Textual Interpretation of the Constitution of India

Article 74(1) of the Constitution states that the Council of Ministers headed by the Prime Minister would aid and advise the President, "who shall, in the exercise of his functions, act in accordance with such advice". Similarly, Article 163(1) of the Constitution states that the Council of Ministers headed by the Chief Minister would aid and advise the Governor in the exercise of his functions. However, Article 163(1) differs from Article 74(1) in one important respect, since the former half of the provision is qualified by the latter, which states: "except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion".³ Further, Article 163(2) provides that if a question arises as to whether a certain matter requires the Governor to act in his discretion, the decision of the Governor in his discretion would be final and the validity of such decision cannot be called a staunch silence regarding the guidelines on the basis of which such power in to question on the ground that he should not have acted in his discretion on the matter.¹⁰ Articles 72 and 161 expressly use the term 'power', and maintain is to be exercised. The use of terms such as 'mercy', 'clemency' and 'grace' in relation to this power indicate that it is intended to be in the nature of a prerogative, entirely based on the subjective satisfaction of the President and Governors. An inference that the President and the Governor would not be bound by the advice of the Council of Ministers while exercising the power to pardon does not seem unjustified, on a bare reading of the text of the Constitution.

VI Judicial Precedents

Although 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. In *Samsher Singh v. State of Punjab*,¹¹ seven-judge bench of the Supreme Court held 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 judgment in *Samsher Singh* was applied to the power of pardon in the case of *Maru Ram v. Union of India*,¹² where the Supreme Court held that it is not up to the President or the Governor to take independent decisions while deciding whether to pardon an individual, since they are bound by the advice of the Council of Ministers.

VII Conclusion

A study of the prevailing situation indicates that there is a need to find a reasonable solution such that the exercise of the pardoning power is based on equitable and logically sound reasons and that the advice of Council of Ministers should be considered only when appropriate. It is recommended that there should be a constitutional amendment which expressly vests the power to pardon in the President or Governor in accordance with their discretion and that such discretion should be exercised after distinguishing between situations where the advice of the Council of Ministers is extremely important and those situations where giving effect to the advice tendered by the Council of Ministers would be most obviously problematic and raise doubts as to the correctness of the decision to grant or deny pardon. Thus, to deny the President and Governor the discretion vested in them by the Constitution would fail to serve the purpose of justice.

References

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5. See Granville Austin, *The Indian Constitution*, at 135, 141-142.
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7. 42nd Amendment of the Constitution, 1976
8. See the schedule at http://cabsec.nic.in/abr/abr_scnd.htm (last accessed 28 April 2018)
9. Article 74(1)
10. Article 74(2)
11. *Samsher Singh v. State of Punjab and Anr.*, (1974) 2 SCC 831
12. *Maru Ram v. Union of India*, (1981) 1 SCC 107