



PARDONING POWERS IN INDIA: ANOTHER TUSSLE BETWEEN THE EXECUTIVE AND THE JUDICIARY

*By Raghav Kansal
From National Law University, Odisha*

HISTORICAL DEVELOPMENT

A pardon is simply an act of forgiveness or mercy. The very concept of pardon has been prevalent in the world, among various societies, communities and civilizations having no contact with each other and it has been traced back to the era of monarchs who had absolute powers to punish or acquit anyone under their jurisdiction. The Code of Hammurabi, one of the oldest codified set of laws known to us today also contains and describes the practice of pardon and states certain situations and circumstances where the punishment could be mitigated¹. It even goes on to state that this power could be exercised at any point before, during or after the proceedings had taken place. Such powers, in earlier times were a symbolic representation of the “Divine Power” theory of the monarchs as it gave them the somewhat supreme control over the life and death of their subjects.

The power to pardon anyone found guilty or convicted for the commitment of any crime or offence was vested with the British monarch during the era of British rule in India. From the year 1935, that is, via the

Government of India, 1935², this power was given a legal status through its provision in Section 295 of the said act.³ Today we find that this power is still provided for much more authoritatively, especially in India through Articles 72 and 161 of the Indian Constitution. Article 72 grants the power of pardoning to the President but it does not restrict this power to that only, rather it extends to “suspend, remit or commute sentences in certain cases”⁴ Prof. Kenny has stated that the power of remission of any sentence shall reside with the crown, it is to exist at all.⁵ India, however, is a democracy⁶ and the president is the executive head⁷ of the state and hence the power to grant pardon shall reside with him (and the governors since they are the executive head of the states)

As can be observed from the ancient eras as well, the power to pardon has been held by or conferred upon the monarch or an individual who was considered the supreme authority of the land. In India, the President, who is the head of the State, holds this extraordinary and unique power, is however, not the only in possession of this power. The Governor of each and every state in India also holds this power. This power has been given to the Governors via Article 161 of the Indian Constitution. The consequences and meaning of a pardon is not that it overturns the decision of the court of law as it cannot do so; rather it merely mitigates or completely eliminates the effect or the outcome of the court’s decision without undermining the

¹ J.P.Rai, “Exercise of Pardoning Power in India: Emerging Challenges” The NEHU Journal, Vol XII

² The Government of India Act, 1935

³ Supra 1

⁴ The Constitution of India

⁵ Abhishek Kumar Pandey, “Presidential Pardon and Judicial Review”

<<http://www.legalserviceindia.com/article/1149-Presidential-Pardon.html>> as accessed on 29th March 2019

⁶ The Constitution of India

⁷ Article 52, The Constitution of India



validity of the same.⁸ Ram Jethmalani, a senior advocate in the Supreme Court of India does not concur with this definition of a pardon. According to him, the power of pardoning is a constitutional power of the president to disagree with the courts both in its findings of fact and law, and should not be confused with or regarded a plea of mercy.⁹

JUDICIAL REVIEW OF PARDON

The Constitution of India has conferred the pardoning powers on the President and the Governors of all the states through articles 72 and 161 respectively. What these sections provide for is that the President and Governors shall act on their own discretion, intellect and understanding when a case or situation shall come to their notice or if an appeal is made to them. It is also provided in the Constitution that the President shall act on the aid and advice of the council of ministers headed by the Prime Minister¹⁰. Any ambiguity regarding the binding nature or any such advice tendered to the President by the council of ministers was done away with via the Forty-second Amendment Act (1976) which stated that the shall, "act in accordance with such advice" which implies that the President shall be bound by the advice. In situations where an appeal is made to President for pardoning or alteration/mitigation of any sentence pronounce by a court of law in India, the

President shall once again be compelled to act on the aid and advice of the council of ministers, even though there is no express provision for the same and thus there is nothing to stop the council from interfering in such matters.¹¹ In *Dhana*¹² v State of West Bengal, the SC held that the powers under Articles 72 and 161 were to be exercised by the central and state governments, and not by the President or Governors or their own.¹³

A similar situation exists with regard to the powers of the Governors as well. There exists a council of ministers headed by the Chief Minister or the state to aid and advice the Governor of that particular state.¹⁴ There is however an exception to this convention that in certain cases the Governor need not work on the aid and advice of the council of ministers where he or she is required to act on his or her own discretion under the Constitution itself.¹⁵ Here however, there is no statement which expressly categorizes the pardoning power of the Governor as a discretionary power and hence once again the executive can interfere in these matters.

The *Epuru Sudhakar*¹⁶ case: the facts of this case are that a PIL was filed challenging the order of remission passed by the then Governor of Andhra Pradesh, Sushil Kumar Shindi, of a convicted congress activist. The main contention was that the relevant material was not placed before the Governor

⁸ Justice Kapadia, "Clemency Powers Open to Judicial Review"

<<https://www.outlookindia.com/website/story/clemency-powers-open-to-judicial-review/232784>> as accessed on 29th March

⁹ "The People's Paper". Tehelka. 28 October 2006.

¹⁰ Article 74(1), The Constitution of India

¹¹ Presidential Pardon and Judicial Review,

<<https://www.gktoday.in/gk/presidential-pardon-judicial-review>> as accessed on 27th March 2019

¹² (1994) 2 SCC 220

¹³ Aditya Dube, "Pardoning Power of the President and Governor"

<<http://www.advocatekhaj.com/blogs/index.php?bid=818515a96137da34755614124&bcmd=VIEW>> as accessed on 30th March 2019

¹⁴ Article 163(1), The Constitution of India

¹⁵ Ibid 14

¹⁶ *Epuru Sudhakar and Anr v Government of Andhra Pradesh and Ors*, AIR 2006 SC 3385



and that the decision was taken without any scrutiny, thinking or application of mind. The question here arose whether the pardon of any sentence came under the jurisdiction of the courts and whether it could be judicially reviewed or not?¹⁷ Justice Pasayat firstly states the very need for the existence of a provision such as a Presidential pardon or a pardon by the Governor. He states that such a provision is necessary as it helps in achieving the goals of social welfare of the society. He says, that a person convicted and sentenced by a court of law seems in all rationality to be reformed person and not and someone who create a harmful impact on the society, then such person(s) shall have the option of availing this remedy since even though they are supposed to be punished under the provisions of law which they have violated, what we must remember is that a major object of law is not only to deter but also to reform¹⁸ and if the reformation has taken place without having to go through the prescribed punitive process, then such a pardon would help in achieving the goal of social welfare through law.¹⁹

The Hon'ble Justice has then compared the concept of pardoning with other countries. He states that in India, this power is a

responsibility given by the Constitution and must be exercised with great care and discretion, whereas in England it is exercised as an act of grace and in the United States it operates mainly as a constitutional scheme.²⁰ He then goes on to differentiate between the judicial power of the courts to hear a case and pronounce a judgement and the act of giving a pardon after scrutiny of the facts and material by the President (we must include the position and power of the Governors as well) which is constitutionally given power and is exercised in the capacity of the their position as a part of the executive wing of the State administration. He reiterates that these two should under no circumstances be compared or considered similar in any regard.²¹ The President does have the power to look into the merits of a case irrespective of the fact that the courts have already pronounced their decision on the matter²². The question then arose whether the pardon by the President could be regulated, supervised or would be completely free from judicial review? The judgement of the SC in the *Maru Ram* case was relied upon where the court had said that Article 72 shall be used arbitrarily or with a mala fide intention.²³ A similar observation was made in *Swaran Singh v State of U.P.*²⁴ It was held that the

¹⁷ Sandhya Shyamsundar, "Judicial Review over Presidential Pardon" <<https://lexquest.in/judicial-review-presidential-pardon-analysing-case-epuru-sudhakar-v-state-andhra-pradesh/>> as accessed on 27th March 2019

¹⁸ American Jurisprudence 2d, 5 (1964) <https://lexquest.in/judicial-review-presidential-pardon-analysing-case-epuru-sudhakar-v-state-andhra-pradesh/#_ftn2> as accessed on 29th March 2019

¹⁹ Vol 67-A Corpus Juris Secundum, Pardon and Parole, 16-17 (1955) <https://lexquest.in/judicial-review-presidential-pardon-analysing-case-epuru-sudhakar-v-state-andhra-pradesh/#_ftn2> as accessed on 28th March 2019

²⁰ J.P.Crouch, *The Presidential Pardon Power*, 88 (1st ed., 2009) <https://lexquest.in/judicial-review-presidential-pardon-analysing-case-epuru-sudhakar-v-state-andhra-pradesh/#_ftn2> as accessed on 29th March 2019

²¹ *Kehar Singh v. Union of India* (1988) 4 SCC 75
²² *Ibid* 21

²³ *Maru Ram v. Union of India* AIR 1980 SC 2147

²⁴ Vijayshankar Na, "Power to pardon should be subject to mandatory judicial review" <<https://www.naavi.org/wp/power-to-pardon-should-be-subject-to-mandatory-judicial-review/>> as accessed on 30th March 2019



order of the President can be reviewed strictly according to the limitation as laid down in the case.²⁵

In the Tata Cellular case²⁶ it was decided that when the court reviews a presidential pardon, it does not act as a court of appeal but as a court deciding the legality of the act done, reviewing the manner in which the decision was made.²⁷ The main concern of the court would be to determine whether the President has exceeded/abused his power or committed a blatant mistake or breached the principles of natural justice.²⁸ Justice Pasayat goes on to state that the scope of Article 72 is very wide and it is not specific in nature. Also the President shall act reasonably while the courts must also not be looking to usurp the discretion given to the President by the constitution.²⁹ The test of reasonability is proposed by the SC but Harold. J. Kent argues that only when the President's decision shocks the conscience should there be a scope of review.³⁰ He further goes on to say that since President's have often imposed certain conditions upon the beneficiary of their pardon, the society must be understanding enough to accept a person released early or not imprisoned at all at certain conditions instead of accepting only those who have completed their sentence.³¹

As has been stated earlier, the act of pardoning a convict by the President or a Governor is an executive action independent

of any judicial or legislative aspect. What we must keep in mind here is that both the President³² and the Governors³³ are to work on the aid and advice of the council of ministers. Now since it has been established that when the SC decides the validity of a pardon, it does not do so in the capacity of a court of appeal. Then by what authority can the SC review this decision, since a pardon is given after the courts have passed their decision? It has been held in the SR Bommai case that though the decision of the President shall not be judicially reviewed, the material on the basis of which such decision was reached can be reviewed.³⁴ A similar observation was made by the SC in Syed Haqshadi v State of J and K.³⁵ If we compare the reviewability of the pardoning power in other countries, we see that in both the United States of America³⁶ and Pakistan³⁷, this power is conferred upon the president of the respective nations by the constitution in the absolute sense thereby leaving no scope for scrutiny³⁸. The only consequence of an allegedly wrongful pardon given by the President of the U.S is that impeachment proceedings may be initiated against him, but there can be no question raised as to the validity of the act in a court of law³⁹

DISTINCTION BETWEEN POWERS OF THE PRESIDENT AND THE GOVERNORS

²⁵ Ibid 23

²⁶ *Tata Cellular v. Union of India* 1994 (6) SC 651

²⁷ Supra 17

²⁸ Ibid 26

²⁹ W. Wade and C. Forsyth, *Administrative Law*, 457 (1st ed., 1961)

³⁰ "Conditioning the President's Conditional Pardon Power", *California Law Review* Vol. 89, No. 6

³¹ Ibid 30

³² Supra 10

³³ Supra 14

³⁴ *S. R. Bommai v. Union of India* [1994] 2 SCR 644

³⁵ 1977 110 ITR 217 J K

³⁶ Article II, Section 2, The U.S Constitution

³⁷ Article 45, The Constitution of Pakistan

³⁸ Supra 5

³⁹ Supra 5



The powers of the President and of the Governors as laid down in Articles 72 and 161 of the constitution are constitutional in nature and have been described as “residuary sovereign power” by the SC⁴⁰. Thus it is established that the powers are not executive in nature and therefore such powers of the Governor cannot be infringed, curtailed or interfered with by the President or the centre via an executive decision⁴¹. Hence, the provisions of Article 257⁴² shall be inapplicable when it comes to the pardoning powers of the Governor.⁴³

If we speak in terms of which article provides greater power to the holder, then Article 72 is the one which gives the President much wider powers to be exercised and in cases of much more gravity and influence⁴⁴. The President can grant a pardon to those tried and awarded a Court Martial and also those who have been awarded the death penalty⁴⁵.

CONCLUSION

The laws in any country are set or enacted for mainly deterrence and to ensure maximum social welfare. Judges decide cases based on the law, and it is their duty to pronounce their judgements accordingly, but the laws are not always just nor are the judicial processes and

methods the flawless way of securing justice. Here is where the need of Pardon is justified and therefore vesting such power in an authority other than the judiciary has been recognized.⁴⁶ What the official pardon does is that eliminates only the effects or the consequences of a court’s sentencing decision, not its findings, that is, it does not take a stance as to whether the court was correct in finding the person guilty of the crimes he or she was accused of.⁴⁷

The power to pardon lies with the executive and it is not listed or provided for not only in Articles 72 and 161 but also in the Criminal Procedure Code, 1973⁴⁸ and the IPC, 1860⁴⁹.

The act of pardon is subject to different kinds of scrutiny or no scrutiny at all in various countries. In England, there is a very limited scope for a judicial review of a pardon but in India the scope is not very narrow.⁵⁰ It has been repeatedly held by the SC, also in the case of William Wells⁵¹ that the power can be subjected to review if it seems that it has not been used judiciously, and used arbitrarily. The power and authority of judicial review has been recognized as a part of the basic structure of the Constitution by the case of *Minerva Mills v Union of India*.⁵³

⁴⁰ <t http://www.pucl.org/Topics/Death-penalty/2011/letter_to_cm.pdf> as accessed on 30th March 2019

⁴¹ *Daya Singh v Union of India*, (1991 (3) SCC 61)

⁴² The Constitution of India

⁴³ *State of Punjab v Joginder Singh*, 1990 (2) SCC 661

⁴⁴ Supra 13

⁴⁵ Supra 13

⁴⁶ H.M Seervai, “Constitutional Law of India” < <http://elearning.vtu.ac.in/P3/CIP71/7>> as accessed on 30th March 2019

⁴⁷ “POWER TO PARDON: AN ANALYSIS”

<[https://www.lawteacher.net/free-law-](https://www.lawteacher.net/free-law-essays/administrative-law/power-to-pardon-an-analysis-law-essays.php?vref=1)

[essays/administrative-law/power-to-pardon-an-analysis-law-essays.php?vref=1](https://www.lawteacher.net/free-law-essays/administrative-law/power-to-pardon-an-analysis-law-essays.php?vref=1)>

⁴⁸ Sections 432, 433, 433A, 434 and 435

⁴⁹ Sections 54 and 55

⁵⁰ Lewis, “Judicial Remedies in Public Law” < <http://www.legalserviceindia.com/article/1370-Presidential-Pardon.html>> as accessed on 30th March

⁵¹ 59 U.S. 18 How. 307 (1855)

⁵² Kaushal Shroff, “Presidential Pardon: A legal, historical and political perspective” <

<http://www.legalserviceindia.com/article/1370-Presidential-Pardon.html>> as accessed on 30th March

⁵³ AIR 1980 SC 1789



Time and again, the SC has clarified, as it did again in the case of Mansukhlal Vithaldas Chauhan v. State of Gujarat⁵⁴ that when reviewing a pardon decision, the SC does not function as a court of appeal but a court sitting to determine the procedural validity of the decision.⁵⁵ The courts however must also interfere as little as possible in these matters for the executive to exercise its powers given to it by the constitution.⁵⁶

The powers of the Governor are similar to that of the President's as has been enumerated in Article 161 though its scope is not as wide⁵⁷. The instance of a judicial review even in the Case of a Governor's pardon shall arise only when the Governor's act seemingly violates the procedure laid in Maru Ram⁵⁸ case as it is for the President.⁵⁹

Although the Governor's power is restricted to his state only, and only it narrower in scope when compared to the President's power, this power granted to the Governors is still constitutional in nature and thus it can't be altered, reversed or interfered with by an executive overriding decision by the centre via the order of the President.⁶⁰

⁵⁴ 1997 (7) SCC 622

⁵⁵ Supra 17

⁵⁶ Supra 47

⁵⁷ Supra 13

⁵⁸ 1981 SCR (1)1196

⁵⁹ Dr Subhash C Kashyap, "Constitutional Law of India"

<<https://www.lawyersupdate.co.in/constitution-of-india/article-161-power-of-governor-to-grant-pardons-etc-and-to-suspend-remit-or-commute-sentences-in-certain-cases/>> as accessed on 30th March 2019

⁶⁰ Supra 43