

PARDONING POWER OF THE PRESIDENT UNDER THE CONSTITUTION OF INDIA – A CRITICAL ANALYSIS

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INTRODUCTION

Pardon is an act of kindness given to a person sentenced to death by the State, setting aside the consequences of his criminal acts and giving that person another chance to live his life like any other citizen of the State. This power can be exercised by the head of state, but a person seeking such mercy cannot ask for it as a matter of right. Such pardon may be absolute or conditional. Absolute pardon is when a convicted felon is released from a sentence imposed by the courts and does not have to spend another minute in custody and is released from the jurisdiction of any pending sentence and is completely acquitted of his charges. However, conditional pardon is where the effectiveness of the punishment depends on the completion of certain conditions. The commutation of death penalty to life imprisonment is an example of a conditional pardon. It is not necessary that the convicted person shall accept the pardon; as such an acceptance would be tantamount to admitting the offense and would deprive him of the right not to testify in a court of law against him. The article 20 (3) of compelled to be a witness against himself." In *Nandini Satpathy Vs. P.L. Dani*, It was held that, the right extends to witness and accused alike, that the expression accused of any offence, must mean that a person formally accused in "present not in future", that it applies at every stage at which furnishing of information and collection of materials takes place, that the privilege extends not only to the deployment of the information obtained as evidence in a criminal prosecution, but to the extraction of the information itself. The position of President of India includes a number of functions that he is required to perform in order to function effectively in government. This includes administrative, military, and judicial functions. The power of the chief to pardon is the same in

many democratic countries and India is no different. However, the debate over the use of such power continues and the interpretation by the Court of Justice continues to be the subject of such debates. These debates stem from the process of changing the procedure of exercising the facility, to eliminate the influence given to the head. In such a case, a better examination of the use of such force requires attention because the execution can only be given where unusual cases are found in India. Although the laws impose the death penalty; a certain number of executions hangings held in India have dropped dramatically within the past decade. For instance, over the past decade (2000-2010) one judicial execution has been done.

The ironical situation is that the implication of the provisions of pardoning or mercy or clemency isn't uniform. Modern mercy provisions in India can best be seen as a layer of justice in the hands of a chief. The power to pardon also provides extensive interplay between the heads and the courts. Lack of effective crime management and delays in eliminating execution cases undermine the very purpose of such penalty. India is an independent country that believes in Justice, Equity and Good Conscience and offers the opportunity to choose the mercy petition to the individual, so that they can benefit from the pardon. However, such a profitable arrangement was in danger of being misused practice of The Purpose of granting Pardon- The basic philosophy of the power of pardon is that "all developed countries recognize and use the mercy, so as long as the power of pardon is to be used as an act of kindness and humanity. Pardon remains relevant and important today for the needs outlined below: The power of pardon is based on the well-being of the community and should be exercised for the welfare of the community. The legitimate purpose of all punishments, are going to be also promoted by a suspension as by an execution of the sentences. Pardon can be very helpful in rescuing an innocent person from punishment due to miscarriage of justice of in situations of uncertain belief. The prospect of pardon in itself is an encouragement to a convicted felon to behave responsibly in prison, thus helping to solve the disciplinary problem of imprisonment. It is always better to choose to convict the offender than to convict an innocent person, thus the object of pardoning power is to correct possible judicial errors, for no human system of judicial administration are often free from imperfections.

Need for the Power of Pardon- There are arguments for granting mercy within the context of the three social institutions. The three centers are the Police, which are the evidence granting

machinery after which are the courts which adjudicate the cases and decide the appropriate sentence; hence the Executive, which deals with mercy petitions.

First of all, there is no need to stress the fact that in India we have bad, corrupt, dishonest and criminal police in India. Evidence presented inside the court is evidence collected by the police. This evidence is so important that to adjudicate whether a person is guilty or not and whether a person should be sentenced to death or not. In view of such evidence, collected by the Police; it itself raises a major point of inquiry, whether it is really safe to treat people sentenced to death in the sense of evidence gathered by the police.

Secondly, the second most important institution involved in the execution is the judiciary. The judiciary is erroneous and flawed, like any other institution in India. It contains the same people who build other institutions in the community and can sometimes lead to the wrong decision. And also, because the pretext for execution, i.e. 'rarest of rare', is inherently so subjective, that there are sure to be varying opinions on an equivalent issue. The Supreme Court has been engaged in soul-searching and that they are admitting time and again, that their own execution jurisprudence is bigoted, and not in the least consistent; that the proper to equality before the law has been considerably violated. In *Bachhan Singh v. State of Punjab* the court held that the judges would need to check circumstances concerning the crime, also as out both, the circumstances concerning the criminal. In this case, Justice Bhagwati, a former judge of India, said that the Supreme Court has been awarding death penalties "arbitrarily and freakishly". Examples are abounding of "a pattern of confusions, contradictions and aberrations" in death-penalty judgments. Identical cases are treated differently so often on become an explanation for real concern. Thus, the thing of pardoning power is to correct possible judicial errors, for no human system of judicial administration are often free from imperfections.

Thirdly, the way by which the people are executed. There's a really good reason to retain the facility of pardon: to correct error within the judicial administration, temper justice mercifully and to try to justice within the widest sense of the term. This is often why all the countries across the world have a mercy power, if we see the recent trend of executions.

Interpreting the pardoning power- The Constitution of India under Article 72(1) the President has power to grant Pardons, Reprieves, Respites, Remissions of Punishments or to suspend, remit or commute sentence of any person convicted of an offence where punishment or

sentence is by a court martial, is for an offence against any law relating to a matter to which the executive power of the union extends, in where the sentence is a sentence of death.

HISTORICAL PERSPECTIVE OF THE PARDON POWER

Historically, the executive's power to pardon was exercised by the sovereign. The Power of Kings was sacred and therefore infinite. The king could order even that which was against the law. The power of pardoning originally originated in ancient Athens. The Athenian society was by nature very democratic and full of human power. Gaining pardon from the people in power or from the king was very difficult and not a substantial thing in Athenian society. Pardon is described as "an act of executives that reduces or sets aside the penalty for a crime." Generally, pardon means an act of forgiveness and the understanding and exercise of the power of pardon is often associated with ideas of mercy and righteousness.

According to Black's law Dictionary; Justice, liberty and particularly equality are the hallmarks of the Indian Constitution. Freedom, of course is the basic human right and when these three are coupled together, it ensures that justice is served to all which was the aim of the founding fathers of Indian Constitution Pardon is an act of kindness, forgiveness, clemency. Pardon's sentence means acquittal of the perpetrator from a sentence imposed by a judge in accordance with the law. This power to free the evildoer was an exclusive privilege of the sovereign. It is confidential, through the official actions of actions, provided to that person who is intended to benefit himself and has not been formally notified in court. The lawless use of the power of pardon is based on the idea that it is part of the judicial system that judges see only with the eyes of the judiciary. Therefore, the exercise of this power begins at the end of the judicial process.

Origin of Pardon Power- The word pardon originated in the late 136 century, in medieval English, ancient French and Latin, but the word mercy exists since the end of the 11th century, having a similar meaning. A pardon may be granted to the guilty criminal even during sentencing, provided that the prisoner receives a request for mercy from the king, however, the power to accept or reject such a request was totally based on the king's discretion.

According to Roman tradition, the concept of mercy can also be traced back to the 3rd century B.C. when the gladiators after their loss would apologize to the emperor, and the emperor

would simply with his thumb determine the fate of the gladiator, when the stabbing movement would mean the killing and thumping of the thumb inside the fist would mean cutting the sword and letting him live Often in such cases the king listened to the public opinion while granting such pardon or death. In Rome, a process known as 'Adeia' facilitates democratic forgiveness of persons, such as athletes, speakers and other powerful individuals, who successfully obtained the approval of at least 6000 citizens by secret ballot Although the basis for this power of forgiveness was not the administrative right, it is not difficult to see the similarities in the concept of "Adeia's ancient and the modern practice of pardon".

The English concept of pardon was also borrowed by the U.S. Constitution which placed the power to pardon in the President of the United States under article 1 and article 2. The United States Supreme Court has clarified on more than occasion that the term 'pardon' should be given the same meaning under the United States Constitution as was given to it in England.

The kind of power of pardon in India can be traced back to the colonial era. The historical background of the power of clemency in India is directly related to the Anglo-Saxon Model of jurisprudence which was famous in England, even though England did not have a written constitution. The right to pardon by the Emperor in England is that with the Constitution of India because India is a Democratic Republic and it has a written constitution to interpret. While under the British system, the King is the Head of State, under the Constitution of India, the President is considered Head of State, which may explain why the power of pardon has been given to him, and the State Officials, acting in a similar manner to the President.

According to Indian tradition, in the word 'Dharma Sastra'. 'Dharma' means law which eventually became the binding position of the king. According to the strict law of Raja dharma' the king is the only source of power to enforce the law without making a law. The reason was that the king should not act in accordance with his conscience because it directly and indirectly causes harm to himself, thus bringing injustice to the people. According to Dharma Sastra, the power to punish the condemned person is kept with the king. Where the greatness of the king's divinity is in question, it is strange that a convicted person can enjoy a pardon of judgment on the king's birthday or on all full days of the month or on the day of the Prince's inauguration or on the birth of a son to the king or on the day of conquest. Apart from that, the offer of pardoning has also been proven by the Fifth Edicts of Delhi Topro. The power of pardon also evident in the Tamil Literature, Silapathikaramin in which, the condemned prisoners were

released on the king's birthday and on the opening day of the temples. King Harsha IV also used to release prisoners on his birthday.

Ancient Indian criminal law, particularly the Yajnavalkya smriti exempts certain individuals from punishment such as older men (above eighty), boys under the age of sixteen, women or people suffering from diseases and children under the age of five. There was also a general rule that a Brahmin who committed a crime should not be sentenced to death or punished." In medieval times, the power to pardon can be found as the work of gentleness, especially in the reign of King Aurangzeb. The rule of the Islamic monarchy was very much based on the teachings of the Quran and the king was a worshiper and a communicator of God according to the Islamic concepts. The Emperor was a source of justice and the king's main occupation was to punish the criminals and to keep the law and order. The Emperor was the only authority to grant pardon as well. During British rule, the power to pardon remained in the hands of the British monarch. In 1790, the Moffusil criminal law had three components of a

Firstly, Magistrates at District level, secondly District Courts and thirdly, succession plan; Sardar Nizamat Adalat was the highest level of the Court, presided over by the Governor-General and the members of the Council for its final decision. A person deserving of favor may proceed before this Adalat and thus the Adalat may make recommendations to the Director-General of the Council regarding remission or reduction. Later, as a result of the merger of Moffusil and the Presidency, the pardoning power was enacted by the enactment of the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1861. These amendments empowered Viceroy and the Governor-General of India to exercise the right of pardon.

The modern practice of pardoning originated in a British structure where it was the Royal Right to Forgive. In today's democratic world, the power to pardon or to forgive is confined to the executives. In India, the law of pardon developed satisfactorily through the timely amendments to the Criminal Procedure Code. Finally, it was the decision taken by the makers of our Indian Constitution that pardoning power in the form of pardon, reprieves, respites, commutations and remissions is an important matter to be given to the highest honor of the country, the President of India under Article 72 and Article 161 of the Constitution. Therefore, with the application of the Indian constitution, the power to pardon, previously recognized under section 295 of the Government of India Act, 1935 is now constitutionally recognized, but the principles of exemption as set out in the Criminal Procedure Act remain valid for various purposes.

Independence and the Constituent Assembly Debates- Although the Colonial Government avoided the use of royal powers to grant pardon, this became inevitable after Independence as the powers of the Director-General were removed. Now the sole power of the Governor-General was to deal with petitions from the provinces and was granted to him under Instruction III of the Royal Commission appointing Lord Mountbatten as Governor General of India. Although, the source of power may have changed but the decision-making process was always controlled by the Governor-General, it is now assumed that the Governor-General, in exercising this power, will be guided by the advice of the Minister of Justice and the Minister of Home Affairs. The old internal process continued but all requests for mercy will now be accepted by the Department of Home Affairs and, after the above Ministers have recorded their views, they will be sent to the Governor General for final instructions.

In doing so it seems that as the first Governor-General of Independent India, Lord Mountbatten did not get too involved in the petitions and most. His successor, Governor-General C Rajagopalachari, however, seems to have taken the job seriously, often seeking advice in certain cases, even from Prime Minister Jawaharlal Nehru. Although he was a staunch supporter of the death penalty. Rajagopalachari used his power to a great extent, restrained himself when he disagreed with the views of the Law or of the House of Representatives and submitted an application twice to the Minister of Home Affairs for reconsideration.

Meanwhile, discussions on the nature of the mercy provisions in the forthcoming Constitution were also taking place in the Council of State. Responding to questions about key constitutional issues raised by B. N. Rau, Constitutional Adviser to the President in March 1947, Dr. Shyama Prasad Mookerjee referred to the President's ability to forgive and excuse or pardon a punishment'. Another member of the Unions Committee, KT Shah, sent a note 'with general guidelines effectively the draft constitution. ThiGovernor-Generals includes the pardoning of criminals' as part of the powers of the Head of State in Clause 15. After a few meetings of the Union Constitutional Committee, the broader powers of mercy (pardon, remission and commutation) were included in the recommendations of the Union Constitutional Committee on 4 July 1947.

When the issue came up for discussion at the Union Council on 31 July 1947, there was a long discussion about how such power should be used in India's proposed 'federal' state. This has brought the concern of the Indian rulers [princes/ natives] who do not wish to lose their 'royal'

power of mercy in the new Indian federation even though they have not opposed the corresponding powers. N. Gopaldaswami Ayyangar, a spokesperson for the Unions Committee discussed the need for this presidential power:

"I think, Sir, the House will agree that, when we are setting up a Head of the Federation and calling him the President, one of the powers that should almost automatically be vested in him is the power of pardon. Now, is the power of pardon going to be unlimited in its character, or are we going to give him only limited powers of pardon? He is not like a hereditary monarch in a position to derive his powers of pardon from any theory on a royal prerogative and so on. If he exercises the power of pardon, we must vest the authority for it to the Constitution or to some Federal Law As a consensus, the Committee has introduced an amendment that limits the President's power to pardon to enforce federal law alone, but as the President of the Constituent Assembly stated, almost all punitive law was a provincial institution and therefore the power of pardon could not cover murder cases. To rectify this situation, M. Ananthasayanam Ayyangar thus proposed an amendment where the President would have the power to be as merciful as any Governor of a province where a person has been sentenced to death. As the sentence is very serious then there should be another agency to consider if there are cases where it should be pardoned. The accepted memorandum of the Union Constitution thus gave the President the same power to 'suspend, remit or commute a sentence in all cases where a person has been sentenced to death in the Province. This however did not extend to the death sentences handed down to the [Indian/royal] province. The provision of minor amendments and subsection 53 (2) (b) was further set out in the Draft Constitution Amended by B. N. Rau and introduced to Council in October 1947. However, after some drafts and meetings, finally on 10 February 1948 the Writing Committee changed its position dramatically. Articles 59 and 141 to which the proposed Constitution was amended by the drafting committee and submitted by the on 21 February 1948 included the following text, The Committee is of the opinion that the President should have the power to suspend, remit or commute the death penalty." So the President, as well as the governor of various states was now empowered to have mercy on all death sentences. This was a reasonable compromise. It is not clear what led to this major change in the powers however, there could be many issues as this was not just a question of tolerance, but a broad issue of the President's position with respect to governors and is therefore an important part of the organization's debate.

These were turbulent times in the new independent country - the Kashmir war continued as civil unrest in other parts of the country. Between the two meetings of the drafting committee, the assassination of Mahatma Gandhi took place on January 30, 1948. One can only guess at what might have affected the drafting committee. Negotiations at a meeting on 31 July 1947 on the protection of the rights of the rulers seemed to be far from over when the provisions of the Proposed Constitution appeared at the conference on December 29, 1948. Member Tajamul Hussain's statement introducing the amendment is helpful because it reflects a situation in favor of a powerful centre and the President: " In those days, when there was no talk of partition, they were thinking of a weak institution with three or four subjects such as Communications, Defense, Foreign Affairs, etc., and the provinces would be completely independent. Now that the country has been divided we, the citizens of this country, have decided once and for all that this Institute will not be weak but powerful, that it will have a very strong Center. If this is our goal the head of the Central Government must have this power."

INTERNATIONAL PERSPECTIVE

The Constitutional pardoning Scheme in India is in various forms followed in the UK and the U.S.A. A comparative study of the power of pardon was conducted here to find existence of the power of pardon in the Commonwealth legal system and developed countries.

To the extent possible, the power of pardon is exercised in a proper and impartial manner in other countries.

England- In England Act the exercise of the power of pardon is authorized by the Criminal Appeal Act 1907. A pardon may be conditional or commutation or remission of a sentence. Free mercy often removes the 'pains, fines and punishments that flow from criminal conviction but it does not end the sentence. In this Act, Section 19 provides for the Right to mercy which makes it invalid that the Act shall not affect the right to mercy but the Secretary-General on the consideration of any petition for the exercise of His Majesty's Mercy, passed on to the convicted person, if he deems it appropriate to: refer the whole case to the Criminal Court and the case will be heard and determined by the Court of Appeal in the case of an appeal by an convicted person; or he or she wishes the Court of Appeal for assistance in any matter arising out of the case for the purpose of determining the appeal, refer the matter to the Criminal Court

for his or her opinion, and the Court shall consider the point and give the Secretary of State an opinion.

The United States of America- The Constitution of the United States provides for a pardon that empowers the President to grant under Article II section 2. According to this Article, "the President shall have the power to grant pardon for crimes against the United States except in cases of impeachment". In view of this passage, language balances the capacity mercy itself in two ways: one is a case against the United States alone and the other is that does not extend to impeachment. The President must therefore have a free exercise in order to be pardoned without any of the above. Mercy can be granted at any time after the commission, conviction or during the service of the sentence Russia- The Constitution of the Russian Federation stipulates that "the President of the Russian Federation shall grant mercy under Article 89. The power to pardon is completely free from the prohibition of the Constitution. From 1992 onwards, Russia formed 15 members of the Presidential Pardon Commission, which included prominent artists and writers. The Commission is responsible for reviewing all applications for mercy and submitting their recommendations to the President.

ROLE OF JUDICIARY

K. M Nanavati was a naval commander, in the Indian Navy, who was tried *K. M. Nanavati v. Union of India* for the murder of Prem Ahuja, who had an affair with his wife Sylvia. K.M Nanavati had moved to Mumbai with his wife Sylvia. With Nanavati usually away sent on assignments, His wife fell in love with Prem Ahuja, one of Nanavati friends and they had an affair. When Sylvia confessed to the act on 27 April 1959, KM Nanavati got enraged and thereafter, after dropping his wife, two children and a neighbor's child to the cinema, went to Prem Ahuja's house and shot him twice and thereby killing him. The defense version says that under grave and sudden provocation he had shot Ahuja, accidentally and surrendered to the police right after the accident to surrender. However, the prosecution stated that the murder was a premeditated crime as he had brought the revolver and bullets from the store and then went to Ahuja's house to murder him. After hearing both the versions the jury came to a verdict that Nanavati was not guilty of murder to the ratio of 8:1, however the sessions judge ordered against the jury's decision and found him guilty and ordered Life Imprisonment to Nanavati.

In subsequent appeals in front of The High Court of Maharashtra and Supreme Court, the courts agreed with the decision of the session's court and he was awarded imprisonment for life. However, Vijaylakshmi Pandit, the then governor of Maharashtra, and former Prime Minister of India Pt. Jawaharlal Nehru's Sister pardoned Nanavati of the conviction completely, after he had completed 3 years of his term. This case became immensely popular as soon as its happening and the media and public opinion about the issue became very active. People having their own opinions and versions about the matter as it were not widely accepted to having committed adultery and murder was unacceptable to the public too. The exception of grave and sudden provocation was also appropriately expounded in this case making this one of the landmark judgments passed by the Indian judiciary.

Kehar Singh v. Union of India This is another case that deals with the President's power to grant pardons under article 72 of the of India, where Kehar Singh was involved in the assassination of the then Prime Minister of India, Indira Gandhi for which Kehar Singh was awarded with death penalty. Kehar Singh's son filed a mercy petition in front of the President of India seeking grant of pardon under article 72 of the constitution, where he pleaded that he was not guilty of the offence and the judgment of the subordinate courts were erroneous, for which he requested to be present before the president while pleading mercy for his father. The President decided that representation to be made by the convict's son was not part of the practice of the mercy petition and conveyed his judgment through the secretary to the party that the mercy petition along with such request was rejected. Following this rejection Kehar Singh filed a special leave petition where it raised the following issues: Whether there is justification for the view that when exercising his powers under Art. 72, the President is precluded from entering into the merits of case decided finally by the Supreme Court; To what areas does the power of the President to scrutinize extend and Whether the petitioner is entitled to an oral hearing from the President in his petition invoking the powers under Article 72.

CONCLUSION

The constitution of India confers certain essential powers on the president of the country and all the governors of states. Among such powers is the judicial discretionary power to pardon. Power to pardon is an act of grace given to any individual who has been sentenced to death

penalty by the court. This clemency depends on the discretion of the president or the governor and cannot be claimed as a matter of right by the convict. This power is mentioned under article 72 and 161 of the Indian constitution and can be established through a plain textual interpretation of these articles. On tracing the boundaries of these articles, it can be noted that there is absolute deliberate silence regarding the factors that need to be taken into account by the President and the Governor while exercising such power. Thus, the complexity in decision making and the opaqueness of this process has led to an availability of a limited view.

