

# **THE PRESIDENT'S POWER TO PARDON: A DETAILED ANALYSIS**

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## **I. INTRODUCTION**

The reasons why this project topic is important with respect to modern constitutional law are three. Firstly, the President's power to pardon deals with providing justice which is essentially a function of the judiciary. The reasons for this interference of the executive in the functions of the judiciary have to be explored, understood and appreciated/critiqued because it is a blatant exception to the doctrine of separation of powers which is one of the most eminent doctrines in the Constitution of India. Secondly, the executive gives an absolute power of pardon to the executive. The likelihood of abuse of such a power is immense. Therefore, an analysis of case law with regard to presidential pardon is very important. Thirdly, pardon is a concept based on mercy, therefore, mercy as a concept has to be studied and the question why mercy is vested with the executive and not with the judiciary has to be answered.

Pardon is commonly considered an act of grace. It is, now, more than a mere act of grace proceeding from an individual having the power to exercise it, and is a part of the constitutional scheme. It is also an act of justice, supported by a public policy. The granting of pardons is a function or act of the state, and not the personal act of the person occupying the office of governor.<sup>1</sup>

The proceeding before the President is of an executive character, and when the petitioner files his petitions it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting an oral argument. It is for the President to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him and if he considers it will assist him with the petition, give an oral hearing to the parties. The matter lies entirely within his discretion.<sup>2</sup>

A pardon not only removes a punishment but, in contemplation of law, places an offender in the same position 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.<sup>3</sup> To be effective, it must be accepted by the person to whom it is tendered.<sup>4</sup>

## **II. BRIEF CONSTITUTIONAL HISTORY**

Before the commencement of the Indian Constitution, the law of pardon in British India was the same as in England since the sovereign of England was the sovereign of India. The Government of India Act, 1935, recognized and saved the right of the Crown or by delegation to Governor-General to grant pardons,

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<sup>1</sup> Hellen and Gavin, Sourcebook on Public Law 505(Cavendish Publishing Company : London, 1997

<sup>2</sup> *Kehar Singh v. Union of India*, (1989) 1 SCC 204.

<sup>3</sup> *Burdwick v. United States*, 236 US 79; 59 L.ed. 476 cited from *The Deputy Inspector General of Police, North Range, Waltair and Anr. v. D. Rajaram and Ors*, MANU/AP/0162/1960, *Knote v. United States*, (1877) 24 Law Ed 442. "A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power or of officers under its direction. It releases the offender from all disabilities imposed by the offence and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal right."

<sup>4</sup> *Burdwick v. United States*, 236 US 79; 59 L.ed. 476.

reprieves, respites or remissions of punishment. Section 295 of the Act, 1935, had conferred on the Governor-General acting in discretion power to suspend, remit or commute sentences of death. The prerogative of the Crown was also delegated to the Governor-General by the Letters Patent creating his office, empowering him to grant to any person convicted by any criminal offence in British India, a pardon either free or subject to such conditions as he thought fit.<sup>1</sup>

In India, the power to pardon is a part of the constitutional scheme. The Constitution of India conferred the power on the President of India and the Governors of States.<sup>2</sup>

### III. CONSTITUTIONAL PROVISIONS

The Institute for Public Policy Research, London undertook a project to draft the principles of constitutional law, according to the project report-

The Head of State, acting on the advice of the Minister of Justice, may-

1. grant a pardon, either free or subject to lawful conditions, to a person convicted of an offence; or
2. grant a delay, either indefinite or for a specified period, from the enforcement of any sentence or order imposed on a person for an offence; or
3. substitute a less severe form of punishment for any punishment imposed on a person for an offence; or
4. remit the whole or part of any punishment imposed on a person for an offence or any penalty, fine or forfeiture otherwise due to the Government on account of an offence.<sup>3</sup>

The powers of the President of the Indian Republic and the Governor under the Constitution bear a close resemblance to those exercised by the President of the United States of America under Article II, Section 2 (1) of the Constitution,<sup>4</sup> which defines the powers of the President in that behalf; It runs:

“.....and shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment.”

The relevant Article 72 (1), so far as it is material for this enquiry, runs:

1. The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commit the sentence of any person convicted of any offence-
  - (a) in any case 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 (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.” Paragraph 2 of Article 72 shows that Governors, with regard to matters to which the executive power of the State extends, have powers similar to those of the President. Articles 72 and 161 reproduce the sovereign powers possessed by the King of England<sup>5</sup> enumerated by Institute for Public Policy Research, London and referred to in the first paragraph of the current sub-section.

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<sup>1</sup> ] P.J Dhan, “Justiciability of the President’s Pardon Power”, 26 IBR 1999 70-71.

<sup>2</sup> Ibid

<sup>3</sup> Ed. Robert Blackburn, *A Written Constitution for the United Kingdom* 57(Mansell : London, 1991).

<sup>4</sup> *The Deputy Inspector General of Police, North Range, Waltair and Anr. v. D. Rajaram and Ors*, MANU/AP/0162/1960.

<sup>5</sup> *The Deputy Inspector General of Police, North Range, Waltair and Anr. v. D. Rajaram and Ors*, MANU/AP/0162/1960.

#### **IV. WHY PARDONING POWER?**

The pardoning power is in derogation of the law. That is to say, if laws could always be enacted and administered so they would be just in every circumstance to which they are applied; there would be no need for the pardoning power.<sup>1</sup> Therefore, the power to pardon is meant to be used in those circumstances where it would not be in the interest of justice to strictly apply the law even if the circumstances call for the same. Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or 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. It is a check entrusted to the Executive for special cases.<sup>2</sup> A country would be most imperfect and deficient in **political morality** without a power for clemency.

#### **V. FINER ASPECTS OF PRESIDENTIAL PARDON**

##### **V.I THE DECISION OF THE PRESIDENT IS SUBJECT TO JUDICIAL REVIEW**

In *Kehar Singh's* case<sup>3</sup> Chief Justice Pathak maintained that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram's*<sup>4</sup> case. As per *Maru Ram's* case the exercise of Presidential pardon must not be arbitrary and unfair. In exercise of such powers there should be obedience of standards and guidelines intelligible and intelligent and integrated with the manifest purpose of the power. The Supreme Court has asked the President to reconsider his decision when it was of the opinion that the decision of the President was totally arbitrary and unfair.<sup>5</sup> In a subsequent Andhra Pradesh High Court judgment it was held that exclusion of one category of prisoners from pardon on the ground that they were convicted by Courts situated outside the State of Andhra Pradesh is arbitrary and forbidden by Article 14 of the Constitution.<sup>6</sup> It is established by the case law above that the Supreme Court has every right to ask the President to review his decision when his decision is manifestly unfair to a particular section of people.

##### **V.II THE PRESIDENT IS BOUND TO FOLLOW THE ADVICE OF THE COUNCIL OF MINISTERS Article 74**

The Supreme Court has held that exercise of power by the President under Article 72 is bound by the advice of the council of ministers under Article 74.<sup>7</sup>

##### **V.III EXERCISE OF POWER UNDER ARTICLE 72 CAN BE LIMITED BY OTHER LEGISLATIONS**

In *Maru Ram v. Union of India*,<sup>8</sup> where the question posed before the Supreme Court was whether Section 433-A of the Code of Criminal Procedure limits the exercise of power under Article 161 and 72, it was held that Section 433-A does not and cannot affect the pardon power under Articles 72 or 161 and therefore, notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid articles.

The Court cited Cooley -

“where the pardoning power is vested exclusively in the top executive any law which restricts the power is unconstitutional.”

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<sup>1</sup> Ibid

<sup>2</sup> S.C. Jain, *The Constitution of India-Select Issues and Perceptions* 57(Taxmann : New Delhi, 2000).

<sup>3</sup> *Kehar Singh v. Union of India*, (1989) 1 SCC 204.

<sup>4</sup> *Maru Ram v. Union of India*, (1981) 1 SCC 107.

<sup>5</sup> *Harbans Singh v. State of U.P.*, AIR 1982 SC 849.

<sup>6</sup> *M. T. Khan v. The Government Of Andhra Pradesh And Others*, 1996-(CR2)-GJX -0432 –AP.

<sup>7</sup> *Maru Ram v. Union of India*, (1981) 1 SCC 107.

<sup>8</sup> Ibid

The above decision was later affirmed in *Ramdeo Chauhan v. State of Assam*<sup>1</sup> where it was held that the power under Article 72 and Article 161 of the Constitution is absolute and cannot be fettered by any statutory provisions such as Section 432, 433 and 433-A of the Code or by any prison rules.

In *Madhav Shankar Sonawane v. State of Maharashtra*,<sup>2</sup> the same question was again raised with respect to a limitation on the exercise of power under Article 72 because of a minimum 25 years imprisonment for a conviction under Section 307 of the Indian Penal Code read with Section 34 of the Indian Penal Code. The Bombay High Court in the above case held that it is not permissible for the Courts to hold that a convict shall have to undergo a minimum period of sentence despite an exercise of constitutional jurisdiction by high constitutional functionaries under Article 72/161.

Therefore, it is very well-settled that powers under Article 72 cannot be fettered by any legislation or rule.

#### V.IV. CRIMINAL CONTEMPT OF COURT IS PARDONABLE

Although the above question has not arisen in India, in the researcher's opinion a discussion on the above issue is important for a complete overview of the finer aspects of Presidential pardon.

In *Ex parte Grossman*,<sup>3</sup> Taft c. J. held in response to the argument that a pardon of criminal contempt would not only reduce the deterrent effect of prescribed punishments but also lower the integrity of the courts, that the pardoning power of the President under the United States Constitution extends even to criminal contempt of court since it does not produce a different effect from the exercise of mercy jurisdiction in other circumstances.

Therefore, criminal contempt of court is a pardonable offence.

#### V.V. PARDON CAN BE GRANTED BEFORE CONVICTION

The above **issue raised** was answered by the Madras High Court in *In Re: Maddela Yerra Channugadu and Ors*.<sup>4</sup> The Court said:

In British India the powers of pardon were exercised by the Governor General or the Governor exercised as a delegate from the Sovereign in Great Britain. Therefore, if in England and Scotland the Sovereign can exercise the prerogative of mercy, reprieve or pardon, even before there is a final decision on the guilt or innocence of an accused person, then it follows that the same power can be exercised by the Governor General or Governor.

In the Handbook of American Constitution law,<sup>5</sup> by Rottachaefer it is stated that:

“The pardon power includes not only that of granting absolute and unconditional pardons, but also that of commuting a punishment to one of a different sort than that originally imposed upon a person. It may be exercised at any time after the commission of an offence, either before legal proceedings are begun or during their pendency, and either before or after conviction.”

In light of the above reasoning, the Madras High Court held that the power under Article 72 and Article 161 could be exercised either before or after the trial. This decision was later confirmed by the Supreme Court in *K.M. Nanavati v. State of Bombay*<sup>6</sup> and *Ramdeo Chauhan v. State of Assam*.<sup>7</sup>

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<sup>1</sup> *Ramdeo Chauhan v. State of Assam*, (2001) 5 SCC 714.

<sup>2</sup> *Madhav Shankar Sonawane v. State of Maharashtra*, 1982-(CR1)-GJX -0161 –BOM.

<sup>3</sup> *Ex parte Grossman*, (1924) 69 Law Ed 527 (F).

<sup>4</sup> *In Re: Maddela Yerra Channugadu and Ors*, MANU/TN/0394/1954.

<sup>5</sup> Cited from *In Re: Maddela Yerra Channugadu and Ors*, MANU/TN/0394/1954.

<sup>6</sup> *K.M. Nanavati v. State of Bombay*, AIR 1981 SC 112.

<sup>7</sup> *Ramdeo Chauhan v. State of Assam*, (2001) 5 SCC 714.

## V.VI. THE PRINCIPLES OF NATURAL JUSTICE SHOULD BE FOLLOWED IN THE EXERCISE OF POWERS UNDER ARTICLE 72

Though the power to grant pardon is executive, it is more quasi-judicial in nature.<sup>1</sup> A quasi-judicial body would impose a duty to act fairly.<sup>2</sup> The Supreme Court has held that the constitutional safeguard enshrined in Article 21 extends to the executive disposal of mercy petitions.<sup>3</sup> As a part of the constitutional scheme, Article 72 is subject to the discipline of Article 21. Therefore, the accused should have a minimal right to fair hearing.<sup>4</sup>

Taking a contrary view to the above, The Supreme Court has held in *Harbans Singh v. State of Punjab*<sup>5</sup> that the power of the government is executive in nature and the principles of natural justice cannot be grafted thereon by means of judicial innovations and activism.

Since the principles of natural justice have been applied at each stage of the sentencing procedure, it may legitimately be done away with at the executive stage.<sup>6</sup>

## VI. CONCLUSION

In the conclusion of this project the researcher shall be classifying the principles, concepts and position of law discussed in the preceding chapters into two- one, which he is satisfied with and second, which he feels is not suitable. The researcher shall be giving reasons for his stand and also suggest improvements in the system.

In the researcher's opinion executive pardon is much needed. A miscarriage of justice by the Courts has to be rectified by a non-judicial body because: firstly, every argument might not be legally valid but the rejection of the same might lead to injustice, secondly, the vesting of the power to pardon with the executive makes the process of dispensing justice more rigorous. Punishment would require the consent of the Head of State, which reaffirms that an innocent should not be punished. Thirdly, since the executive does not have a duty to interpret the law, it shall prevent injustice wherever strict interpretation of the law is leading to the same.

In the researcher's view the Supreme Court has been correct in not framing guidelines for the exercise of mercy jurisdiction. If so happens, the exercise of this power of the executive will become similar to judicial functions where an interpretation of the guidelines will be required with respect to every fact situation.

An application for pardon before conviction should not be allowed because that would be in violation of the express provision of the Constitution and the intention of the Constitution framers.

The principles of natural justice should be imbibed in the exercise of clemency powers because: firstly, they do not affect the purpose of mercy jurisdiction and secondly, through procedural fairness the scope of a bias is reduced.

There should be a time frame within which the executive should be asked to decide over cases in order to prevent undue trauma to the applicant and his family members and back logging of cases.

An amendment should be brought about in the Constitution at the earliest barring the executive from pardoning its own members, since, that is likely to create a bias, abuse of power and effectively make one a judge in his own cause.

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<sup>1</sup> *R.Raghupathy v. State of Tamil Nadu*, 1984 Cri LJ (NOC) 117.

<sup>2</sup> Poornima Sampath and Priyadarshini Narayanan, "Mercy Petitions : Inadequacies in Practice", 12 Stud Adv (2000) 72 at 74.

<sup>3</sup> *T.V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68.

<sup>4</sup> Upendra Baxi, "Clemency, Erudition and Death : The Judicial Discourse in Kehar Singh", 30 J.I.L.I(1988) 501 at 503.

<sup>5</sup> *Harbans Singh v. State of Punjab*, 1987 Cri LJ 1088.

