

Pardoning Power of the President and the Governor

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ABSTRACT

The pardoning power of the President and the Governor in India is a crucial aspect of the country's constitutional framework. This paper examines the extent to which the President and the Governor are bound by the advice of the Council of Ministers while exercising their pardoning powers. It discusses the textual interpretation of the Constitution, judicial precedents, and the possibility of absurdity in certain situations. The paper concludes that the President and the Governor should have some leeway to exercise their pardoning powers independently, without being bound by the advice of the Council of Ministers, in order to prevent situations of absurdity and ensure that the power is exercised reasonably and fairly.

KEYWORDS: Pardoning Power, President, Governor, Constitution of India, Council of Ministers, Judicial Precedent, Executive Power, Court Martial, Mercy Petition, Judicial Interpretation, Constitutional Amendment, Prerogative, Royal Prerogative, Judicial Review, Public Welfare, Political Pressures, Supreme Court, Bias, Discretion, Fairness, Impartiality, Judicial Boundaries, Presidential Pardon, Governor's Pardoning Power, Court's Interpretation, Mercy Petition Process.

INTRODUCTION

The Constitution of India vests the power to pardon in the President and the Governors of the States. Although the Constitution provides for the President and the Governor to be aided and advised by the Council of Ministers respectively, at the Union and State level, whether such advice must be mandatorily followed while granting or declining pardon is an issue that requires examination.

A. A 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”. 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. An inference that the President 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.

B. JUDICIAL PRECEDENT

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*,¹ a 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*,² 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.

C. THE POSSIBILITY OF ABSURDITY

An interpretation of the Constitution to the effect that the President is bound to act as per the advice of the Council of Ministers while exercising their pardoning powers may lead to situations of absurdity. For example, in the case of *Kehar Singh*,³ the accused in relation to whom pardon was sought was the assassin of Ms. Indira Gandhi, a former Prime Minister of India. In such a situation, the possibility of the advice of the Council of Ministers, which comprised ministers from the same political party as the former Prime Minister, suffering from bias or a lack of objectivity cannot be precluded. Further, in the era of coalition governments, there is a chance that the advice given to the Council of Ministers would not reflect a 'true, just, reasonable and impartial opinion',⁴ and would instead be based wholly on political motivations.

In light of such possibilities, it is submitted that some leeway for the President to exercise the power to pardon without being bound by the advice of the Council of Ministers, and without bowing to political pressures, is absolutely necessary. Hence, I am of the opinion that the decisions of the Supreme Court in this regard have been far from prudent.

D. THE SOLUTION

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, logically sound reasons, and that the advice of the Council of Ministers is given effect to, wherever appropriate.

It has been recommended that there should be a constitutional amendment which expressly vests the power to pardon in the President, such that he is under no obligation to act on the aid and advice of the Council of Ministers.⁵ I find that such a view is flawed on two counts: first, such an amendment to the Constitution would be virtually impossible to pass, since the reigning party in the Parliament would be absolutely unwilling to divest themselves of the power of aiding and advising the President; and second, regardless of the possibility of absurdity in certain cases, the reigning party is the representative of the will of the people, and its advice must be given effect to as far as possible, to uphold the public confidence.

I submit that the solution to the foreseeable problem described above may be found by way of the President exercising his/her discretion in a self-determined manner. That is, the President should be allowed to use his/her discretion to distinguish between situations where the advice of the Council of Ministers is extremely important in light of the context of the case and the need to give effect to certain policy decisions of the ruling party (for example, a strong stand against terrorism), 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.

¹ *Samsher Singh v. State of Punjab and Anr.*, (1974) 2 SCC 831.

² *Maru Ram v. Union of India*, (1981) 1 SCC 107.

³ *Kehar Singh v. Union of India*, (1984) 4 SCC 693.

⁴ N. Thakur, *President's Power to Grant Pardons in Case of a Death Sentence*, 105 CRI.L.J. 101 (1999), 104.

⁵ P. J. Dhan, *Justiciability of the President's Pardon Power*, 26 (3, 4) INDIAN BAR REVIEW 78 (1999).

It is important that the judiciary takes note of the fact that the power to pardon has been vested in the President, as opposed to the Prime Minister, Cabinet or the Legislature, for a reason: the President is an impartial Head of the State, who stands on a higher pedestal than the Prime Minister, Cabinet or the Legislature; similarly, the Governor is deemed to be in a position similar to that of the President in his respective State. Thus, to deny the President and Governor the discretion intended to be vested in them by the Constitution would be a grave injustice.

Q). Can President go beyond the scope the circle of Council of Ministers?

An important point I am bringing forward is the question whether while exercising the powers guaranteed by Constitution under Art. 72 and 161, are the President or the Governor as the case may be, must act on the advice of the Council of Ministers or are the President or the Governor powerful enough to go beyond the circle of Council of Ministers?

The advice of the appropriate Government binds the head of the State. It is not necessary to pass a separate order in each case but any general order can be made provided the group is identified and that it indicates the application of mind to the whole group.

It is submitted that the power of the President to grant pardon is independent of the advice of the Council of Ministers. Article 72 contains no such limitation; under Art.53 it is the executive power of the Union which has to be exercised directly or through the officers. It is further submitted that the provisions of Art. 74(1) requiring the President to act as per advice of the Council of Ministers will not apply in the context of Article 72.

Indeed in Kehar Singh's case, it was held that the President, in exercise of the power vested in him under Art.72, could scrutinize the evidence on record of the criminal case and come to a different conclusion from that of the court. It was held that the President can determine "for himself" whether the case is one deserving the grant of relief within that power. The President can also go into the merits notwithstanding that it has been judicially concluded by a judgement. These observations are clearly incompatible with the view that the President has to act as per the advise of the Council of Ministers even while exercising powers under Art.72.

If the President has to follow whatever is the view of the executive of the Council of Ministers, then there is no question of his independently going into the merits or scrutinizing the evidence.

The law on the subject is in a highly unsatisfactory state, particularly because of the inherent contradictions in the Kehar Singh judgement.

There should be reasons in the orders of the President and the Governor, as the case may be, and that in the nonexistence of such reasons the exercise of judicial review over presidential pardon would be affected. The mercy petition without providing any reason is not justified and the power to commute death sentence must be exercised reasonably in a fair and just manner.

The court ruled in Kehar Singh's case that the President has no compulsion to give reasons but it does not mean that the power shall always be exercised in a wrong manner.

Q). Can Governor go beyond the circle of Council of Ministers?

The power of the Governor to grant pardon Article 161 does not refer to him being bound by the advice of the State Government. However, on judicial interpretation, the governor has to act on the aid and advice of Council of Ministers. Thus the discretion of Governor is controlled by such advice and he cannot act independently. At the same time, it is submitted that the Governor cannot be treated as a mere rubber

stamp. If he is of the view that the Council of Ministers requires reconsideration, he can make his suggestion to that effect and send the file back to the Council. If on a consideration of the views of the Governor, the Council of Ministers still feels that there is no justification to grant pardoning power, the Governor has to act accordingly. It can also happen that the Governor can suggest a lower sentence which again the Council of Ministers is bound to consider but are not obliged to accept. It is submitted that serious weightage must be given to the views of the Governor.

STAGE OF EXERCISE OF PARDONING POWER

A plain reading of Articles 72 and 161 would give an impression that the power of pardon can be exercised by the President only for persons convicted of an offence and not to undertrials. However, the courts in India, on several occasions, have held otherwise, without giving due attention to the language of the provision.

In *Re Maddela Yera Channugadu & others*, the validity of a Governmental Order granting a general amnesty and releasing all prisoners in the State of Andhra Pradesh and Andhra Prisoners in jails in Mysore came into question due to the inclusion of condemned prisoners awaiting confirmation of their sentences from the High Court in the said order. Two levels of argument were pressed on behalf of the Government. It was first argued that a confirmation of sentence was not a continuation of the proceedings in a court of session, but a safeguard against the perpetration of any injustice, and as such, a person awaiting such confirmation from the High Court would be a person 'convicted of an offence' within the meaning of Article 161 of the Constitution. In addition, it was also argued that the power under Article 161 could be exercised at any stage, whether before or after conviction. The Court after declining to express an opinion on the first point proceeded to decide the case on the basis of the second argument. It observed that the similarity of the language of Article 161 and Article 2 Section 2(2) of the American Constitution permitted the use of American authorities in answering the question. Since in the United States, the Courts had held that the power could be exercised at any time after commission of the offence, the Court found no reason to take a different stand and held that the power of pardon under Article 161 could, indeed be exercised by the Governor before a person is convicted and sentenced, and therefore, the G.O. was held to be valid. Again, in *State v. K.M. Nanavati*, the validity of the Governor's order suspending the sentence imposed by the Bombay High Court on Commander Nanavati was challenged on the ground that an appeal was pending before the Supreme Court, and as such, the trial had not concluded. A Full Bench of the Bombay High Court dismissed this contention on the ground that the word 'trial' did not include the proceedings in an appeal and in any case, the powers under

Article 161 could be exercised at any stage. The court relied upon the judgment of the Madras High Court in *In Re Channugada*, and held that the framers of our Constitution intended to confer on the President and the Governors, within their respective spheres, the same power of pardon, reprieve and clemency, both in its nature and effect, as was possessed by the Sovereign in Great Britain and by the President in the United States. The sentence being suspended, Nanavati appealed to the Supreme Court against his conviction where a plea was taken by the appellant to exempt him from the requirement of Order 21 Rule 5 of the Supreme Court Rules which mandated that during pendency of a criminal appeal, the appellant must necessarily surrender to his sentence before the appeal could be heard. This plea was taken on the basis of the Governor's order of suspension of sentence. A Constitution Bench decided by a majority of four against one that the power to suspend the sentence lay with the court under Article 142, and though the Governor had the power to grant a full pardon at any stage of the proceeding, including during

pendency of the appeal, he could not grant a suspension of the sentence when the matter was sub judice before the Court.

Therefore, with respect to the stages at which the various forms of pardoning power can be exercised under the Constitution, the following conclusions have been reached by the Courts:

- A. Pardon can be granted at any stage after commission of the offence, that is, before or after conviction.
- B. Pardon can be granted during pendency of an appeal to a higher court.
- C. A sentence cannot be suspended during pendency of appeal to the Supreme Court.

It is submitted that the Courts, in reaching the above conclusions have neglected the core principles of interpretation of a constitutional text. It is not doubted that in England, the Royal Prerogative to pardon offences could be exercised by the King at any time. As stated in Halsbury's Laws of England, "Pardon may, in general be granted either before or after conviction".

It is also not doubted that in the United States, too, the power of pardon has been held to be available to the President at any stage, either before or after conviction of the offender.²¹ However, these conclusions need to be put in their proper perspective before they can be applied in India, a task the Indian judiciary has failed to perform. The power of pardon of the British Crown was in the nature of a prerogative, that is, 'something out of the course of the ordinary common law'.

This is clearly not the case with our Constitution. In India, the power of pardon is vested with the President as an integral part of the constitutional scheme. As is rightly pointed out by Balakrishna, "The President of India has no prerogatives; he has only powers granted and functions enjoined by the Constitution of India.

There being vital distinctions between the two, it is not permissible to proceed on the presumption that the powers of the President of India are those which are enjoyed by the British Crown at the present day." The Constitution makers were very specific in those cases where there was a clear intention to confer a power of the same nature and effect upon any functionary as the one enjoyed by its British counterpart: the most prominent being the reference to the House of Commons in the unamended Articles 105(3) and 194(3). A Court of Law must gather the spirit of the Constitution from the language used, and what one may believe to be the spirit of the Constitution cannot prevail if not supported by the language, which therefore must be construed according to well-established rules of interpretation uninfluenced by an assumed spirit of the Constitution.

The conclusions reached by the American Courts can be understood better by referring to the provision in the Constitution of the United States which enunciates the power of pardon of the American President, "... and he shall have the power to grant reprieves and pardons for offences against the United States except in cases of impeachment."

CONCLUSION

Judiciary through a number of cases ruled that presidential pardon will be subject to judicial review only on limited grounds because to restrain the abuse of power and criminalization of politics. It has also made an effort to show that how power can be manipulated to favour criminal politicians. To prevent such sort of awful practices judiciary transgressed its boundary many times. It is not good sign at least for the executive because its actions are challenged and quashed in few cases in spite of being correct and constitutional and in consonance to the article 72 and 161 of the constitution.

It is patent court has averted the plausible abuse and misuse of this constitutional power. But there are also possible misuse of judicial review and court should exercise restraint while exercising its power of judicial

review otherwise it will led to undue fighting between judiciary and executive wing of the constitution. Court should refrain to encroach on the power of the President and the Governor. It should not always come forward to examine the legality of pardon granted by the executive in its exercise of power, because the power of president and governor is very high, reputed and at the same time very wide and unfettered. In this particular situation if court would interfere with the function of executive unnecessarily, then patently clash is likely to occur leading to chaos between these two. It is evident from the case of K.M. Nanavati v. State of Bombay, where the court unnecessarily quashed mercy granted to the accused. Later on it corrected to itself in **Sarat Chandra Rabha v. Khagendranath**. It manifestly indicates that judiciary is somewhere usurping the power and transgressing the constraints set by the constitution itself. It should refrain itself and judicial review should be exercised only in limited cases where larger public interest is involved and interest of the society is at stake. Therefore judiciary should keep away itself from the domain of executive and should function in the particular area assigned to it.

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