

Clemency in Indian Criminal Justice system

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Abstract

In accordance with principle of separation of powers, Administration of Criminal Justice comes within the domain of Judiciary. However, executive has been entrusted with the function to take a final call on execution of sentence and show mercy to the person convicted of an offence. In this research paper, researcher seeks to explain Constitutional background of the extent and scope of clemency power of President/ Governor and some key issues related to exercise of such power such as Judicial Review of Pardoning Power, fair exercise of pardoning power, consequences of delay in deciding mercy petition by executive etc.

Keywords : Clemency , Pardoning power , Judicial Review , Public Opinion

Introduction

Every Civilized country recognizes and has therefore provided for the pardoning power to be exercised as an act of grace and humanity in proper cases. Mercy is an attribute of deity whose judgments are always tempered with mercy.¹ Clemency means Mercy or Leniency especially the power of president or governor to pardon a Criminal or commute a criminal sentence. It is an act or instance of officially nullifying Punishment or other legal consequence of a crime. A Pardon is usually granted by chief executive of a government.² In India Constitution vests power to grant pardon, reprieve, and respite and to commute sentence of a person convicted of an offence upon President of India under Article 72 and upon Governor of State under Article 161 of the constitution of India. The Powers are exercised after consultation with the respective Central or State executive. Clemency, consists of the power of President to grant reprieve, remission, commutation and pardon for all offences, though death sentence cases invoke the strongest sentiment since it is the only sentence that cannot be undone once it is executed.³

Apart from the powers conferred on the President of India and the Governors of states by article 72 and 161 of the constitution to suspend, remit or commute any sentence, section 432 of the Code of Criminal Procedure, 1973 empowers the appropriate Government to suspend and remit sentences. Section 433 of the Code of Criminal procedure, 1973 provides that notwithstanding anything contained in section 432 where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law, or where a sentence of death imposed on a person has been commuted under 433 into one of imprisonment for life, such person shall not be released from prison unless he has served at least 14 years of imprisonment. The Supreme Court of India has upheld the Constitutional validity of section 433 –A.⁴ However, neither Constitution nor the Code lay down grounds upon which these powers are required to be exercised. Supreme Court of India in a number of cases has held that power to grant pardon

etc. cannot be arbitrarily exercised and the exercise of such power is not beyond judicial scrutiny. The delay in disposal of cases of clemency petitions by the President has also been subject of criticism by Supreme Court, Media, as well as common masses. The Apex Court has also regretted the absence of Uniform Standards of guidelines by which the exercise of power under Article 72 was intended to be or in fact guided. Supreme Court has commuted the Death Sentence of assassins of former Prime Minister on the ground of extraordinary delay in deciding their mercy petitions. ⁵It has also been suggested that the decision of President or Governor accepting or rejecting Mercy plea should be reasoned one.

Necessity of Pardoning Power

It is well known maxim that “to err is human”. The fallibility of human Judgment being undeniable even in the most trained and experienced mind. Therefore, it has been considered appropriate that in the matter of life and personal liberty the protection should be extended by entrusting power further to some high authority to scrutinize the validity of the threatened or continued denial of personal liberty.⁶ Capital punishment or the death penalty remains a controversial subject in India. Despite the global move toward abolition, India retains such punishment. In *Bacchan Singh v. State of Punjab*⁷ the Supreme Court of India laid down that death penalty should be awarded only in the “rarest of rare” murder cases. Although most death sentences in India are awarded for murder, capital punishment can be awarded in India for a large number of other offences under the Indian Penal Code, 1860 . Despite this fact, the actual number of executions or hanging carried out in India have reduced to a trickle. During the period between 1999 and 2009 only one person was executed. “This seemingly paradoxical situation is largely explained by the provisions of mercy or clemency in Indian Law”⁸

Scope and Nature of clemency Powers

The Scope and Nature of President’s power has been considered by the Apex Court in *Kehar Singh v Union of India*.⁹ Pathak C.J speaking for the court expressed the view that it is open to the President to scrutinize the evidence on record of the criminal case and come to a different conclusion from that recorded by the Court in regard to guilt of or sentence imposed on the accused. In doing so, the president does not amend or modify the Judicial record. The Judicial record remains intact and undisturbed. The President acts in a wholly different plane from which the court acted. The court further observed that the nature of President’s power is “Constitutional” and it is different from “Judicial Power” of the Court.

More recently, in *Narayan Dutt v. State of Punjab*¹⁰ the Supreme Court held that to decide on the innocence or otherwise of the accused person in a Criminal trial is within the exclusive domain of a Court of Competent Jurisdiction as this is essentially a Judicial function. Justice Ganguly , Speaking for the Court laid down that the power of a Court of law in a Criminal trial and President/ Governor’s powers under Article 72/161 operate in totally different arenas and the nature of these two powers are also different from each other and should not trench upon the other. Relying upon this reasoning, the court held that while exercising power under 161 Governor cannot pronounce upon guilt or innocence of the accused.

The Apex Court held that the exercise of power is subject to challenge on the following grounds:

- a) If the Governor had been found to have exercised the power himself without being advised by the government;
- b) b) If the Governor transgressed his jurisdiction in exercising the said power;
- c) If the Governor had passed the order without applying his mind;
- d) The order of the Governor was mala fide; or
- e) The order of the Governor was passed on some extraneous considerations.

Judicial Review of Exercise of pardoning power

The Pardoning powers are granted to president under Constitution. The Constitution confers the power Upon Supreme Court and High Courts to protect fundamental rights of citizens. In Maru Ram v. Union of India, Krishna Iyer . J. Speaking for Constitutional bench held that although the powers under Article 72 and 161 are very wide, it could not “run riot”. His Lordship held that no legal power can run unruly like John Gilpin on the horse, but “must keep sensibly to a steady course”. According to His Lordship, “all public power, including Constitutional power shall never be exercisable arbitrarily or *mala fide* and ordinarily, guidelines for fair and equal execution are guaranters of the valid play of power”.

In Epuru Sudhakar v. Government of Andhra Pradesh¹¹ the Supreme Court observed that the exercise or non exercise of the power of Pardon by the President or Governor was not immune from Judicial review and Limited Judicial review was available in certain cases. The Court in this case, however, added words of caution. “It is important to bear in mind that every aspect of the exercise of the power under Article 161 does not fall in the Judicial domain. In certain cases a particular aspect may not be justiciable”. This case is a stern reminder to the executive of its constitutional responsibility in exercising the power of pardon to convicted persons; Supreme Court warned the Central and State Governments against recommending clemency petitions on political, religious and caste considerations. Deploring the misuse of clemency powers by the executive, the Judges in Separate but concurring verdicts said, “the principle of legality occupies a central plan in the Rule of Law. Every prerogative of President or Governor is subject to Rule of Law. The rule cannot be compromised on grounds of political expediency. Such considerations would be subversive of the fundamental principle of the rule of law and would amount to setting a dangerous president”.¹²

Swaran Singh v. State of U.P.¹³ exemplifies political considerations in the exercise of Pardoning power by State Government. In that case , one Sri Doodh Nath, an MLA of U.P. Assembly, convicted for murder, came out of the prison within less than two years of imprisonment as a result of remission granted by the Governor. The petition of the son of the deceased before the High Court was dismissed on the ground that the order of the Governor was not justiciable. Then SLP was filedThe Hon'ble Supreme Court held, after looking into the files concerning the grant of remission to Doodh Nath, that the Governor was not told of

certain vital facts concerning Doodh Nath, namely his involvement in 5 other criminal cases of serious offences and the rejection of his earlier clemency petition which was filed on the same grounds and the report of the jail authorities that his conduct inside the jail was far from satisfactory, and that out of two years and five months for which Doodh Nath was supposed to be in jail, he was in fact on parole during the substantial part thereof. The Supreme Court found that since the Governor was not posted with material facts, the Governor was deprived of an opportunity to exercise the powers under Article 161 in a fair and just way. Therefore, the Court quashed the order of the Governor and sent back the matter to the Governor to enable him pass a fresh order on the petition of Doodh Nath in the light of the observations made in the said judgment.

In *Mahendra Nath Das vs. Union of India*¹⁴, Hon'ble Supreme Court taking note of the fact that there was a delay of 12 years in the disposal of the mercy petition and also considering the fact that the appellants therein were prosecuted and convicted under Section 302 IPC held the rejection of the appellants' mercy petition as illegal and consequently, the sentence of death awarded to them by the trial Court which was confirmed by the High Court, commuted into life imprisonment.

In *Devinder Pal Singh Bhullar v. State of N.C.T of Delhi*¹⁵ the Supreme Court of India held that delay in disposal of mercy petition will not in all circumstances afford a ground for Judicial Intervention even in Death Sentence case. The court is entitled to look into the circumstances which caused the delay. The court laid down, "It is true that there was considerable delay in disposal of petition filed by the petitioner but keeping in view the peculiar facts of the case, we are convinced that there is no valid ground to interfere with the ultimate decision taken by the president not to commute the sentence of death awarded to the petitioner into life imprisonment. We can take Judicial notice of the fact that a substantial portion of the delay can well –nigh be attributed to the unending spate of the petitions on behalf of the petitioner by various persons to which reference has been made hereinabove.

In *Satrughan Chauhan v. Union of India*¹⁶ the court pronounced upon the effect of delay in disposal of Mercy Petitions and Power of Apex Court in Such circumstances.

The Court held, "If there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the Constitutional Authorities have failed to take note of or consider the relevant aspects, this court is well within its powers under Article 32 to hear the grievances of the convict and commute the death sentence into Life Imprisonment on this ground alone. The court further observed, "although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is inexcusable. The court rejected the contention that it has no power to commute the sentence and the matter should be remanded to president for reconsideration. The court commuted the death Sentence of 15 accused person in Life Imprisonment on ground of Undue delay in disposal of their Mercy petitions by the president".

The Court held that while examining challenge to the decision taken by the president under Article 72 or the Governor under Article 161 of the Constitution, as the case may be the "court's power of Judicial review of such decision is very Limited". The court can neither sit in appeal nor exercise the power of review,

but can interfere “If it is found that the decision has been taken without application of mind to the relevant factors of the same is founded on the extra or irrelevant considerations or is vitiated due to malafides or patent arbitrariness.

An Appraisal of Kehar Singh Case¹⁷:

Kehar singh case is termed by critics as “Judicial Murder” . Following the assassination of Prime Minister Indira Gandhi, Kehar Singh was convicted of being involved in the conspiracy along with two assassins on the basis of extremely flimsy circumstantial evidence. V.M Tarkunde , former Judge of the Bombay High court, remarked that the evidence was not sufficient even to hang a dog. Instead of exercising his moral authority and power for seeking re-consideration president R. Venkataraman allowed the mercy petition to be rejected without any question or objection. Although he never completely admitted to this lapse, in his autobiography the former president suggests that the decision was politically motivated noting that “Kehar singh” case raised a few queries in my mind. Should not the president have discretion to examine any extenuating circumstances and alter the death sentence without the advice of the government? How else can prejudice or partisanship be prevented?”¹⁸

The validity of Public Opinion in decision making by executive

Whether public opinion should be a factor to be considered in exercise of power of clemency is a matter of serious debate. Gopal Krishan Gandhi in his article titled as “The power of Pardon” ¹⁹ has expressed the opinion that “If a referendum were to be held in India today, the hangman will not only stay but have to be paid overtime. Terrorism and crime against women have played sufficient role in favor of retention of capital punishment.” The Author asks the question, “But since when has the state become such a three legged racer with public opinion”. “A Democracy” ,says Author, “Is about what people want but a Democratic republic it is also about what its enlightened new agers fight to make it what it is meant to be. The Author of the Present paper also is in agreement with the views expressed by the Gopalkrishan Gandhi in his article. The courts as well as the executive authorities exercising the power of Pardon should be objective in their decision making process and should not be too much guided by public opinion. Public Opinion may be misleading guide in certain cases.

Conclusion.

The power of clemency is a very delicate and sublime power entrusted by Constitution on tallest offices of the country. It is necessary in cases where punishment will do more evil than good. Though no exhaustive guidelines may be issued for the issue of such powers by the constitutional Authorities, the procedure should be objective and transparent. An analysys of the case Law also suggests a trend that the Supreme Court has arisen to the occasion whenever the Power to Pardon has been manifestly based on extraneous consideration. To conclude it would not be out of place to quote sane advice of Jeremy Bentham

in the context of "Pardon". "...Justice cannot require that punishment should be established for the protection of innocence, and pardon should be granted for the encouragement of crime."

Keywords: Clemency, Criminal Justice system

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¹ See 59 American Jurisprudence 2d, page 5

² Bryan A Garner, "*Black's Law Dictionary*", (2004)

³ Epuru Sudhakar v. Government of Andhra Pradesh, A.I.R 2006 SC 3385

⁴ Ashok Kumar Golu v. Union of India (1991) 3 SCC 498

⁵ Hindustan Times ,Dated 19 feb2014

⁶ U.S v. Benz, 1930 75 Law Ed 354 quoted by Pathak Justice in Kehar Singh v. Union of India ,A.I.R 1989 SC 653

⁷ AIR 1980 SC 898

⁸ Bikram Jeet Batra. 'Court' of. Last Resort. A Study of. Constitutional edu.au/ncf/ events/pardonsperspective.pdf (last accessed 31 March 2009).

⁹ A.I.R 1989 S.C 659

¹⁰ 2011 (2) Law Herald(P&H) 1514 S.C

¹¹ A.I.R 2006 S.C 3385

¹² Clemency Powers: SC warns executive , SS Negi , the Tribune dated 12 october 2006, available at <http://www.tribuneindia.com/2006/20061012/main1.htm> (last accessed on 15 march 2014)

¹³ Available at indiankanoon.org/doc/1144349(last accessed on 15 April,2009)

¹⁴ 2013) 6 SCC 253

¹⁵ 2013 (5) Scale 575

¹⁶ Dided on 21 Jan 2014 available at <http://indiankanoon.org/doc/59968841/> (Last accessed on 14 march 2014 at 7.00 P.M)

¹⁷ *Supra* at 8

¹⁸ Bikram Jeet Batra, Wider ambit , available at www.hindu.com/thehindu/the_scrip/print.pl?file=20090410260703700.htm&date=f12607/&prd=fline&

¹⁹ Gopal Krishan Gandhi .the power to pardon, The Hindu dated April 18 2013 ,available at <http://www.thehindu.com/todays-paper/tp-opinion/the-power-to-pardon/article4628499.ece> (last accessed on 14 march 2014)

[Mercy petitions: The President of India's power to pardon is not an anachronism \(scroll.in\)](#)