International Journal of Law
ISSN: 2455-2194
Impact Factor: RJIF 5.12
www.lawjournals.org
Volume 4; Issue 2; March 2018; Page No. 277-279

Article 72: pardoning power not unbridled

Dr. Sandhya Verma[1], Ankit Prasad[2]
[1] Faculty of Law, Law College Dehradun, Uttaranchal University, Uttarakhand, India
[2] Research Scholar, Law College Dehradun, Uttaranchal University, Uttarakhand, India

Abstract
Since the time of inception of our nation's constitution, the President has been bestowed upon with the power to grant clemency to accused or convicted persons in certain criminal cases. While this power is furnished to him to eliminate unnecessary harshness or remedy mistake in the administration of criminal law, it is contested by many that this right given to the highest authority of the country goes against the very essence of the rule of law. There has been great amount of adjudication on this matter and while it has been affirmed that the powers conferred on the executive are unhindered, recent debates on the issue have brought out the need for judicial review of the same. In the this paper I will try to examine the nature of this power entrusted with the President, the use of this power today and ultimately aim to answer the crucial question– whether this power is in conformity with notions of natural justice and rule of law.

Keywords: article 72, pardoning power, judicial review

Introduction

"The longer I live, the larger loom those decisions about justice and mercy that I had to make as governor. They didn't make me feel godlike then- far from it; I felt just the opposite. It was an awesome, ultimate power over the lives of others that no person or government should have, or crave. And looking back over their names and files now, despite the horrible crimes and the catalog of human weaknesses they comprise, I realize that each decision took something out of me that nothing--not family or work or hope for the future--has ever been able to replace."

- Edmund G. Brown, former Governor of California.

Since the time of inception of our nation's constitution, the President has been bestowed upon with the power to grant clemency to accused or convicted persons in certain criminal cases. While this power is furnished to him to eliminate unnecessary harshness or remedy mistake in the administration of criminal law, it is contested by many that this right given to the highest authority of the country goes against the very essence of the rule of law. There has been great amount of adjudication on this matter and while it has been affirmed that the powers conferred on the executive are unhindered, recent debates on the issue have brought out the need for judicial review of the same. In the this paper I will try to examine the nature of this power entrusted with the President, the use of this power today and ultimately aim to answer the crucial question– whether this power is in conformity with notions of natural justice and rule of law.

Renowned American jurist, Oliver Wendell Holmes had once said *'in a modern democracy, the power to punish with death rests with the judiciary, and the power to spare life with the executive.'* Holmes' words will bear more significance after a reading of Article 72 of constitution of India: - Power of president to grant pardons, etc., and to suspend, remit, or commute sentence in certain cases:

1. The president shall have the power to grant pardons, reprieves, respites all remissions of punishment for to suspend, remit or commute the sentence of any person convicted of any offence-
   i) In all cases where the punishment or sentence is by a court martial;
   ii) 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;
   iii) In all cases where the sentence is a sentence of death.
2. Nothing in sub clause (a) of Clause (1) shall affect the power conferred by law on any officer of the armed forces of union to suspend, remit or commute a sentence passed by court martial.
3. Nothing in sub clause (c) of Clause (1) shall affect the power to suspend, remit or compute a sentence of death exercisable by the governor of a state under any law for the time being in force.

Nature

Since independence, Indian presidents have been known to grant pardons generously, although the statistics in this regard are in dispute. Pardon refers to an act of grace and cannot be demanded by a person as a form of a right. Despite the wording of the constitutional provision, it is granted not only by the President but by the executive as a whole, as it is essential for the President to resort to the aid and advice of his ministers [1].

A pardon exonerates an offender completely of all his guilt, and an apt description of the legal effect of a pardon was put forward by Justice Field in Ex Parte Garland:

"When pardon is full, it releases the punishment and blots the

existence of the guilt, so in the eye of the law the offender is as innocent as if he had never committed the crime...it restores him, as it were, a new man and gives him a new credit and capacity."

One major contention with respect to presidential power was the discretion enjoyed by the President. It was held in the landmark judgment Maru Ram v. Union of India [2] that the President cannot exercise discretionary powers and is bound by the aid and advice of his council of ministers. Of course, the President not being able to function without the advice of the ministers has its own problems, which I will discuss later in the paper.

This practice of conferring the right of pardon on a figure of authority has existed for long, and is adopted today in other countries across the globe as well; for instance, the U.S. Constitution too prescribes such a power to the President which is unlimited and absolute, and in the United Kingdom where this power is considered to be a 'royal prerogative [3].'

While some people feel that grant of presidential pardon is legitimate in certain cases, many others believe that this practice is a catalyst for abuse if applied arbitrarily, discriminatorily and without strict guidelines.

Jurisprudence of granting pardon

The philosophy underlying the pardon power is that the "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, without such a power of clemency to be exercise by some department or functionary of government, a country would be most Imperfect and deficient in its political morality and in that attribute of deity who's judgement are always tempered with Mercy."

The pardoning power is founded on the consideration of public good and is to be exercised on the ground of public welfare, which is the legitimate object of all punishments will be as well promoted by a suspension as by and execution of the sentences.

Purpose

Chief Justice Taft, in Ex parte Philip Grossman [4] has said:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the 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."

The fundamental question to ask would be why there is a need for such a provision in the first place. India has, since it became an independent Union, adopted Baron de Montesquieu's theory of 'separation of powers' [5]. and this, along with 'exclusivity of organs' is given utmost importance. There exists the Supreme Court, the highest seat of Indian judiciary, which takes into account all facts and evidences before arriving at its decision and this decision is binding. It can, of course, not be said that the courts have embraced a sort of cloak of infallibility – however, in the past, the courts have succeeded in passing judgments in accordance with principles of natural justice, procedure established by law and rule of law. Being an organ created for the purpose of adjudicating, the judiciary is undoubtedly impervious to the shortcomings and vulnerabilities of many other non-law persons. Why then is there a need for further supremacy to overrule the decision of the Supreme court, if required?

In the much-deliberated Kehar Singh v. Union of India [6] case, the Supreme Court asserted that in matters of life and personal liberty – the two being the most important attributes in society, the deprivation of which is a serious issue – there is a paramount need to extend the protection of these rights by delegating the power to an even higher authority.

This seems reasonable enough. There is a need for a pardoning clause as no institution - including the judiciary- is scrupulous and there is always a chance of fallacy. This is especially true in the case of capital punishment, where an erroneous verdict by the courts can literally be fatal to the convicted. Thus, resorting to the executive to solve this problem is fair.

The pardoning power has been awarded to the executive, headed by the President, the highest officer of the nation and expected to exercise it wisely and not abuse it. In recent times, however, the veracity of this power has been in question. Is this power subject to limitation or restriction? Can the judiciary review the decisions of the President?

And Justice for All. Brief Trajectory of Judicial Review on Pardons

There are frequent debates on the extent of judicial scrutiny with respect to presidential pardoning. On the one hand, this power has been explicitly vested on the executive, and interference by the judiciary would be a misbalance of powers. One the other hand, however, it is felt that in the case of arbitrary and selective pardoning, it is vital for the judiciary to step in.

In K.M. Nanavati v. State of Bombay [7], the sentence of the accused was suspended by the Governor of the state under Article 161 of the Constitution during the pendency of his appeal in the Supreme Court. Although the Governor's order was held unconstitutional by the Supreme Court, it was argued that the power of the court to suspend hearing or grant bail is distinguishable from the power of the executive to grant pardon. The court thus embraced the doctrine of Harmonious Construction between both the organs of the government. [8]

So, we see that in Nanavati's case the court stepped in and attached a restriction to the pardoning power [9].

In Sarat Chandra Rabha v. Khagendra Nath [10] the court made a clear distinction between judicial and executive power, asserting that 'both of them operate on different planes, one not affecting the other.'

The court further went on to give its standpoint in G. Krishta Goud v. State of Andhra Pradesh [11]. In this case the persons who had approached the court were actually murderers who had petitioned to the President to grant clemency to them, which he refused. The court here said that the power granted to the President was 'historically a sovereign power, politically a residuary power and humanistically an aid of intangible justice [12].' In this case the court was extremely reluctant to exercise judicial review, and Justice Krishna Iyer stated:

No power in a republic is irresponsible or irresponsive, the people in the last resort being the repositories and beneficiaries of the public power. But two limitations exist in our constitutional system. The Court cannot intervene

everywhere as omniscient, omnipotent or omnipresent being. And when the Constitution, as here, has empowered the nation's highest Executive, excluding by implication, judicial review, it is officious encroachment for this Court to be a superpower unlimited.

Despite being initially unwilling to take a stand, the court eventually put limitations on the pardoning power of the President.

The court has the power to review the decision of the executive only in specific cases where the pardoning power is exercised on irrational or extraneous considerations or when relevant material has not been reflected on or in malafide cases.

Pardoning power under judicial review

There is always been a debate as to whether the power of Executive to pardon should be subjected to Judicial review or not. Supreme Court in a variety of cases had laid down the law relating to judicial review of pardoning power.

In Maru Ram v Union of India [13] the constitutional bench of Supreme Court held that the power under article 72 is to be exercised on the advice of Central Government and not by president on his own, and that the advice of the government binds the head of the Republic.

In Dhananjoy Chatterjee alias Dhana v State of West Bengal [14] the Supreme Court reiterated its earlier stand in Maru ram's case and said;

"The power under article 72 and 161 of the Constitution can be exercised by the central and state governments, not by the president or Governor on their own. The advice of the appropriate government binds head of the state."

The Supreme Court in Ranga Billa [15] case was once again called upon to decide the nature and Ambit of the pardoning power of the President of India under article 72 of the constitution. In this case, death sentence of one of the appellant was confirmed by Supreme Court. His mercy petition was also rejected by the president then the appellant filed a writ petition in the supreme court challenging the discretion of the President to grant pardon on the ground that no reasons were given for rejection office Mercy petition the court dismissed the petition and observed that the term "pardon" itself signifies that it is entirely a discretionary remedy and grant or rejection of it need not to be reasoned.

Supreme Court once again in Kehar Singh [16] reiterated its earlier stand and held that the grant of pardon by president is an act of Grace and, therefore, cannot be claimed as a matter of right. The power exercise able by the president being exclusively of Administrative nature, is not justiciable.

Analysis & Conclusion

After much debate, the big question still remains – figuring out the relationship between the executive and the judiciary. Picture this: a convicted person, after much appeal, turns to the executive as a last resort and pleads for mercy, and the President consequently grants him clemency. In this scenario, judicial review of the matter would be bizarre, as the court can't turn a blind eye to its previous judgments, nor can it revert back to its final decision, overriding the President's pardon. The decision of granting pardons cannot be taken exactly the same way as a court – the President will need to consider all circumstances, including the position of the family of the victim, the society in general and also realize that he will be setting a precedent for the future.

References

1. Samsher Singh v. State of Punjab: AIR 1974 SC 2192, (1974) 2 SCC 831.
2. AIR. SC 2147 (1980) 1 SCC 107. 1980.
3. Hartalkar: Critical Evaluation of Pardoning Power, Criminal Law Journal, 1996, 152.
4. 267 US. 87
5. Trias politica. Or separation of powers coined by Montesquieu.
6. See, L'Esprit Des Lois (Spirit of Laws), 1748.
7. AIR. SC 653 (1989) 1 SCC 204. 1989.
8. AIR. SC 112, (1961) 1 SCR 497. 1961.
9. Seervai: Constitutional Law of India, 2103, 2.
10. Also see Sarat Chandra Rabha v Khagendra Nath AIR SC 334. Here, the same bench as Nanavati unanimously accepted the dissenting opinion of Nanavati's case, 1961.
11. *Ibid*.
12. 1 SCC 157. 1976.
13. *Ibid*, Para 6.
14. AIR. 1 SSC 107. 1981.
15. SCR. (1) 37, 1994 SCC (2) 220, 1994.
16. AIR. 1572, 1981.
17. AIR 653, 1989.