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The Pardoning Power under the Constitutional Scheme and its Judicial Review: An Overview

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ABSTRACT

Every civilized society in the world recognizes and provides for discretionary power of pardon in its legal system to be exercised as an act of grace by its functionaries. This power is provided to promote the humanity in criminal law system prevalent in the country. The eminence of administrative discretion has created a jurisprudence of non-interference by the judicial branch in exercise of such administrative discretion. But lately Indian Courts following the footsteps of US Supreme Court have started to judicially review the pardoning power of the Executive whenever there is glaring injustice, unfair and arbitrary use of such power is visible.

Keywords: Article 72, pardoning power, judicial review.

“Power corrupts, absolute power corrupts absolutely”

- **‘Lord Acton’**

I. INTRODUCTION

Every civilized society in the world recognizes and provides for discretionary power of pardon in its legal system to be exercised as an act of grace by its functionaries. This power is provided to promote the humanity in criminal law system prevalent in the country. The eminence of administrative discretion has created a jurisprudence of non-interference by the judicial branch in exercise of such administrative discretion. S.A. Smith remarked:

“Judicial review of administrative action is inevitably sporadic and peripheral. The administrative process has not, and cannot be, a succession of justifiable controversies, public authorities are set up to govern and administer, and if their every act and decision were to be reviewable on unrestricted grounds by an independent judicial body the business of administration could be brought to a standstill. The prospect of judicial relief cannot be held out to every person

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whose interest may be adversely affected by administrative action."²

In the field of Indian constitutional provisions, Article 72³ confers the power to grant pardon, respite, reprieve and remission, commutation of any punishment on the President of India. This power is available with respect to any offence and in all cases where death penalty is imposed upon any person. A similar power is entrusted upon the Governor of each State by Article 161.⁴ The judiciary has not so far ventured either to define the scope and ambit of the pardoning power conferred under Constitution of India nor to lay down the considerations for the exercise of this power. Earlier, there was no scope of judicial review to examine the exercise of pardoning power by the Executive.

The origin of the pardoning power of the President under Article 72, owes its allegiance to the power inherent in the King or Queen of the United Kingdom where it is known as *mercy power*. In the United States of America Section 2 of Article II of the Constitution of U.S.A. deals with the pardoning power. The special feature of the Indian Constitution provides for the similar powers to the Governors of each State. In India, the pardoning power is to be exercised by the President of India with the aid and advice rendered by the cabinet of Ministers as per the scheme laid down by Article 74 of the Constitution of India.⁵ The President cannot take any decision without aid & advice of the Council of Ministers. Further Clause 2 of Article 74 makes it evidently clear that, the above mentioned aid and advice of the Council of Ministers cannot be inquired into any court of law.⁶

The judiciary so far has neither ventured into to define the scope nor the ambit of the power conferred under Article 72 of Constitution of India. It has also exercised restraint by not laying down the considerations for the exercise of this power. Before *Maru Ram's* case,⁷ there was no scope for judicial review to examine into the exercise of pardoning power. With acknowledgment of human dignity and the importance of human rights, interference of judiciary in the exercise of administrative discretion increased and it opened new horizons for judicial review overall. Article 21 of the Constitution of India which guarantees the fundamental right to life and personal liberty was interpreted in its widest amplitude in *Menaka Gandhi* case.⁸ The Court has given liberal interpretation to the term "*procedure established by*

² S.A. De Smith & J.M. Evans, *De Smith's Judicial Review of Administrative Action*, 3 (London Stevens and Sons Ltd., 4th edn., 1980).

³ INDIA CONST. art. 72.

⁴ INDIA CONST. art. 161.

⁵ INDIA CONST. art. 74 cl. 1.

⁶ INDIA CONST. art. 74, cl. 2.

⁷ *Maru Ram v. Union of India*, AIR 1980 SC 2147(India).

⁸ *Menaka Gandhi v. Union of India* AIR 1978 SC 597(India).

law” in the same vein as the U.S. Supreme Court has interpreted the term “*due process*” under their Constitution. After this judgment, the State cannot deprive any person of his life and personal liberty “*except according to the procedure established by law*” and such procedure must be fair, just, non-arbitrary and reasonable.

This paper was conceived with the hypothesis that pardoning power of the President is not subject to judicial review by Court of law in light of Article 72 of Constitution of India read with Article 74. But upon examination of plethora of cases filed for redressal of the plight of death row convicts whose mercy petition has been rejected by the President speaks otherwise. The analysis of cases discloses that in some cases the pardoning power has not been exercised genuinely and fairly and in some mere inaction of the Executives in India was clearly visible. The aggrieved persons petitioned in the Supreme Court of India under Article 32 of the Constitution of India to get redressal for violation of their fundamental rights by such rejection or inaction on their mercy petitions by the Executive. The Court before the case of *Maru Ram* was reluctant to interfere into the functioning of the Executive and tried to apply the doctrine of separation of power. In *Maru Ram* case for the very first time the Court judicially reviewed the action of the Executive in such cases stating that limited judicial review in such cases is not in violation of the doctrine of separation of power. As in India water tight compartmentalization of the functioning of three organs of the State is not warranted by the Constitution. The Supreme objective of our Constitution is to achieve the rule of law. If any of the organs of the State violates the norms established by the Constitution then the judiciary is expected to take steps to rectify the same and provide remedy to the citizens of this country. Especially when it comes to violation of fundamental rights of any person the Supreme Court is expected to provide remedy, through Article 32 of the Constitution which itself is a fundamental right under the constitutional scheme. The Court held that the doctrine of separation of power is not violated by the judiciary while judicially reviewing the cases in which the fundamental rights of any person is violated due to inaction or misuse of power on the part of Executive. Though pardoning power as such cannot be subjected to judicial review. But the exercise of such power shall be in accordance with the principles established by law. In other words the pardoning power is sacrosanct in nature, so its existence cannot be judicially reviewed but it shall be exercised on the just, fair and reasonable grounds and if its exercise is malafide then the court shall step in and judicially review the action of the Executive. The pardoning power is subject to judicial review to a very limited extent has been held by the court in various landmark judgments. The Court also said that the exercise of such pardoning power is subject to the norms of equality as enshrined in Article 14 of the Constitution of India which calls for equality

before law. The pardoning power is subjected to the principle of equality is evident from the judgment of the court in *Navneet Kaur* case⁹ wherein the court has done away with the distinction of convicts on the basis of the statutes in which they have committed crimes punishable with death penalty.

After the *Maru Ram* judgment the Court got the opportunity to analyze the scope, nature judicial reviewability of pardoning power in *Kehar Singh* case.¹⁰ In this case the Court held that pardoning power enshrined under the aegis of our Constitution are not a matter of grace to be given by the Executive, rather it is public duty imposed by the constitution to be discharged using fair, just and non- arbitrary process. Here also the Court held that the pardoning power as any other administrative act of the Executive is capable of judicial review. However its existence into the Constitution cannot be judicially reviewed.

II. GROUNDS OF JUDICIAL REVIEW OF PARDONING POWER

In some cases pardoning power of the Executive is not exercised on merits of the case but was actually misused to achieve political motives, there is inordinate delay or procedural lapses in many cases and in these circumstances judicial review of pardoning power was allowed by the judiciary. The grounds on which the court had judicially reviewed the action of Executive while dealing with mercy petitions are as follows:

a) Misuse of power by the Executive

The pardoning power was vested in the highest Executive of the State so that it cannot be misused, but criminal politician have managed to manipulate it. In the cases like *Satpal*, *Swaran Singh*, *Epuru Sudhakar* the pardoning power has been abused by the Executive by granting pardon in cases which does not call for such clemency. In these cases the Supreme Court quashed the impugned order granting pardon and directed the Executive to reconsider the mercy petitions afresh.

The cases clearly establish the existence of political partisanship during the exercise of the pardoning power of the Governor. Some glaring examples are mentioned below:

1. In *Swaran Singh's* case,¹¹ convicted person got remission of his sentence by the Governor under Article 161 of the Constitution of India. By using of political influence of his wife who was a sitting MLA and despite an adverse report of police suggesting otherwise. The Governor was kept in dark regarding pending criminal cases against the petitioner.

⁹ *Navneet Kaur v. State of NCT of Delhi* (2014) 7 SCC 264 (India).

¹⁰ *Kehar Singh v. Union of India* AIR 1989 SC 653(India).

¹¹ *Swaran Singh v. State of Uttar Pradesh* AIR 1998 SC 2026(India).

2. In *Satpal* case¹² the convict got his sentence remitted by the Governor under Article 161 of the Constitution of India. The fact that the petitioner never submitted to police custody even after the orders of the court was overlooked by the Executive. He only submitted to custody after the Governor remitted his sentence and he was released on the same day. In this case use of political influence was evident on the face of it.
3. In *Epuru Sudhakar* case¹³ the fact that convict committed another murder while released on bail by court of law was not mentioned before the Governor in the mercy petition filed under Article 161 of the Constitution of India. The fact that the petitioner was on continuous parole till the time his sentence was finally remitted by the Governor. The factum of release of petitioner on parole was also not brought to the knowledge of the Executive. In this case also the wife of the petitioner used political influence being an MLA.

The Supreme Court quashed the order passed by the Governor in all these cases. These cases show how politician are misusing their political influence and in future also it can be misused to exploit the Executive's discretionary power to escape the clutches of law. An illegal and unjustifiable order passed by the Executive definitely gives ground to the Supreme Court of India to take step through judicial review and rectify the injustice.

b) **Undue delay in deciding mercy petition**

The delay in disposal of mercy petitions of the death row convicts is another glaring issue while dealing with pardoning power. It has been observed that at times the Executive takes unduly long time to decide mercy petition and at times very hasty decision are taken. In both situations one needs to look at the decisions of the Executive very suspiciously. The delay in deciding the mercy petitions of death row convicts causes great deal of injustice and inhumane torture to them. Almost in every such undue delay the reasons for such delay is not explained on the part of the Executive. Such delay occurs due to inefficiency of the authorities to get all the details required, prior engagements of the authorities and simple indecisiveness on the part of the Executive. In any case the brunt of such delay has to be borne by the convict who is kept in dilemma as to the fate of his mercy petition. This delay subjects the convict to suffer an additional sentence of imprisonment which was never the part and parcel of his original sentence of death, this tantamount to double jeopardy. However this issue of effect of undue delay in deciding mercy petition by the Executive has been settled by the Apex Court within

¹² *Satpal v. State of Haryana* AIR 2000 SC 1702(India).

¹³ *Epuru Sudhakar v. Govt. of Andhra Pradesh* AIR 2006 SC 3385(India).

the span of almost thirty years. First of all this issue was dealt by the court in *Vatheeswaran* case¹⁴ in which the Division Bench of two judges held that two year delay in execution of death penalty pending the mercy petition is a supervening event in itself which is sufficient to commute the death sentence into the imprisonment for life. Then the Apex Court in *Sher Singh* case,¹⁵ a three judge Division Bench held that undue delay in deciding mercy petition cannot in itself give a ground to commute the death sentence of a convict into that of imprisonment for life. The Apex Court in the same year in the *Javed Ahmed* case¹⁶ upheld the decision given in *Vatheeswaran* case. This confusion was settled by the Constitutional Bench of the Supreme Court in *Triveniben* case.¹⁷ In this case the Court held that undue delay in execution of death sentence caused without any fault on the part of the convict is definitely a ground that shall be considered while deciding a petition under Article 32 of the Constitution of India, as it amounts to violation of one's right to life and personal liberty which is curtailed by the State without following the just and fair procedure established by law. But it needs to be coupled with some other ground. The Court agreed with the rationale of the *Vatheeswaran* case to this extent only but it refused to accept the two year rule as was established in this case. However the Apex Court's Division Bench in *Shatrughan Chauhan* case¹⁸ categorically upheld undue delay in deciding mercy petition by the Executive without any fault on the part of convict as a supervening circumstance giving valid ground to the convict to get his death sentence commuted into imprisonment of life without claiming any other ground in addition thereto. The Court not only made undue delay a ground for commutation of one's sentence, it included the ground of mental illness, solitary confinement, procedural lapses to get the death sentence commuted to life imprisonment by filing a petition under Article 32 of the Constitution of India. In this case the Court also set some guidelines to be followed by the authorities while executing the death sentence. It is made mandatory to give ten days notice to the convict and his family of the date of execution of sentence so that the convict can meet his family and friends for the last time; it is done keeping in view the *Afzal Guru's* execution which was done immediately next day when his petition was dismissed by the Court.

III. DISTINCTION BETWEEN THE OFFENCES UNDER INDIAN PENAL CODE AND TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT

Mercy petitions of persons who are convicted in political murders or terrorist activities are

¹⁴ *T. V. Vatheeswaran v. State of Tamil Nadu* AIR 1983 SC 361(India).

¹⁵ *Sher Singh v. State of Punjab* 1983 SCC (2) 582(India).

¹⁶ *Javed Ahmad Abdul Hamid Pawala v. State of Maharashtra* AIR 1985 SC 231(India).

¹⁷ *Smt. Triveniben v. State of Gujrat* AIR 1989 SC 1335(India).

¹⁸ *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1(India).

generally not shown any mercy by the Executive. The *Indira Gandhi* Assassination case,¹⁹ *Rajiv Gandhi* Assassination case,²⁰ *Devender Pal Singh Bhullar* case²¹ dealing with murders or attempt of murder of political figures have lead to stern actions on the part of the State. These cases were segregated from other offences and made into another class of crimes in which the Executive refused to exercise its discretionary jurisdiction in their favour solely on the ground that these cases were involving murder of political figures hence they stand on different footing than other cases involving murder simpliciter under Indian Penal Code. The mercy petition in *Kehar Singh* and *Devender Pal Singh Bhullar* cases were rejected by the President on the ground that their acts fall in the category of terrorist activity hence these are not fit cases for the President to grant pardon. But the Supreme Court of India in *Shatrughan Chauhan* case obliterated the distinction made between the cases related to terrorist acts and other acts calling for death penalty. Till date *Kehar Singh*'s execution is termed as not only political but judicial murder as well. The Court said that gravity of offence has been dealt by the Courts while deciding the case and after the final determination on the part of the Court every convict who is awarded death sentence stand on the same footing and the Executive will be wrong if they make any other distinction between a person convicted for an offence under India Penal Code and other for offence under TADA etc. After the *Shatrughan Chauhan* judgment the Apex Court in *Navneet Kaur* case commuted the death sentence of *Devender Pal Singh Bhullar* into life imprisonment on the ground of undue long delay in deciding the mercy petition by the Executive and mental illness caused by such delay while he was incarcerated in prison even though it was a case related to terrorist activity. In *Rajiv Gandhi* case the death sentence of all the convicts was commuted to life imprisonment by the Supreme Court of India on the ground of delay in disposal of mercy petition by the Executive.

IV. CONCLUSION

As per the above discussion it can be said that in India we need to proceed with more caution as technically speaking the mercy petitions are decided by Council of Ministers; which cannot be said to be devoid of political influences. There were some instances where such prerogative power of the Executive was put to use achieve malafide political goals, without acquainting the Executive with full facts and circumstances of the given case. It not only results in abuse of constitutional powers but also in mal-administration of criminal justice system. The process of decision taking in mercy petition is not transparent. As what advice was given to the Executive and what

¹⁹ *Supra* Note 9.

²⁰ *Union of India v. Sriharan@ Murugan* (2014) 4 SCC 242(India).

²¹ *Devender Pal Singh Bhullar v. NCT of Delhi* 2013 (5) SCALE 575(India).

all grounds were taken into consideration while tendering such advice is not disclosed by the authorities concerned nor the Courts have power to inquire into the same by virtue of Article 74 of the Constitution of India. Hence this whole process of deciding mercy petitions is very opaque. So we are in a dire need to formulate a procedure which is fair, transparent and which will restore the faith of general public in the decisions taken by the Executive while exercising the discretionary power of pardon.

The reasons for the other issue of undue delay can be attributed to the fact that there is no definite body of rules in place which needs to be followed by the Executive while deciding the mercy petitions. In United States of America there is a fixed Office of Pardon Attorney who receives all the mercy petitions. The Pardon Attorney after giving an opportunity of being heard in person to the petitioner and the victim or his representative, forward the petition to the President of United States of America with his recommendations thereon. The President is free to accept the recommendations of Pardon Attorney or arrive at different conclusion. In India we also need to form a board to help the Executive in deciding mercy petition.
