Executive Power to Undo Punishment vis-à-vis Doctrine of Precedent

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Abstract

One of the powers which have been conferred on the President and Governor of India is the Power of Pardon. Article 72 and Article 161 of the Indian Constitution confers this power on the President and Governor respectively which is to be exercised with a sense of responsibility. A kind of check over misuse of this extraordinary power by the hands of the executive organ of the State is provided through the power of judicial review. The main purpose of the pardoning power of the Executive is to provide a human touch to the judicial process. The very purpose of mercy provisions will be defeated if this human touch is not exercised in a proper way. This paper made an effort to discuss factors influencing the commutation of sentencing and the issues to get a complete understanding of the pardoning power under the Constitution of India.

Keywords- *Pardoning power, President of India, Governor, Commutation, Judicial Review*

I. Introduction

The Constitution of India confers power to the President of India to grant pardons and to suspend, remit or commute sentences in certain cases which read as under[2]:

> (1). The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-(a). in all cases 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 (a)

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[2] Article 72, Constitution of India.

> of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial; (3). 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.

In the same way, Constitution of India confers power to the Governor of each of the States to grant pardons and to suspend, remit or commute sentences in certain cases which read as under[3]: "The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter of which the executive power of the State extends."

The pardoning power of the President of India or the Governor of each of the States, leave a field open for the executives to depart from the strict adherence to the "Doctrine of Precedent". As far as finality is concerned, 'Doctrine of Precedent" gets a jolt when President of India under Article 72 and the Governor of a State under Article 161 of Constitution of India grants pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence under any of the penal laws. It implies that the Ratio-Decidendi of a judgment pronounced either by Supreme Court of India or the respective High of a province to penalise a person either by honouring a pre-existing Ratio-Decidenti or newly declared Ratio-Decidendi by interpreting the law is departed. Then where lies the finality of "Doctrine of Precedent", one of the purposes for which it was developed when the executives of a country by exercising quasi-judicial power (even though separation of powers between judiciary, executive and the legislatures is one of the basic structures of the Constitution of India which cannot be damaged or destroyed), can nullify it? As judiciary can depart from the strict adherence of "Doctrine of Precedent" due to the presence of its own inherent power under certain situations, similarly executives of a country also by exercising pardoning power can stop the honouring of it, though in a very limited way.

[3] Article 161, Constitution of India.

II. Analysis of the Nature of Pardoning Power of the Executives vis-a-vis Judicial Review

MARU RAM V. UNION OF INDIA: The first question which is emerging: is the pardoning power of President under Article 72 (including Article 161) a discretionary power of the President himself or does he need to act must on the advice of the Council of Ministers? Next important question: is the pardoning power judicially reviewable by the Supreme Court or respective High Court? The following observations of the Supreme Court in the above-mentioned Maru Ram v Union of India give answers to these pertinent questions[4]:

> It is not open either to the President or the Governor to take independent decision or direct release or refuse release of any one of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns. Being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers save in a narrow area of power. The subject is now beyond controversy, this court having authoritatively laid down the law in Shamsher Singh's case. So, we agree, even without reference to Art, 367 and ss. 3(8)(b) and 3(60)(b) of the General Clauses Act, 1897, that, **in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers**. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis a vis his Cabinet is no higher than the President save in a narrow area which does not include Art. 161. The Constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government.
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> An issue of deeper import demands our consideration at this stage of the discussion. **Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot**; for no legal power can run

[4] **AIR 1980 SC 2147**

unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. **It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power.** We proceed on the basis that these axioms are valid in our constitutional order.

Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism.

It is the pride of our constitutional order that all power, whatever its source, must, in its exercise, anathematise arbitrariness and obey standards and guidelines intelligible and intelligent and integrated with the manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power.

Speaking generally, Lord Acton's dictum deserves attention I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that the did no wrong. If there is any presumption it is the other was, against the holders of power, increasing as the power increases. Likewise, Edmund Burke, the great British statesman gave correct counsel when he said: "All persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust, and that they are to account for their conduct in that trust to the one great Master, Author, and Founder of society."

Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. **Political vendetta or party favouritism cannot but be interlopers in this area. The order which is the product of extraneous or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual**

exercise may still be vulnerable. Likewise, capricious criteria will void the exercise.

Push this logic a little further and the absurdity will be obvious. No Constitutional power can be vulgarised by personal vanity of men in authority. **Likewise, if an opposition leader is sentenced, but the circumstances cry for remission such as that he is suffering from cancer or that his wife is terminally ill or that he has completely reformed himself, the power of remission under Articls 72/161 may ordinarily be exercised and a refusal may be wrong- headed. If, on the other hand, a brutal murderer, blood- thirsty in his massacre, has been sentenced by a court with strong observations about his bestiality, it may be arrogant and irrelevant abuse of power to remit his entire life sentence the very next day after the conviction merely because he has joined the party in power or is a close relation of a political high-up.** The court, if it finds frequent misuse of this power may have to investigate the discrimination. The proper thing to do, if Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty. **Once we accept the basic thesis that the public power vested on a high pedestal has to be exercised justly the situation becomes simpler. The principal considerations will turn upon social good by remission or release.**

The power under Articles 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 the Head of the State**. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group. (**9).** Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate

> Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. **Only in these rare cases will the court examine the exercise.**

KEHAR SINGH VS UNION OF INDIA: In the same way, in this judgment, Supreme Court followed the Ratio-Decidendi of Maru Ram v Union of India judgment by reiterating briefly the mandatory acceptance of the decision of Council of Ministers by the President or respective Governor and elaborately the judicial review-ability of the Presidential pardon or Governor's pardon which was not done in the former case. While exercising the power, the President or the Governor, to justify the pardon, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence, without altering or ignoring the records/evidence of the case, the cabinet can come to a different conclusion by going into the merits of the case with a different interpretations of the facts[5]:

> The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. **We may point out that the Constitution Bench of this Court held in Maru Ram v. Union of India that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State.**
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> We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. **In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed**. The president acts in a wholly different plane from that in which the Court acted. He acts under a

[5] **AIR 1989 SC 653**

constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him.

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In Sarat Chandra Rabha v. Khagendranath Nath (AIR 1961SC 334), Wanchoo J said: "Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the Court which remained as it was."

It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

The further question raised was whether judicial review extends to an examination of the order passed by the President under Article 72 of the Constitution. At the outset we think it should be clearly understood that we are confined to the question as to the area and scope of the President's power and not with the question whether it has been truly exercised on the merits. **Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in Maru Ram v. Union of India. The function of determining whether the act of a constitutional or statutory**

functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court.

This Court proceeded in State of Rajasthan v. Union of India, [1978] I S.C. R. 1 80, to hold: "So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so this Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law". In Minerva Mills Ltd. v. Union of India. [1981] 1 S. C. R. 206, Bhagwati, J. said: "the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. The Constitution has, therefore, created independent machinery for resolving these disputes and this independent Machinery is the judiciary which is vested with the power of judicial review."

We are concerned here with the question whether the President is precluded from examining the merits of the criminal case concluded by the dismissal of the appeal by this Court or it is open to him to consider the merits and decide whether he should grant relief under Article 72. We are not concerned with the merits of the decision taken by the President, nor do we see any conflict between the powers of the President and the finality attaching to the judicial record, a matter to which we have adverted earlier. Nor do we dispute that the power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved in this case of asking for the reasons for the President's order. And none of the cases cited for the respondents beginning with Mohinder Singh v. State of Punjab (AIR 1976 SC 2299), advance the case of the respondents any further. The point is a simple one, and needs no elaborate exposition. We have already pointed out that

> the Courts are the constitutional instrumentalities to go into the scope of Article 72 and no attempt is being made to analyse the exercise of the power under Article 72 on the merits. As regards Michael De Feritas v. Ceorge Ramoutar, [1975] 3 W.I.R. 388, that was, case from the Court of Appeal of Trinidad and Tobago, and in disposing it of the Privy Council observed that the prerogative of mercy lay solely in the discretion of the Sovereign and it was not open to the condemned person or his legal representatives to ascertain the information desired by them from the Home Secretary dealing with the case. None of these observations deals with the point before us, and therefore they need not detain us. Upon the considerations to which we have adverted, it appears to us clear that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.

The facts which are emerging from the above-mentioned two leading judgments of Supreme Court, are; **firstly,** the pardoning power of the President or the Governor under articles 72 or 161, cannot be exercised arbitrarily or by whims and caprice, rather there should be a sound logic and fair principle behind the exercise of this discretionary power; **secondly,** the decision of pardoning the convicted person by the constitutional Head of the country or the state is actually the decision of the cabinet- union and state as the case may be, which they have to accept and abide by; **thirdly,** if the President or the Governor grants the pardon, reprieves, respites or remission of punishment or suspends, remits or commutes the sentence pronounced by Supreme Court or High Court, then as pre-requisite, they can come to different conclusion or findings of facts with an opposite interpretation by going into the merits of the case, as finally pronounced by the judiciary; **fourthly,** though the pardoning power cannot be judicially reviewable, but its malafide exercise or if the exercise of power under articles 72 and 161 is irrelevant, irrational, discriminatory, then judiciary can venture into. Over and above these legal and constitutional standings of Articles 72 and 161, the crux of the issue is the dilution of the application of Doctrine of Precedent in India. In leading cases of Maru Ram v. Union of India and Kehar Singh v. Union of India, the Supreme Court declared that the pardoning power of the President and the Governor is subject to judicial scrutiny. In the later cases, though the Supreme Court enumerated some specific grounds on which

the judiciary could scrutinise the constitutionality of the decision of the Constitutional pardoners, but it did not lay down specific guidelines within the trajectory of which the *de jure* Constitutional pardoners could exercise that discretionary power on the advice of *de facto* Constitutional executives. Therefore, the fact remains that the application of Doctrine of Precedent has to a great extent been diluted because of pardoning power of President and Governor as they can just stop the implementation of the sentence of the convict, based on the Ratio-Decidendi of a final judgment, either on the basis of strict compliance with a previous Ratio-Decidendi or a newly developed Ratio-Decidendi-it is last instance of departing from the applicability of Doctrine of Precedent. But this dilution has also been diluted due to the Ratio-Decidendi of the above referred leading cases through which the judiciary brings the exercise of pardoning power under judicial scrutiny-the judicial review-ability of any pardon, reprieves, respites or remission of punishment or suspension, remission or commutation of the sentence by the President of India or the Governor of any of the States which they have done on the advice of the respective Council of Ministers.

III. Specific Instances of Pardoning by the President and the Governor

Nirbhaya rape case[6] and Parliament attack case are instances where the President did not grant pardons to the convicted person/s. You have to find out some cases where the president granted pardons but those were not declared unconstitutional. It is better if each of the pardons is tagged with the Ratio-Decidendi of the actual judgment which convicted and sentenced the person either by following a previous Ratio-Decidendi or by making a new Ratio-Decidendi.

On the other hand, there are instances like in like K M Nanavati v State of Bombay, Swaran Singh v State of U.P, Satpal v State of Haryana, Epuru Sekhar v Govt of Andhra Pradesh where pardoning by the Governor was declared to be unconstitutional.

IV. Findings and Conclusions

The power of pardon has been made subject to judicial review. It is a good development in so far as it will prevent a misuse of this important constitutional

[6] Mukesh and Anrs. V NCT Delhi (Nirbhaya Case) (2017)6 SCC1.

power by unscrupulous politicians in favour of people with power and influence. However, it may serve to further increase the burden of cases on the courts and altogether prolong the judicial process. It may also prevent the executive from utilizing this power for reasons that although may not strictly be in conformity with constitutional principles, may nevertheless be in the interest of the State. Given the bizarre twist that our polity has taken in recent times, it seems to be self-evident that the only protection we have from complete insanity is judicial review. Thus, while the trend towards greater judicial scrutiny of the power of pardon is undoubtedly a welcome one, the judiciary must leave the executive with a window of discretion in the exercise of the same. If we do not combine democratic governance with firm governance, we shall have no one except ourselves to blame for lawlessness resulting from the abuse of the provisions relating to pardon by criminals guilty of heinous crime.

Given that the Supreme Court itself has also recently argued for whole life sentences as an effective replacement for the death penalty, this may well be the common ground between the executive-judiciary that will avoid confrontation and deal with the delay question. It will however replace the controversial death penalty with the equally controversial ‘whole life’ sentence.