



JUDICIAL REVIEW OF PRESIDENT'S POWER IN INDIA: UNDER ARTICLE 72

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Abstract: *The power of pardon was historically vested in the British Monarch. At common Law, a pardon was an act of mercy whereby the king "forgive any crime, offence, punishments, execution, right, title, debt, or duty." This power was absolute, unfettered and not subject to any judicial scrutiny. From this source, it came to find a place in the constitution of India and the USA as well as the constitutional structure of Britain. However, it could hardly survive in its unrestrained nature in the democratic systems of these states¹. In India, the President by the virtue of the Indian Constitution is the Executive Head. He is empowered with the power to pardon. If this power of President is subjected to judicial review it would be a clear cut encroachment of the judiciary in the executive, and the separation of power is defeated. This invasion of judiciary whether could be justified or not, this would be evaluated in the essay.*

Key Words: *judicial scrutiny, Executive Head, Pardon, Democratic, judicial review.*

Before the constitution came into force, the law of pardon in India was the same as the one in England since the sovereign of England was the sovereign of India. From 1935 onwards, the law of pardon was contained in section 295 of the Government of India Act. Which did not limit the power of sovereign. The result was up to the coming into force of the constitution, the 'exercise of the king's prerogative was plenary, unfettered and exercisable as hitherto.

Article 72 of Constitution of India empowers the president to grant pardon, reprieves, respite of remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.

- in all cases where the punishment or sentence is by a court martial
- in all cases where punishment or sentence is for an offence against any law relating to matters within the executive power of the union, and
- in all cases where the sentence is sentence of death.

In this article it will be discussed the judicial review of the president's power in constitutional manner. Pardon means to *forgive a person for his offence*. It is an act of grace and can not be demanded as a matter of right. It is a purely executive act. Even principle of natural justice need not be followed. However, it was contended in *Kuljeet Singh V. Lt. Governor of Delhi*², that the president cannot exercise his discretion arbitrarily, particularly in cases of death sentence. The Supreme court refused to examine this issue because it was a clear case where no other punishment could possibly be imposed.³ The effect of full pardon is to blot out the guilt and the offenders made innocent as if he had never committed the offence. It removes all penalties and disabilities and restores to him all his civil rights.



In another case *Devender Pal Singh V. State of NCT Delhi*⁴, the petitioner and other member of Khalistan Liberation front were convicted for being found responsible for killing a innocent person and injuring 17 others by the bomb blast attack. The petitioner's mercy petition on the award of penalty was turned down regarding the nature of the power of the executive under Art.161/72. Held that- it is neither a matter of grace nor a matter of privilege but is in important constitutional responsibility to the discharge by the highest executive keeping in view the consideration of the large public interest and welfare of the people.

President power under art.72 of the Indian Constitution is a constitutional power of wide amplitude and is not subject to the judicial review on merit, nor court can suggest guidelines. This was made in *Kehar Singh V. Union of India*⁵ and *Manu Ram V. Union of India*⁶, that the court cannot enquire as to why a mercy petition was rejected. He must be supposed to have considered all material facts before coming to conclusion. However, the court certainly has power in respect of the following matters: -

- 1.To determine the scope of Art.72.
- 2.Where the exercise of power is denied on erroneous appreciation of amplitude of power conferred by the constitution.
- 3.Where there has been inordinate delay in disposing of petition without any fault of the petitioner. The court may in such cases substitute life imprisonment in place of death sentence.⁷
- 4.Where the president's decision is wholly arbitrary, discriminatory or mala fide. The court held in *Manu Ram's* case that consideration of religion, caste or political loyalty are totally and fraught with discrimination.
- 5.The decision in *Swarn Singh V. State of U.P*⁸, regarding governor's power under Art.161 suggests that the court can judicially review an order passed without being appraised of material facts.

In above mentioned case one Doodah Nath Singh found guilty of murder of Joginder Singh and was convicted and imprisoned for life. His appeal to the high court and special leave petition under Art.136 to supreme court were unsuccessful. However, within the period of two years the governor of Uttar Pradesh granted remission of the remaining sentence. The supreme court quashed the order of the governor on the ground that when governor was not posted with material facts the governor was apparently deprived of opportunity to exercise the power in a fair and just manner. Conversely the impugned order fringes on arbitrariness⁹. Later in *Epuru Sudhakar V. Govt. of A.P.*¹⁰ Passayat, J has laid down the judicial review under Art.72 and Art.161 is available on the following grounds-

- (1) that the order has been passed without application of mind.
- (2) that the order is mala fide.
- (3) that the order has been passed on extraneous or wholly irrelevant considerations,
- (4) that the relevant materials have been kept out of consideration.
- (5) that the order suffers from arbitrariness.

He also emphasised that for effective exercise of judicial review reason for the exercise of power under these Articles must also be provided. Besides, he held that pardon obtained on the base of manifest mistake or fraud can also be rescinded or cancelled. Thus, the exercise of president's power under Art.72 is subject to judicial review like any other power of executive.¹¹ Clause (2) of Art.72 saves the power conferred by military law on any officer of the armed forces of the union to suspend, remit or commute a sentence passed a court martial.¹² Clause (3) of Art.72 lays down that the



power of the State Governors to grant suspension, remission or commutation of a sentence of death conferred by any law. For example-Sec.432 and 433 of code of criminal procedure shall remain unaffected.¹³

In *Mohinder Singh V. State of Punjab*, AIR 2013 SC 3622¹⁴, the sentence of a fixed term of imprisonment awarded by the court would be subject to any order passed by president of India or governor of the state, as the case may be.

Another case in *Shivaji Jaising Babar V. State of Maharashtra*, a delay of four years in taking a decision on the exercise of this power on the prisoner's mercy petition was held to be sufficient ground to alter the prisoner's sentence.

A worrying trend in respect of the president's power of pardon is the growing tendency of successive presidents to disregard the advice of the council of ministers in the exercise of this power. Former president APJ Abdul Kalam inherited twelve pending mercy petitions from his predecessor which grew to twenty in his tenure. Despite recommendation for rejection of the same by the Home Ministry, he rejected only one petition in his five-year tenure, that of Dhananjay Chatterjee whose mercy petition had already been rejected by two former presidents, Shankar Dayal Sharma and K.R.Narayan. The Supreme Court has held in *Manu Ram and Kehar Singh* that the power under Art.72 and 161 of the constitution is to be exercised by the central and not by the state Govt. and not by the president and governor on their own. A move by successive presidents to act in their own jeopardies the constitutional scheme and the court may soon be called upon to decide whether such action furnishes an additional ground for judicial review.

The power of pardon has thus conclusively been made subject to judicial review. Two extreme cases demonstrate the diametrically opposite position of judicial scrutiny of the power of pardon at present in comparison to that which existed immediately after independence. In *Re Channagudu* the Madras High Court held that the general pardon by the governor granted to all prisoners to mark the formation of the state of Andhra Pradesh did not amount to an act of interference with the due and proper course of justice. 53 years later the supreme court has stayed a pardon granted by the Governor of the same state to 1500 prisoners to mark the 150th anniversary of the Revolt of 1857.

This is both a good and bad development. It is a good development in so far as it will prevent a misuse of this important constitutional power by unscrupulous politician 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 on reasons that although may not be strictly in conformity with constitutional principles, may nevertheless be in the interest of the state. 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.

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