

PARDONING POWER OF THE PRESIDENT AND GOVERNOR

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ABSTRACT

In every constitution, there is a term pardoning power which is given to the head of the country (president). The main purpose of this power is to ensure maintaining checks and balances in the organs of the government. This power can only be achieved when exercised with a sense of responsibility and justice. Article II, section 2 of the American constitution provides pardoning power to the president. In the same manner, article 72 and 161 of the Indian Constitution provides pardoning power to the president and governor¹. The point of articles 72 and 161 is to provide a human touch to the judicial process. If human touch is not worked properly, the value of mercy provision is defeated. In the landmark judgment Maru Ram v. Union of India, the court held that pardoning power may be used in consultation with the central government. This article makes a comprehensive analysis of the pardoning power in India as well as other nations too. Deeply examine the Indian pardoning power and its limitation, the pardoning power of president and governor, the scope of the judicial system under this power, and other factors as well.

Keywords: Pardoning Power, The Origin Of The Power, President Of India And Governor, International View, Judicial Activism.

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INTRODUCTION

The pardon power has special significance, it is just the kind of authority that would attract the special attention of someone obsessed with himself and his ability to influence events.

BARBARA OLSON

If we talked in general, the meaning of pardon is forgiveness of an offense and release from the penalty of the offense. The word pardon originated in medieval Latin, it means to forgive. The origin of the word is between 1250-1300. According to Wex Definition Team, a pardon is an executive action that exonerates the person who is the subject of the punishment. The

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¹ Constitution of India 1950, art, 72 &161

pardoning power is only given to the head of the state (president). Apart from this president also has other powers which he holds in our hands, like remission, respite, and reprieve. It is also known as a mercy petition. In the Indian context under the constitution of India, article 72 provides pardoning power to the president, while Article 161 of the constitution of India, grants the state governor the same ability². Under the USA Constitution article II, section 2 Clause 1 grants the President the pardoning power, except in the cases of impeachment³. The first person who introduced the concept of pardon power at the constitutional convention was Alexander Hamilton. George Washington was the first president of America who exercised pardon power in the year 1795 after he issued an amnesty to those who engaged in Pennsylvania's Whiskey Rebellion. The pardoning power is frequently regarded as an essential aspect of checks and balances in democratic government. That's why it is very important.

HISTORICAL BACKGROUND

The power to pardon was a privilege granted to the English kings, who may commute any sentence imposed on a person. Back then the pardoning power was absolute and kings had full authority to execute this power. Previously the pardon power was known as the "prerogative of mercy". It first emerged in the 7th century, under the rule of King Ine of Wessex. During the reign of King Charles II between the year 1660-1685, the impeachment process was removed from the pardoning power. Alexander Hamilton was the first person who introduced the concept of the pardon power and George Washington was the first president who the pardon power.

In ancient Rome, clemency power was often used for political reasons rather than justice or mercy. Sometimes to increase his popularity or to win over the public, the executive would pardon the criminal. According to the biblical account, Pontius Pilate pardoned Barabbas before Jesus, which is a well-known example. Justice Holmes described the pardon as a private act of grace from an individual who happened to be in power⁴. So clemency seems to have had more to do with power than justice. The comparisons that could be made to the ancient pardoning practices for an accused person described above. The framers of the Constitution deliberately separated the judicial function of government from the pardon

² Constitution of India 1950, art 72 & 161.

³ CONSTITUTION ANNOTATED, <https://constitution.congress.gov/browse/article-2/section-2> (July 16, 2023)

⁴ Biddle v. Perovich, 274 U.S. 480, 486 (1927).

power. So the issue was raised by the English lawyer William Blackstone and he argued that the power to judge and pardon should not be given to the same person or body.

TYPES OF POWER

In addition to the ability to grant pardons, the president and governor also have other powers, which are given below.

Pardon Power: It removes both the sentences and the conviction and completely absolves the convicts from all sentences, punishment, and disqualification.

Commutation Power: this power denotes the substitution of one form of punishment for the lighter form. Let's take an example, a death sentence may be commuted to lifetime imprisonment, which in turn may be commuted to simple imprisonment.

Remission Power: this power denotes reducing the period of a sentence without changing its nature. For example, a sentence of rigorous imprisonment for 4 years, may be remitted to rigorous imprisonment for 2 years.

Respite Power: this power implies that, substituting a lesser sentence for the one that was initially imposed due to an exclusive circumstance, such as physical impairment of the prisoner or the pregnancy of the offender who was a woman.

Reprieve: this power refers to a short-term stay of the execution of the sentence, particularly the death penalty. Its objective is to enable the convict to have time to request pardon or commutation from the president.

PARDONING POWER IN INDIA

The pardoning power of the President

Article 1(1) of the Constitution of India says that "India that is Bharat, shall be the union of state⁵. India is federal in form and unitary in spirit. Beforehand to the establishment of the Constitution of India, the sovereign of England was also the sovereign of India, and the law of pardon in both nations was the same. Section 295 of the Government Of India Act 1935 included the law of pardon, which did not limit the sovereign's jurisdiction. As a result, the king's prerogative was fully vested, unrestricted, and exercisable up until the Constitution

⁵ Constitution of India, 1950, art 1 (1).

came into force. As per articles 72 and 161, respectively, of the Indian constitution, the president of India and the governor of the states were granted the authority. The sovereign of the United Kingdom and the president of the United States both possess the power of pardon, which the founders of the Constitution intended to grant to the president and the governors within the jurisdictions they granted.

Article 72 of the Constitution of India stated that the president shall have the power to grant pardon, reprieve, respite, or remission of punishment and to suspend, remit or commute the sentence of any person convicted of an offense in three cases.

- An instance of a court martial.
- A case involving a piece of legislation that is subject to the union's executive authority.
- The sentence awarded is death.

Many presidents used the pardoning power back then but President PRATIBHA PATIL was the only president who granted a record of 30 pardons in the 28th month. 90 percent of India's total death sentence was pardoned ever, but 22 of those related to brutal multiple murders. Some crimes against the children also.

The Supreme Court held in the matter of MARU RAM V. UNION OF INDIA 1981⁶. The Court held that, the power under Article 72 of the Constitution of India was exercised on the recommendation of the central government and not by the president on his own, and that the advice of the government holds the head of the republic. In the case of KEHAR SINGH V. UNION OF INDIA⁷, the court addressed the nature of the president's power under Article 72 while dealing with a petition challenging, the president's rejection of a mercy petition by Indira Gandhi's assassin Kehar Singh. The SC said that Article 72 falls within the judicial realm and can be examined by the court through the process of judicial review.

THE PARDONING POWER OF THE GOVERNOR

Before the starting of the Constitution of India, under the revised constitution of India in 1948. The pardoning power of the governor is given under Article 141, which says that the governor of the state shall have the power to grant pardon, reprieves, respite or remissions of

⁶ Maru Ram v. Union Of India, (1981), 1 SCC 107.

⁷ Kehar Singh and Anr. Etc. v. Union Of India and Anr, 1989 AIR 653, SCC (1) 204.

punishment, or to suspend, remit or commute the sentence, of any person liable of any offense against any law related to a matter concerning which the legislature of the state has the power to make laws. The power to commute under Article 161 which is the governor's pardoning power is a constitutional power which is cannot be dismissed or curtailed even by the statute much less executive instruction. Likewise, the power to commute the death sentence given under section 54 of the Indian penal code (IPC)⁸ and section 433 of the CrPC are statutory power conferred on the executive. Therefore the executive instructions under Article 257 will not apply to the exercise of the power under the statute also. The pardoning power of the governor which is Article 161 is different from the pardoning power of the president which is Article 72. The president and the governor do not have any precedence in the constitutional's hierarchy of power. Only the executive power of the union may be instructed according to article 257(1) the executive authority of the state may not be instructed in circumstances where it also existed. Thus, the executive directions can in no way fetter, curtail, or limit the power of the governor under Article 161 of the Constitution of India, which cannot be limited by the statute.

PARDONING POWER AT THE INTERNATIONAL LEVEL

United States Of America: Article II, section 2 of the United States Constitution allows the president to grant pardons and reprieves, but not in the case of impeachment. Courts in the USA have been very particular when it's come to interpreting the pardoning power where the conditions were stated in the grant of pardon that interfered with the individual who was pardoned constitutional rights. In the case of Hoffa v. Saxbe⁹, a condition imposed on a pardon was challenged as unconstitutional. According to the district court, the framework of the constitutional system defines boundaries that the president is not permitted to exceed while setting and afterward implementing conditions on pardon. In another case Burdick v. United States¹⁰, the court upheld an offender's right to refuse a presidential pardon granted to compel him to testify in a case that conflicted with his rights of self-incrimination. Apart from the judicial scrutiny in this area, the power of pardon has been allowed to be exercised without any restriction.

⁸ Indian Penal Code, 1960, sec 54,

⁹ James R. Hoffa et al v. William B. Saxbe, (1974), 378 F. Supp. 1221.

¹⁰ Burdick v. United States, (1915), 236 U.S. 79.

United Kingdom: The constitution of the United Kingdom is unwritten. In the United Kingdom, the crown practice of mercy reinforced itself during the middle ages, with the infringement of the king's peace emerging as a basis for criminal liability. However, the United Kingdom's judiciary has provided some checks and balances and has continuously scrutinized the unrestrained, unjustified pardon granted. In the case of *Thomas v. Sorrel*, the maxim "non Po test rex gratiam facere cum injuria et damno aliorum, means "the king cannot confer the favor on one man to the injury and damage of others". Nowadays the monarch performs based on the home secretary's recommendations. Sometimes the home secretary's decisions can be challenged by judicial review in some situations. In the United Kingdom, judicial review of power pardon is extremely restricted in scope.

OBJECTIVE OF PARDON POWER

The main objective of the pardoning power is to aid in making up for potential judicial flaws, as no system of judicial administration can be perfect. To release a convict from imprisonment that is unjust, grave, and disproportionate to the crime is an element of sovereignty, wherever that sovereignty may exist. This position of power has been given to a government body that is independent and unrestrained to tackle such a problem. The maxim "Fiat justitia per eat mundus" which means let justice be done even if the world shall perish would have remained. Without this mercy power, which would be used by a government department or official, a nation's political morality and that aspect of the god whose judgments never conflict with mercy would be drastically lacking and flawed. The pardoning power is founded on the consideration of public good and is to be executed on the account of public welfare, which is the necessary object of all punishment and will profit from the suspension of the penalties just as much as they will from their execution.

EXECUTIVE POWER TO PARDON AND JUDICIAL REVIEW

The Supreme Court consistently held that the executive commands under articles 72 and 161 of the Constitution Of India¹¹ should only be subject to limited judicial scrutiny based on the justification. The power under articles 72 and 161 of the Constitution Of India is per se above judicial review but the manner of exercise of power is certainly subject to judicial review. It is generally established that the president or governor's abuse or misuse of the pardon power

¹¹ Constitution of India, 1950, art 72 & 161.

is not exempt from judicial review. The power of pardon under Article 72 was reviewed in two landmark cases *Maru Ram v. Union Of India*¹² and *Kehar Singh v. Union Of India*¹³ as I mentioned earlier. In the case of *Maru Ram* case, the Supreme Court said that the power of pardon, commutation, and release under articles 72 and 161 " shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal executions and guarantors of valid play power. In *Kehar Singh v. Union Of India*, it was held that the president's order can only be challenged on the merits if it falls under the narrow parameters established in the *Maru Ram* case. After analyzing that case the court did not request judicial intervention in these situations.

In the matter of *Jagdish v. State Of Madhya Pradesh*, the court said that the power of the president and governor to grant pardon, etc. under articles 72 and 161, although it is expressed in an imperative language, must be used by the executive authority's advice.

CONCLUSION

“Where there is a great power, there is great responsibility” - Winston Churchill

The pardoning power of the president and governor is very important as it corrects the flaws of the judiciary, and also it helps in checks and balances into three organs of the government. The process of the pardoning system is very simple to use, but the disposition of mercy petitions is delayed due to political influences and government inefficiency. Therefore it is essential to make amendments to the law of pardoning that make sure clemency petitions are disposed of immediately. Clemency petition decision must be made within a particular period. The clemency authority can be improved to function as a moral means of resolving some of the problems now present in our criminal system. Also establishing an independent panel with the necessary expertise focused on justice-enhancing justification for sentence reductions is necessary. If pardoning power is used properly and not misused by the executive, it will certainly prove useful to remove the flaws of the judiciary.

¹² *Maru Ram v. Union Of India*, (1981), 1 SCC 107.

¹³ *Kehar Singh and Anr. Etc. v. Union Of India and Anr*, 1989 AIR 653, SCC (1) 204.