Pardoning Power: A Constitutional Scrutiny

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Abstract

Indian Constitution has been crafted from multicolored legal principles that mandate the present constitutional structure in action and thus moral inclination was also made a vital part of constitution. Power to grant pardon is one of such significant trait that could be easily traced the present constitutional framework. Power to grant pardon is confused in an overriding manner form the judicial functions but in reality both are two separate division nonetheless of the same government. Ones power to give remedy do not fetter the power to shake the stand of other since both of them have been alienated power by the same "Grund Norm" i.e. Constitution of India. Power to grant pardon is a executive function traced in provisions of the Constitution and are hence been adhered by the executive bodies although an interference is possible by the judicial wing on appropriate grounds as was seen in some present pronouncements.

Therefore in present paper, an analytical point of views sows the seed of power of pardon in India and also its comparative effect on judicial wing. The paper approaches several pronouncements by the apex court as a constitutional consolidation process as well that will make the authoritative distinction more clear.

KEYWORD: Apex court; Constitution of India; Executive bodies; Judicial Functions; Pardon

1- Introduction

Constitutional and criminal law are two distinctive parts that improvises to register an influence in their collaborative functional operation and hence the concept of pardoning or mercy evolves as coalesce of both the laws. Although most part of the world feels presence of this power of granting mercy in some or other form but is absent from countries like China.[1] Countries around globe have diversified structure for application of grant for mercy[2] but the spirit related to power and interest remain same. Taking the Indian scenario in place will make the concept more perplexed to understand since two divergent and separate organs of government are responsible for granting pardons for sentence or punishment. Judiciary and executive are two concerned organs responsible for pardoning under Indian legal system. The condition warrants a vigil move toward the issue basically developed from the historic relevance and hence moved toward the present arrangement of remedy regarding mercy. Our constitutional framers have made the structure for mercy grant in a binary formation wherein statuary and constitutional provisions are governing the law relating to pardon. Article 72 and 161 of constitution are the two basic provisions engulfing the power of executives to grant mercy, reprieves, respites or remission of sentences or punishment articulated by court. In the present paper a focus is given on the structural inhabitation of laws regarding pardon in country and hence it making them a kind of extra remedies for the sufferers and provide them a therapeutic element of relief. A well verses judicial approach being taken by the court of country in recent era of judicial enlightening and one of the very recent case of supreme court on

commuting death punishment of several accused have attracted eyes on the issue in matter. Some views of the judges in the current case of Shatruhan Chauhan v. Union of India[3] have mentioned the power of executive to pardon as a kind of duty endowed by constitution and failure to operate in accordance with the duty upshot as relief to convicts of whom mercy petition was delayed. The court in Shatruhan Chauhan reiterated the principle that justice delayed is justice denied but whether that justice should be construed as subject matter of judiciary or it should also cover extra-judicial power of executive in for m of granting pardon was missed to be captured. Although the case for administration of justice is not to be construed as the work of judiciary but the principles like 'duty to act judicially'[4] should be conceived and hence the executive spread his arms for capturing attendance in administration of justice either in form of administration of criminal law or in form of administering civil litigation affecting public interest.[5]

2- Historical and Conceptual inputs

History reveals that the power of mercy was an act to show the power of absolute grace inherited in the King.[6] History encountered many dynamic approaches to the mercy from very past time to present. As in older days, the mercy was nor granted for crimes like murders but a change was registered in fifteen century as the cases of '*malum prohibitum*' were allowed for mercy[7] and at last a fully fledged concept of pardoning power evolved in the society wherein the king was exclusively endorsed for granting the power of mercy.[8] In the global scenario sometimes grant of mercy becomes an act for reconciliation between countries and restoring tranquility if the relief through mercy is granted to the rebels and insurgents of country.[9] Validity of pardon can be construed as the conditional and validity of pardon depends on same.[10] In case of non-fulfillment of prescribed conditions subsequent to pardon will terminate the relief granted form pardon and restore the preexisting conditions that may me continuation of sentence. The power of pardoning was a sort of political will that was used to be in hands of king in UK[11] and even termed as 'super-political' nature in U.S.[12] but Indian addresses a change because of separation of power and the constitutional power to pardon remain in hands of executives of country i.e. President and Governors. Indian law of pardon can be traced from the English period of pre-independence era wherein the law applicable to England will be followed in Indian and the Sovereign holding the power to pardon remained as the authority relating to mercy in British India. Although there were certain statuary provisions being framed in this regard by way of their enactment in Criminal Procedure Code[13]. Even this power under article 72 and 161 of constitution shares similarity with that of Section 295 of Government of India Act, 1935 that is the referred legislation while constructing various elements in Indian legal system.

Power to pardon is recognized and can be exercised in the cases of punishment or sentencing relating to contempt of court.[14] There are contentions that that involving contempt of court cases into realm of pardon power should be dejecting the principles of separation of power vis-à-vis judicial freedom but court itself took much liberal approach over the issue by keeping an eye over the nature of the power to pardon. The position in U.K. is that sanction of mercy can be even allowed irrespective of any provision of an appeal.[15] A pardon cannot be granted if the offences in lieu of which pardon is granted haven't committed so as to condone from over-protectionist nature of power that deems

inherited in executive.[16] Mr. Seervai very significantly and vigilantly observed the need for speculation to encounter the query regarding the effect of legislature and judiciary over power of pardon envisaged in executive.[17] Therefore much of jurisprudence has evolved over past that encountered the issues present in the matters of pardon but as a changing society new issues needs to be resolved for making a harmonious presence of power of pardon and its conflict with other organs of government.

3- Law of pardon in India

Indian legal structure provides pardoning power sourcing from both statuary and constitutional authorities. Statuary power inherits in Section 432 and subsequent provisions of Cr.P.C and constitutional authority initiate from Article 161 and article 72 of Constitution of India. Although section 432 and 433 of Criminal Procedure Code,1973 provides for power to commute or suspend a sentence but the subsequent section imposes a conditional clause for enjoyment of power for same. Therefore a statuary power of clemency is itself conditioned by provisions in the same statue i.e. Cr.P.C but no such condition could be found in Article 72 of 161 of constitution of India.[18] This presence of embargo in statuary provision makes it different from constitutional idea of pardon. While providing pardon under section 433 of Cr.P.C, court has applied a vigil aye that impediment provides subsequently under Section 433 must be followed so as to overuse the power granted under the statue.[19]Although power of pardon can be broadly divided into three categories i.e. total pardon, conditional pardon and tumbling down of sentence.[20] Words in article 72 and Article 161 like suspend, remit and commute signifies the diversified power given under power of pardon under Constitution of India. Article 161 is co-extensive to powers given in article 72 which means that the power of pardon under 161 is with reference to matters in List II and List III of Schedule 7 conditioned that the matters relating to List III have to be duly adhered with respect of any power exercised under Article 72 so as to save any interference between the two provision with reference to matter pertaining same subject matter list. The law in U.K. is same as the power of King to Grant pardon arise for those crimes committed against Majesty's name, infringing public rights, or recovering assets belonging to king.[21]Although the authority devised to grant pardon must not do so in dictation of other person and hence the decision must be qualified to be accepted as a valid exercise of power of pardon[22]and to rectify the quandaries created by law.[23] Also the power of pardon can only be exercised after the offence come into existence and is not possible in any to be applied before the subject matter comes into occurrence so as to save the possible purpose of the power of pardon to protect it with coming into contradiction with law[24]and even making a new person after granted pardon.[25]

There are some divergence in power granted to president and governor of state under article 72 and 161 respectively. Difference lies is that under Article 72 power to grant pardon for military sanctions like court marshal is provided whereas Article 161 is lacking this feature according to Section 2 of article 72 that reads as : "Nothingin this sub-clause (a) of clause 1 shall affet 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. This feature proves the supremacy of head of an institution over other whereby providing a prerogative absent in case of latter. Under article 72 and 161 both President and Governor have power to pardon matters relating in List I and List II and also enjoys a concurrent

power over matters relating to List III. Solitary exception that can be positions lies in the matter of death penalty wherein power of president to pardon is absolute regardless of any similar power under article 161. Clause 3 of article 72 lays foundation of the same read as: "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." Therefore with these two exceptions, rest of the principles applied in the concurrent articles moves with same momentum.

4- Judicial approach to pardoning power

Indian judiciary is always vigilant in securing interest of citizens and hence delivering precedents that attains the estimated goal of justice. Although separation of power have attained sacrosanct position in realm of Indian functional organs and as the prerogative power of pardon lies in sphere of executive as endowed by constitution and hence the minimum interference be obliged by judicial and legislative wing of country. From very past, court were ensuring the savior of idea of pardoning power wherein case of In Re Maddela Yera Channugadu & others[26]was remarkable where court confirming the American jurisprudence and practice on pardoning opinioned that the power of pardon under 161 can be exercised at any stage either while continuation of trial or confirmation of conviction. Cases of K.M.Nanavati were remarkable both in State v. K.M.Nanavati[27] and K.M.Nanavati v. State of Bombay[28] whereby forms was heard by Bombay High court and latter by Supreme Court of India. In case of Bombay High court, court observed that the power under article 161 is inherent and contention of petitioner was ignored that 'trial' include proceeding in appeal therefore dismissing the petition by upholding the decision of Governor. When the same case reached before Supreme Court for consideration, the court took technical view while determining the material fact in issue regarding confrontation between two separate power houses i.e. judiciary and executive. A tussle between two provision of constitution was seen as in Article 142 and Article 161 wherein both the branches have power to suspend the sentence under respective provisions and therefore a harmonious interpretation was warranted to deliver justice and maintain a sheer balance of power. In Nanavati it was contended that both the power can be exercised in same field giving similar touch upon both but it created a space of disharmony between the two power hubs and hence the motive of court to create a so called harmony between two provisions was depreciated by the judgment.[29]A slight shift was registered in later case of Sarat Chandra Rabha v. Khagendranath Nath[30] wherein court gave disocncern over the similarity effect between the two provision i.e. Article 72 and Article 161 and hence it was contended that order of court cannot be compared similar as of pardon power under 161 and hence the effect of both is different while interpreting it in realm of other legislation. This move in Rabha case although technically not overruled the Nanavati case but the core reasoning of Nanavati was denied in Rabha case.[31] Court is Rabha asserted that the order of remission functioned under power of pardon has only effect over the lowering the sentence up to the extent remitted but do not affect the conviction and order of sentence of lower court. While dealing with other substantial questions in law, the order of court has to be referenced rather than the order of pardon by executive. The possibility of overlapping effect between the two provision seems to be harmonized by demarcating the difference between the two. Hence the depart from judgment of Nanavati was passed by same bench as in Rabha can be even concluded as

the ineffectiveness giving rise to ambiguity in former judgment was covered by the latter case by same bench.[32]

While exercising the power fewer than 161 and 72, procedures as given under section 433A of Cr.P.C must not be strictly adhered but mere governed by principles of good faith.[33] In case of *Kehar Singh v. Union of India*[34]*a petition was filed against the rejection of mercy petition by President under* article 72 of constitution. The petitioner contended that no chance for oral presentation was given to the parties to petition and hence demanded for invalidating the order of president's rejecting the mercy petition. Court rejecting the pleas of petitioner opined that the power under article 72 is prerogative power of executive nature and hence petitioner cannot insist upon the oral hearing and hence dependency for allowance of same lies to discretion of president. Although a absolute liberty to grant mercy petition is still not exist as judicial review attracts some actions or omissions of executive that resulted in sheer injustice. In case of *Singh v. State of UP*[35] *where*in governor have mistakenly accepted the mercy petition of same person of whose mercy petition have previously rejected and hence court set aside the pardon deeming it arbitrary and therefore also confirmed the notion that to preserve the executive from applying over discretion should be condoned.[36]Even in present time the principles regarding pardon come into realm of argument in courts and varied interpretation construct in court of law regarding same leaving untouched the basic principle connected thereto.

5- Suggestion

In the present study, a significant path left to be discussed is over two issues that are indeed discussed and resolved upon to solve the contest between two branches of government i.e. Executive and Judiciary that arose because of powers derived from same source i.e. Constitution overlapping each other for similar matter. Difficulty to address is regarding the determination of superiority of power of remission when once a death penalty is approved by Apex court as was seen in a recent case[37]. In the authors view, a brief opinion lies in support of Executive specifically in matter of death penalty. Laws relating to death penalty are settled that can only be given in "rarest of rare"[38] case and hence the apex court indisputably will come over the decision after applying its imperative vigilant and rightful observation that cannot be contradicted. An additional remedy that is left for the person is of the remedy of pardon exercised by executive under Constitution that can be inclined by aggrieved party as a matter of "mercy" and not even as a matter of "right". If that remedy is also exhausted and there is a negative opinion being opined by the executive, will steadfastly authenticates the death penalty as "beyond reasonable doubt" and hence the matter is settled. Now a period based reasons is superfluous to condense the death penalty into imprisonment. Even in various cases, when the accused are acquitted from the serious charges like one in recent case Akshardham[39] that took same period of around 10 years. Now the position to consider is that if the courts those are responsible for Justice if did late will definitely violate the fundamental right of the citizen and hence be made responsible and penalized but since there are reasonable respond available to the said delay made the courts desisted from those implications. If unavailability of machinery and work force is one of the reasons of judicial delay then the same reason applying over the executive will support the delay in deciding over the death penalty.

Now after providing the supportive reasoning suggesting the erroneous move of apex court in recent case and laying a law that affects the legitimacy and repute of a constitutional power in hand of executive. The law is laid and its execution have already taken

place and hence to preserve such conflicts in future, special provisions must be made for death penalty cases where an application pardon is pending so as to save the mental trauma that purports to be conveyed with such delay. Although the matter is purely to be considered in right approach to increase the working efficiency that relates to the sole observance of administrative functionary and hence cannot be decided with an idealistic approach but yet special procedures are warranted to conclude the "pardon petitions" lounging before the executive ensuing in practice of natural law of smooth administration.
Situation must be considered that a person is having a "right to have speedy justice"[40] but not to have a "speedy mercy". Court may be bound to follow the principles, but executive is not bound by such principles and if the case if so genuine to consider, then inscriptions are raised on those courts that mishandled and misaimed the proceeding to result in an invalid and false conviction.

6- Conclusion

To conclude within as summary, it is pertinent to spotlight on the recent controversy of the time when in a death penalty remission case, the court have overpowered themselves after passing of a negative order from executive for rescinding the death penalty being pronounced by the apex court previously. Now the matter in question lies to the twofold questions that are resolved in the previous section of the manuscript that shows that the power to grant pardon is a prerogative power that lied in the hand of kings and presently in President duly authorized by the sacrosanct and most commanding charter for governance of India i.e. Constitution of India. Now judiciary must have to respect that power and even on the basis of some stringent but unreasonable calculation must not interfere in the "last relief" present to anyone in cases dealing with death penalty. The question to solve lies in the notion nature and scope of power of which apposite analysis clears differentiation between the judicial and executive wing vis-à-vis making a restriction points that need to be placed between the both of the functionaries. Power of pardon is subdivided into distinct categories that in accordance with circumstances be applied. Executive while making a pardon is not bound with preconditions procedures but have to keep principles of natural justice. Although judicial authorizes have wide ranging powers ensued by Constitution but same constitution is also source of executive power of pardon. Paper in short concludes in reference with the recent case that one has a "right to speedy justice" but not of "speedy mercy".

In the present context it can be clearly seen that the legal and social structure of Indian records a vibrant change from pre-independence era till date and although the source of the power of pardon originates from foreign systems but remain to be applied according to the present system wherein independent judicial intervention should be allowed up to an extent still leaving a wide discretion over the executive to save them from applying an over-discretion that could endanger the present system. Also lack of procedures regarding the implementation of power under the constitutional mechanism of pardoning power can be replaced with some procedure framed by applying the inherited parliamentary power to amend the constitution and even propose some legislation for the same. Self regulatory approach can be enabled while determining and applying pardoning power under constitutional framework wherein principles of good faith and reasonableness must be applied and in exceptional condition leaving the door to judicial review open. Wherein argument

regarding the constitutional status of pardon should be recognized, also the effect of political interference in every organ of government should not be left untouched and the possible harm that potentially exist with the pardoning power should also be recognized with same effect.

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