

**INDIAN JOURNAL OF CONSTITUTIONAL STUDIES**

**Issue - March, 2017**

**Volume I Issue III**

Copyright © 2016-17. All rights reserved with the Editors of Indian Journal of Constitutional Studies.

**ISSN 2456 - 5008**

Published bimonthly

**- - Disclaimer - -**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of the Indian Journal of Constitutional Studies. The Indian Journal of Constitutional Studies (hereinafter IJCS) and its affiliates holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Board or Board of Advisors for the Indian Journal of Constitutional Studies. Though all efforts are made to ensure the accuracy and correctness of the information published, the Editorial Board or the Board of Advisors for IJCS are not responsible for any errors caused due to oversight or otherwise.

**- - Note - -**

This compilation has continuous footnoting. Kindly read the references to previous footnotes in all the Articles in isolation upon the particular Article only.

**Publisher Details -**

**Bishikh Mohanty**

**E33, AWHO Colony Chandrasekharapur, Sailashree Vihar,**

**Khorda, Odisha, Pin - 751021**

**Telephone: +91 8106743973**

**Email: editor@ijcons.com**

## **The Board of Advisors**

---

**Dr. Bisnu Charan Patro**

Assistant - Editor, National Institute of Health and Family Welfare

**Ms. Sudha Kaveri**

Asst. Professor, Damodaram Sanjivayya National Law University

---

## **Panel of Experts**

---

**Ms. Prathyusha Samvedam**

LL.M., National Law University, Jodhpur

**Adv. Siddharth Sharma**

M.P. High Court

---

## **The Board of Editors**

---

**Mr. Bishikh Mohanty**

Managing Editor

**Ms. Ammu Sasidharan**

Senior Editor

**Ms. Vanya Srikant**

Compiling Editor

**Associate Editors**

Ms. Sudipta Lenka

Mr. Himanshu Gupta

Ms. Yashasvi Gupta

Ms. Ojaswini Tripathi

---

- Acknowledgement-

Efforts from many quarters have gone into the successful publication of this Inaugural Issue of the Indian Journal of Constitutional Studies. We would like to express a deep sense of gratitude towards our blind peers who thoroughly validated all articles sent to them for reviews. We would also like to thank our contributors for contributing extraordinary submissions to the issue which stood at par on the rigorous scrutiny.

## **ALL YOU NEED TO KNOW ABOUT PARDON**

**“The living God is a God of justice and mercy and He will be satisfied with nothing less than a people in whom his justice and mercy are alive.”**

**~Lesslie Newbigin.**

### **The Author**

Swapnil Paul. Manovikalp Singh, Amity Law School, Noida

### **Contents**

- I. Introduction
- II. Capital punishment, an important matter of moral and justice.
- III. Constitutional provisions regarding pardon.
- IV. Procedure of filing, accepting and rejecting of mercy petition.
- V. Statistics and landmark decisions
- VI. Universal concept of pardoning
- VII. Judicial Review of pardoning
- VIII. Conclusion

### **I. INTRODUCTION**

Pardon in strict sense means to forgive someone for his/her actions. Under Indian constitution such power is vested under the president and the governor to give pardons for special cases under article 72 under which president is empowered to pardon and under article 161 under which the governor is empowered to pardon.

Pardon is known as an act of grace through which a person can look for mercy after his/her conviction by the court. On state level governor and on national level president can give such mercy to the convicted person. This power is vested under the executive body (president and governor) but even in exercise of this power the executive body is used as a rubber stamp as this power cannot be exercised without the advice of cabinet of ministers. Anyone can file a mercy plea including foreign nationals through any means of official communication.

Such power is vested under the executive body as there has to be checks and balances in every part of the democratic body of the country as there can be errors in any part of the government and there should be checks and balances by other bodies of the government. It is considered that there can be mistake or error by any human being and no human being is perfect so in this context there has to be checks and balances of every power exercised by every body of the government. Judiciary is considered as most important organ of the government but it can't be ignored that even this organ can make wrong decisions which should be looked by other organ of government for which the executive body is vested with judiciary powers.

**“A democracy without checks and balances is like a man without his essential organs, he can live but for how long?”**

### **II. CAPITAL PUNISHMENT, AN IMPORTANT MATTER OF MORAL AND JUSTICE.**

Capital punishments are considered as one of the most important matters for deciding the pardon by the president as capital punishment is usually given in very rare cases. Usually the question arises that whether mercy plea of person penalized by capital punishment should be entertained or not? Moral defense which is given in favor of pardoning for capital punishments is that while a crime could be really harmful for the society and deeply destructive but the fact cannot be ignored that a punishment cannot undo the act done by convicted person but it only serve as a justice and protect the society from such acts. Therefore it's considered to give a chance to the person to change his behavior and personality, on this factor pardoning in cases of capital punishment is allowed.

**“Under what circumstances is it moral for a group to do that which is not moral for a member of that group to do alone?”**

— **Robert A. Heinlein**

---

### III. CONSTITUTIONAL PROVISIONS REGARDING PARDON

There are 5 types of pardoning mandated by the constitution of India which are –

- **Pardon** – It means to free the offender from all punishments, convictions and disqualifications.
- **Commutation** – It means to reduce the nature or character of punishment (qualitative). Example - From death sentence to life punishment.
- **Remission** – It means to reduce the amount of punishment (Quantitative). Example- from 8 years to 4 years.
- **Respite** – It means to give lesser sentence than prescribed in special cases or circumstances. Example – convection of pregnant women.
- **Reprieve** – It means to put a stay on execution of a sentence.

Under Article 72 of Indian constitution president can grant pardon where –

- Punishment is for offence against a union law.
- Punishment is by court martial.
- Punishment or sentence is Death penalty.

Under article 161 of the Indian constitution governors of each state are empowered to pardon. Thus even the governor can grant pardon, commute, remission, respite and reprieves. Both governor and president have concurrent powers but there are 2 differences in exercise of the power which are –

- President can pardon in cases of court martial but the governor cannot do so.
- President can pardon in case of death sentence but governor cannot do so however he can

reprieve, respite, or commute the sentence.

---

#### **IV. PROCEDURE OF FILING, ACCEPTING AND REJECTING OF MERCY PETITION**

Mercy petitions filed to the executive are usually based on personal factors, social factors, psychological factors and cultural background and other factor which are usually not considered by the courts.

Such petition filled to president is first received by his secretary then he forwards it to ministry of home affairs for its recommendations. Then the ministry deals with the petition and studies it in detail. Then the petition with the recommendations is sent to the president for final decision. However there is no fixed amount of time for president or ministry of home affairs to decide on the petition. After making the decision if president agrees with the recommendation then he acts accordingly and if he disagrees then the president may send a note of disagreement to the home ministry.

---

#### **V. STATISTICS AND LANDMARK DECISIONS**

Studying the statistics of recent time president pranab Mukherjee has cleared 32 petitions as of 24/01/2017 which is highest number of petitions cleared by a president in recent time. Out of 32 petitions cleared by president pranab Mukherjee, 28 were rejected by him which is over 87 percent of total mercy petition, Out of rejected petitions there has been plea of ajmal kasab and gurmeet Singh. President even accepted 4 pleas out of which latest was accepted on 1<sup>st</sup> January 2017 which is also considered one of the most historic step taken by a president as he asserted his power opposite the government and rejected its recommendation while considering the plea of death convict, according to the records on official website of presidents office this is the second time such instance has happened whereas first time when he did so was in case of Jitu Nainsingh Gehlot, on 18th September 2016 where he commuted the sentence and went against the recommendation of home ministry. Due to these decisions President Pranab mukherjee is also considered as one of the most successful and mercy less presidents of India.

One of the most popular case where the convicted was pardoned was [1] K.M.Nanavai vs. State Of Maharashtra, where the convicted was pardoned by the governor. In this case the accused k.M.Nanavati was found guilty of murder by the High Court of Bombay and sentenced to life imprisonment. After the conviction by High court nanavati appealed to the Supreme Court where the SC reiterated the High Court's verdict. After this nanavati appealed for pardon where he was granted mercy by the then Governor of Maharashtra, Vijaylaxmi Pandit who was also sister of Jawaharlal Nehru .This is known as one of the most controversial step taken by governor as the convicted person was said to be in close relation with Nehru family which could have been one of the influencing reason behind the decision of the governor.

---

#### **VI. UNIVERSAL CONCEPT OF PARDONING**

Pardoning or granting mercy is not new to the world, it's very old and universal practice. It is a

practice which we can find in the depth of the history in most of the civilization known to the world. In medieval period this power was mostly used to reduce overcrowding in the prisons during wars, revolts, etc. In modern days this power is used to secure the rights of the people. The modern practice of pardoning was started from the British rule where it was royal power or duty of the king to forgive. In modern time the power of pardoning is mostly vested under the executive body in most of the countries. Main reason for such power being vested under the executive is ‘‘division of power’’ which is one of the most important concept of democracy.

In **America** the president can pardon or relieve for offences against the laws of the country, except impeachment under the constitution of America. However president can only pardon in case of offences against federal laws under article 2, section 2 of United States constitution and for offences against state laws, governor has to pardon.

In **England** the constitutional monarch is vested with the power to pardon but with the advice and recommendation of his ministry.

In **Canada**, parole board of Canada is federal authority responsible for granting pardons under criminal records act (CRA).

In **Germany** power of pardoning is vested under the president which he can transfer to chancellor or minister of justice on his own will. Such power is absolute and non-questionable.

It is mostly argued that power of pardoning is often misused by the executive as reasoning is not necessary by the executive while granting pardon due to which there can be biased decisions. There is also a possibility that the convicted person can procure his release by undue influence on the executive. To avoid these problems most of the countries have a provision of judicial review on pardons granted by the executive.

## VII. JUDICIAL REVIEW OF PARDONING

Judicial review is a power of court of law to review the actions of executive and legislative branches in terms of constitutionality in some of their jurisdictions. Judicial review works as a balance of power in the government as it insures checks and balance in the working of the bodies of the government. This power is vested with the supreme court of India and it can even review its own decisions.

In case of [2] Naqshbandi the Supreme Court observed that judicial review is allowed only to find the process in reaching the decision not the decision itself.

It has always been an argument that whether there should be judicial review of pardoning by executive or not. However, even if such power is vested under highest executive authority it has to be used in good faith and for the welfare of the society. Such power should not be exercised arbitrarily and there should be fair decisions by the executive branch while pardoning. It was observed by the court that there is need of specific guidelines in exercising of pardoning power by the executive branch. However no such guidelines or rules were implemented on the pardoning power until mid-80. There was continuous misuse of pardoning power by the

executive branch which was been ignored due to absolute power with the executive branch.

However it was observed by the Supreme Court after examining different cases regarding pardoning power of executive that there is need of checks and balances in exercise of pardoning power as a president or governors are sounded by many factors which may result as an influencing factor while exercising such power. As a remedy judiciary branch was vested with power to review such decisions and many guidelines were laid down by the Supreme Court to avoid unfair use of pardoning power.

Some of the most important guidelines implemented by the Supreme Court in different cases were –

- No right for oral hearing is there for the petitioner.
- President can examine the evidence on his own different from the view of court.
- President has to take recommendation for in union before taking his decision.
- President is not bound to gives reasons for his decision.
- President can pardon on moral basis and on the base of evidences too.
- There can be judicial review only in case of arbitrary, irrational, mala fide or discriminatory decisions.

One of the first case where supreme court expressed its views on pardoning power of president was [3] Maru Ram v Union of India where the supreme court said that the power of pardoning mentioned under article 72 of constitution of India should be exercised on the advice of home ministry and not by president on his own, and that ministry's advice binds the head of republic.

In [4] Kehar Singh v. Union of India, Supreme Court said that the executive cannot be subject to judicial review with exception to guidelines mentioned in Maru ram case; Based on these cases there was no intervention by courts in working of executive in exercise of their powers, However courts view changed in [5] Swaran Singh v. State of U.P, where the governor of Uttar Pradesh granted remission to minister of state legislature convicted for murder. The Supreme Court revoked the remission by the governor based on the fact that some important facts were not bought to the knowledge of governor while taking the decision.

4 fold principle mentioned by the court in Kehar singh case which were –

- No right for oral hearing is there for the petitioner
- President has to take recommendation from union before taking his decision.
- There can be judicial review only in case of arbitrary, irrational, mala fide or discriminatory decisions.

- President can have his own view, different from that of courts.

In case of [6] *Bikas Chatterjee v. Union of India* the Court said that whether there is consideration or there is no consideration based on wholly irrational, irrelevant grounds and mala fide decisions, then such pardoning by executive can amount to judicial review.

In [7] *Raga Billa* case the Supreme Court observed the nature and ambit of presidents pardoning power. In this case one of the appellant was given death sentence by the Supreme Court, After which he went to the president by filing a mercy petition but his petition was rejected by the president, Then the appellant filed a writ in the supreme court under which he challenged the president's power to pardon on the ground that his mercy petition was rejected without any just reason. His petition was rejected by the court on the ground the "Pardon is an act of grace or and it's totally on discretion of the person having such power and exercising it and there is no need to give a reason for such act.

In [8] *Satpal v. State of Haryana*, Supreme Court revoked the decision of pardoning done by governor of Haryana. In this case the governor pardoned a person convicted of murder by the court, the court revoked the decision of governor on the ground that the governor was not advised properly and many relevant facts were not in the knowledge of the governor while taking the decision regarding pardoning the convict. Keeping such decisions in mind court held that "Not being aware of important facts would make an order of granting pardon arbitrary and irrational".

One of the most important decision regarding judicial review of pardoning power was taken in [9] *Epuru Sudhakar Case* where the question was on just and fair use of judicial power vested under executive body, In this case the governor of Andhra Pradesh Sushil Kumar Shinde remitted the sentence of a congress member who was charged for murder of two persons including a TDP activist, The supreme court in this case warned the executive that the exercise of the pardoning power would come under the court if any decision is taken against rule of law. The Supreme Court said that the rule of law is basis of all the decisions taken by the court and the principle of rule of law can't be compromised even if it's taken by highest executive authority.

Court said that power of granting pardon by president and governor can be challenged on the following grounds –

- When order is passed without application of mind
- When order is mala fide
- When the order is passed on irrelevant considerations.
- When relevant facts are ignored.
- When there is arbitrariness in the order of governor or president.

From above cases and decisions taken by court it's quite clear that the supreme court can review the power of pardoning vested under the president and the governor but such review should be based on some limited guidelines mentioned by the supreme court which could be arbitrary decisions, unfair decisions or any such decision which is non-justifiable under the guidelines mentioned by the court or under the constitution of India. The court of law can't grant pardon themselves just on the bases of criterion by president and can't even reverse the decision of president. On the other hand President can investigate the case and have different view regarding the case from that of the court; however the decision of president won't make any difference on the judicial records of that case. Decisions and judgments of the court regarding the case would remain undisturbed.

It is always considered that it's not necessary that there will always be fair and wise decisions by judiciary or even by executive branch as there can be flaws by anyone. In many instances there have been controversial decisions taken by courts as well as executive body, As a result there is pardoning power vested under executive body and power to review executive pardon is vested in the judiciary. Court of law always makes their decisions based on facts and laws and not taking moral point of view in their decisions. As a remedy it's important in any democratic government to vest judiciary power in some authority other than the judiciary itself, so that there can always be a window open for avoiding or improving judgment made by the courts. This power of pardoning vested under the president and governors is said to be one of the most important executive power as it ensure checks and balances in the government. The power of pardoning vested in president under article 72 and power of pardoning vested in governor under article 161 under constitution of India are executive power and usually know as power of mercy. However people usually get confused with pardoning power and judicial decisions or judgments, Major difference between working of both the bodies is that the trail and passing of judgment is purely under the judiciary and no other body can do so but on the other side executive body deals with execution of a sentence. Thus both the powers are connected with each other but different in every aspect.

---

### VIII. CONCLUSION

In recent time we have seen public awareness regarding presidential pardon compared to the past, with cases like of Afzal Guru, Ajmal kasab or gurmeet Singh there has much talk about this power in recent time. With the awareness there are always questions regarding the subject. As our topic says "Judicial review of pardoning power of president and governor", there have been questions regarding validity of this power under president and governor from long time as it's usually argued that president and even the governor are only rubber stamps and every decision taken by them is directly or indirectly influenced by the union government in case of presidential decisions and state government in case of governor. So it have been important that weather such power should be vested under the executive when it's quite clear that their decisions could be influenced by many political and social factors. To insure that there is no wrong or mala fide use

of such power judiciary is given power to review the decisions taken by president or governors. But in recent time president Pranab Mukhrjee has taken historic steps while asserting his power in the Bara massacre case where he rejected home ministry's recommendation and commuted the sentence of 4 convicts in the case. This is said to be one of the most historic step ever taken by a president as this step broke the frictional rubber stamp and made presidential Pranab Mukhrjee one of the most successful and mercy less president of India.

---

#### **IX. END NOTES**

1. K. M. Nanavati vs. State of Maharashtra, 1962 AIR 605 1962 SCR Supl. (1) 567
2. Syed T.A. Naqshbandi & Ors vs. State Of Jammu & Kashmir & Ors on 9 May, 2003
3. Maru Ram Etc... vs. Union Of India & An, 1980 AIR 2147, 1981 SCR (1)1196
4. Kehar Singh and Anr. Etc. vs. Union of India and Anr, 1989 AIR 653, 1988 SCR Supl. (3)1102
5. Swaraj Singh vs. State Of U.P. & Others on 9 August, 2010
6. Bikas Chatterjee vs. Union Of India & Ors on 12 August, 2004
7. Kuljeet Singh vs. Union Of India & Anr on 21 April, 1981, 1981 AIR 1572, 1981 SCR (3) 512
8. Satpal Singh vs. State Of Haryana on 28 July, 2010
9. Epuru Sudhakar & Anr vs. Govt. Of A.P. & Ors on 11 October, 2006