

AN ANALYSIS OF ARTICLE 72 AND 161 OF THE
INDIAN CONSTITUTION- PARDONING POWER OF
THE PRESIDENT AND THE GOVERNORS.

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Best Citaion - NIKHIL J, AN ANALYSIS OF ARTICLE
72 AND 161 OF THE INDIAN CONSTITUTION-
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GOVERNORS, 2 ILECR 13, 2022.

ABSTRACT

The research paper revolves around the aspect of pardoning powers in India, mainly focusing with respect to the Governors of the States. The paper also focuses on how the judiciary in our Country has reiterated its observation about the pardoning power in the Indian Constitution many a times by judging that the pardoning power present in the Constitution of India is different from the pardoning power that is vested in the hands of the Crown in the Constitution of Britain.

The main research question in this paper is whether the pardoning power given to the President and Governors is eclipsing the Rule of Law.

The purpose of writing this research article is that it has to be noted that though there are recent debates challenging the presence of Article 72 in our Constitution, it needs to be implored into the fact that whether the abrogation or the deletion of such a provision from our Constitution denies it the present pith and marrow. The President's and Governor's power to pardon has been granted and will be continually regulated by the Constitution of our Country; hence the depth

of this power that has been guaranteed to the President and the Governors under the Constitutional provision needs to be read with the Constitutional scheme drawn within the mind and not with repetitive reference that is made to the same power enjoyed by the Crown under the British Constitution.

Finally, in conclusion, the paper proves that the power to pardon as it is blended into our Constitution was added with the ideas solely fixed in the mind of our constitutional framers. Furthermore, it can be concluded that even though the power of pardon has survived through the ages, its scope is limited by the axioms of modern political philosophy, such as separation of powers and the supremacy of the Constitution, and it does **not** violate the fundamental principle of the rule of law.

Keywords- Britain, Constitution, Executives, Governor, Judiciary, Power to pardon, President, the rule of law, Violation

INTRODUCTION:

The power of pardoning by the executive is a provision that has been envisaged in almost every Constitution in the modern world. Such a discretionary power has been given to the executive of a state from time immemorial. It has even been enshrined in the code of Hammurabi. However, it needs to be said that little study has been done dwelling into the actual powers vested in the hands of the executive which provides him with power to grant clemency to the accused, who have been trailed under the judiciary of the Country.

LEGISLATIVE BACKGROUND:

the power of pardoning enjoyed by the executives around the globe has evolved from the power to pardon the Crown in England. The power to pardon in England was one of the royal prerogatives enjoyed by the sovereign.

During the British regime, the power to pardon for offenses was vested in the hands of the British autocrat. Under the

common law, this power to pardon wherein the sovereign forgave any crime, offenses, punishment, execution, right, title, debt, or duty existed. This power vested initially within the monarch was absolute, unrestrained, and not even subject to the review by the judiciary. This was the source from where pardoning power found a place in the modern Constitution of India. In the Government of India Act, 1935, the power to pardon was contained in Article 295⁵² of the Act. However, the Act did not have a provision corresponding to Article 161 of the Indian Constitution. In India, the Presidential pardon has been given as a provision in Article 72 of the Indian Constitution that says that President shall have the power to grant pardons, remissions, respites, and reprieves of punishment or to suspend, remit or commute the sentence of any person who has been convicted under any offence.⁵³ A parallel power is given to the State executive, the governor of every state under Article 161 of the Constitution.

In addition to these provisions the penal laws in our Country also provide for the power to pardon. The Code of Criminal Procedure, 1973⁵⁴ has illustrated pardoning power in Sections 432, 433- A, 433, 434 and 435. Sections 54 and 55 of the Indian Penal Code⁵⁵ also confer power on the appropriate government in the Country (State government /Central government) to commute the sentence that has been awarded to a person. The judiciary in our Country has reiterated its observation about the pardoning power in the Indian Constitution many a times by judging that the pardoning power present in the Constitution of India is different from the pardoning power that is vested in the hands

of the Crown in the Constitution of Britain. It has to be noted that though there are recent debates challenging the presence of Article 72 in our Constitution, it needs to be implored into the fact that whether the abrogation or the deletion of such a provision from our Constitution denies it the present pith and marrow. The President's power to pardon has been granted and will be continually regulated by the Constitution of our Country, and hence the depth of this power that has been guaranteed to the President under the Constitutional provision needs to be read with the Constitutional scheme drawn within the mind and not with repetitive reference that is made to the same power enjoyed by the Crown under the British Constitution.

CONSTITUTIONAL SCHEME OF PARDONING POWER IN INDIA:

Though the pardoning power present in our present Constitution has been derived from the prerogative of the Crown of England to grant pardons, the pardoning power in India is not an act of grace but is a constitutional scheme. Since the pardoning power in India is limited within the ambit of the Constitution, it becomes necessary to examine the text of the Constitution since it is the Constitution that has been granted, extended, and controlled by various provisions in our constitutions.⁵⁶ The power of pardon, being an executive one, has to be carried out according to Article 74(1) of the Constitution with the aid and advice of the Council of Ministers. This is entirely different from how pardoning power is exercised by the President in countries following Presidential form of government. In these

⁵² Section 295, the Government of India Act 1935 reads as follows: (1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission of commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province. Provided that nothing in this sub-section affects any powers of His Majesty's forces to suspend, remit or commute a sentence passed by a court-martial. (2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment

⁵³ The actual meanings of the terms are as follows: Reprieve- To delay or suspend the punishment of someone. Respite- Awarding a

sentence of lesser magnitude. Remission- Reducing the amount of sentence. Commutation-changing the punishment awarded from one to another.

⁵⁴ (i) Section 432, CrPC- Power to suspend or remit sentences. (ii) Section 433, CrPC- Power to commute sentence. (iii) Section 433A, CrPC-, Restrictions on provisions of remission or commutation in certain cases mentioned therein. (iv) Section 434, CrPC- Power on the central government in case of death sentence. (v) Section 435, CrPC-Power of the state government to remit or commute a sentence where the sentence can only be exercised after the consultation with the Central Government

⁵⁵ Section 54 IPC- Commutation of sentence for death

Section 55 IPC- Commutation of sentence of imprisonment for life

⁵⁶ *Kechar Singh v. Union of India*, AIR 1989 SC 653

countries, the power to pardon is according to the sole discretion of the President.

The power of pardon vested in the hands of the British Crown is a prerogative outside the realms of ordinary common law. However, this is not the case with the Indian Constitution. The power of the executive to grant a pardon is an essential part of our constitutional scheme. It was rightly stated by Balakrishna that “The President of India has no prerogatives; he has only powers granted and functions enjoined by the Constitution of India. There being vital distinctions between the two, it is not permissible to proceed on the presumption that the powers of the President of India are those which are enjoyed by the British Crown at the present day”⁵⁷ The makers of our Constitution were particular about their intent.

THE NATURE OF PARDONING POWER:

“The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments and monarchies to vest in some other authority than the courts' power to ameliorate or avoid particular criminal judgments.”⁵⁸

Coming to the Indian perspective of pardoning power, since it has been derived from the pardoning powers of the western constitutions, the nature and extent of pardoning power in our Country too has been influenced by the pronouncements around the world. In *Kehar Singh v. Union of India*⁵⁹, the Court justified the existence of ‘Pardon’ given in the Indian Constitution by acknowledging the fact that the human judgments are fallible and it is undeniable even if it is a mind that has been supremely trained to understand the different facets of a case, and hence any such errors can be rectified by assigning the power of pardoning to a higher authority that

shall “scrutinize the validity of the threatened denial of life or the continued denial of personal liberty”.

PARDONING POWER AND THE COUNCIL OF MINISTERS:

The executive of our Nation enjoys the power to grant pardon to those who have been adjudged as convicts by the judicial machinery of the state. However, the Constitution of India, through Article 74(1) states that the President shall in the exercise of his functions, act in accordance with the advice given to him by the Prime Minister and the Council of Ministers. This means that whenever the President discharges any of his functions as per the demands of his office, he is supposed to do it in accordance with the Union Legislature and should not go against their will. The same applies to the Governor aided by the Chief Minister and the Council of Ministers in every State under Article 163(1). There also has to be an essential differentiation drawn out between functions that can be used with a certain degree of discretion with that functions which require a mandatory following of the Ministers' advice for the functioning of an effective constitutional machinery⁶⁰. However, it can be assumed with a bare reading of the Constitution that the usage of terms such as ‘pardon’, ‘clemency’ and ‘grace’ with relation to this power of the executive indicates that it is intended to be as a nature of prerogative, something that is entirely dependent on the subjectivity and discretion of the President and thus the advice of the Council of Ministers will not be binding upon him.⁶¹ Such an assumption cannot be treated as an invalid one since the Constitution does not provide us with any such provisions regarding the pardoning power of the President and governors.

POSSIBILITIES OF PARDONING POWER DEFEATING THE RULE OF LAW:

⁵⁷ Balkrishna, Presidential Power of Pardon, 13 JILI 103.

⁵⁸ | Supreme Court | US Law | LII / Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/267/87>

⁵⁹ 1989 (1) SCC 204. In this case, the observations of Justice Holmes have been approved

⁶⁰ The executive power to pardon: Dilemmas of the Constitutional discourse by Parul Kumar

(<https://google.com/url?sa=D&q=http%3A%2F%2Fnujlslawreview.org%2Fwp-content%2Fuploads%2F2016%2F12%2Fparul-kumar.pdf>)

⁶¹ *ibid*

a. Influence of the Council Of Ministers

It is a sad, but a true fact that if the pardoning power of the President and Governors are followed accordingly with the propositions set forth by the Apex Court in our Country, the very purpose of the Pardoning power will be defeated. According to judicial interpretations, the President and Governors are bound by the advice of the Council of Ministers regarding the discharge of pardoning power. Let us take a hypothetical case where in the convict who has approached the President or the respective state Governor for his mercy has some kind of relationship with the ruling party. It can easily be assumed as how the pardoning power of the President or Governor may be misused by the Council of Ministers. For example, let the accused who is to present his mercy petition to the President be someone like the accused in the case of Kehar Singh, the assassin of Indira Gandhi, the former Prime Minister of India. In such a case the advice of the Council of Ministers who belongs to the same party as that of the former Prime Minister cannot be averted on the basis that it is devoid of objectivity⁶². Similarly, if the advice of the Council of Ministers is made bound on the President or Governors, it would not reflect a 'true, just, reasonable and impartial opinion' but will only be based on narrow and selfish political interests.⁶³

b. Violation of Fundamental Rights

The Fundamental Rights prescribed in Part III of the Constitution comprises of the minimum guidelines that the President and the Governors are supposed to follow while exercising his right to pardon. If the fundamental rights guaranteed to a person under our Constitution have been violated, he/she has the right to approach the judicial systems of the Country. In actuality, there can be situations where, when the union executive is exercising his right to pardon, fundamental rights of an individual can be violated. These situations can be put into two separate parts. One is when the President or the Governors, during their decision may take a

⁶² The executive power to pardon: Dilemmas of the Constitutional discourse by Parul Kumar (<https://google.com/url?sa=D&q=http%3A%2F%2Fnujlslawreview>

decision in an arbitrary manner or during their course to make a decision regarding a mercy petition may violated the fundamental rights of a person either due to the procedures involved or due to the substantive reasons for the decisions. The fundamental right guaranteed to a person can also be violated in an event where the President or the Governor grants a conditional pardon, this means that that President or governor has laid a condition upon the person who is seeking a mercy petition, which he has to fulfill in order to attain the pardon and the condition laid upon him may violate his fundamental rights.

c. Self- Pardon

Thought the issue of self-pardon can be treated as highly unlikely since the privileged position of a union executive will only be maintained by a person of commendable moral and personal conduct, there are two facts that needs to be checked upon this matter.

- The Constitution of our Country, does not prohibit people a convict or an under-trial convict from contesting in the Presidential elections or be appointed as the Governor of a state,
- Article 72 or Article 161 of our Constitution does not prescribe a bar on pardoning power on the individual who possesses it.

Though as said earlier, the chances for a self-pardon is very bleak, such situation would be undoubtedly rare, and it is argued that any individual worthy of holding a position as important as the position of a President or Governor should be vested with the power to pardon, there need to be a guideline formed to ensure that the decision of the President or Governor is reviewed under the said circumstances.

CONCLUSION:

The study of pardoning power in India reveals that from its inception itself it was set out to be of discretionary in

<http://www.ileedu.in/wp-content/uploads/2016/12/parul-kumar.pdf>

⁶³ ibid

character. However, it also needs to be noted that the pardoning power that is exercised by the executive in our Country is far narrower than the powers of pardon that are enjoyed by the British Crown or the President of the United States. The existence of the absolute power of the executive to grant pardon to the accused is being questioned by judiciary and there needs to be solution that needs to found to it as fast as possible. There are only two options that we have in front of us is either to abrogate Article 72 and Article 161 of the Indian Constitution or to give in to the demands of the human rights activists and abolish death penalty from our penal system. It does not mean that the judicial system should prevail all over the pardoning power exercised by the President or Governors and allow judicial review for all the cases that are dealt by the executive. It can be concluded that the existence of the pardoning power in India, has to be vested in the hands of the President and the Governors as a discretionary power itself not as an entity that prevails over the state's judicial system, but as another system that provides an extra judicial view to the convicts who have been through the hustle of our judicial procedures.

The biggest question that can be raised against the judicial review of the pardoning power of the President and the Governors is that, when a person pleads for pardon at the hands of the President and the Governors, it means that all the doors of the judiciary have closed on him.⁶⁴ And when the executive grants pardon to such a person under moral and humanitarian grounds and when judicial review is granted once against to this decision of the President or the governor, the judiciary will not turn a blind eye towards the previous judgment that was passed by them on the same person. It is more or less clear that when the judiciary is given power to review the decision that is made by the President or the governor, it will revoke the pardon that was granted by the President or the Governor to the accused and revert back to its original decision.⁶⁵ Even according to the present scenario that is existing in our Country, when the judiciary is given a chance to review a pardon that has been passed by the

executive, it should go by the moral values and not by its legal circumstances.⁶⁶ In this regard, it has to be said that the observations made by the court in several judgments like the power of the President and the Governor under Article 72 and Article 161 will be observed under the facts and circumstances of each case and the judiciary has the power to review on this matter even though it has been vested on the executive by the Constitution seems to be going directly against the policies that are enshrined in the Constitution of our Country.

The courts in our Country have always upheld the principle of rule of law which means that everyone is equal in the eyes of law. Judgments have clearly stated that the "Rule of Law is the basis for evaluation of all decisions (by the court)... That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent". The scope of the judicial review on the pardoning power must be limited or else the character of the pardoning power, as depicted in the Indian Constitution will be compromised. Such circumstances will lead to serious frictions between the organs of the government which would cause imbalance between the political systems of the world's largest democracy. All the three pillars of our democracy must be free to dispose their functions in the sphere that has been allotted to it and it needs to be made sure that there is no encroachment by either organs of the government. Through the research it was found out that the President's power to pardon as it is blended into our Constitution was added with these ideas solely fixed in the mind of our constitutional framers. Thus, it can be concluded that even though the power of pardon has survived through ages, its scope is limited by the axioms of modern political philosophy such as separation of powers and the supremacy of the Constitution and it does not violate the fundamental principle of rule of law.

⁶⁴ Presidential Pardon and Judicial Review (<https://google.com/url?sa=D&q=https%3A%2F%2Fwww.legalseviceindia.com%2Farticle%2F1149-Presidential-Pardon.html>)

⁶⁵ *ibid*

⁶⁶ *ibid*

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