

# Judicial Review of the Pardoning Power of President

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## ABSTRACT:

Judicial review is the power of the courts of a country to scrutinize the actions of the legislative, executive, and administrative arms of the government and to find out whether such actions are constant with the constitution. Activities judged inconsistent are stated unconstitutional and, therefore, null and void. The organization of judicial review in this sense depends upon the presence of a written constitution. The usage of the term judicial review could be more accurately described as “constitutional review,” because there also exists a long practice of judicial review of the actions of administrative actions that require neither that courts have the power to declare those actions unconstitutional nor that the country have a written constitution. Such “administrative review” assesses the purportedly questionable actions of administrators against standards of reasonableness and abuse of decision. When Judges confronted administrative actions to be irrational or to involve abuses of discretion, those actions are declared null and void, as are actions that are judged erratic with constitutional necessities when courts exercise judicial review in the conventional or constitutional sense. Whether or not a court has the power to declare the acts of governing agencies unconstitutional, it can achieve the same effect by exercising “indirect” judicial review. In such cases the court articulates that a confronted rule or action could not have been envisioned by the legislature because it is inconsistent with some other laws or established legal principles. This paper basically deals with the question that whether there can be Judicial Review on the power of the President under Article 72 of the Constitution of India or to put it in other words whether the Pardoning power of the President of India can be subjected to Judicial Review or not.

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## I. PARDONING POWER OF THE PRESIDENT

The nature and extent of the power of “Pardon” has been dealt by the Judiciary in different countries. Espousing the nature of a “Pardon”, Justice Oliver Wendell Homes in *Biddle v. Perovich* said:

*“A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of our Constitutional Scheme. When granted it is the determination of the ultimate authority that public welfare will be served by inflicting less than what the judgement fixed.”*

From the above case we can conclude that power of pardoning or pardoning power is granted by the Constitution or shall be granted by the Constitution and is not a self-derived power. One can simply not have access to the power of pardoning unless it is granted through the Constitutional Scheme. The power to pardon is a part of the constitutional scheme which has been reposed by the people through the Constitution in the Head of the State and enjoys high status and such power rests on the advice tendered by the Executive to the President. The power to grant pardon or to commute the sentence of any person convicted of any offence which vests in the President, is not subject to any other provision of the Constitution. It is a constituent power

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vested in the Head of the State and in its terms the power is absolute. Such being the nature and content of the power exercisable by the President under Article 72 in matter of tendering pardon or commuting a sentence cannot be equated with any other executive act performed by the Government or a judicial act discharged by the Court. The President is not required to record reasons for either directing the commutation of a sentence or refusing to do so. It depends upon his will whether he wants to grant pardon or not, but this discretion should not be exercised on any malafide ground or should not possess any kind of arbitrariness.

In the case of *Kehar Singh v. Union of India*<sup>1</sup>, the manner of consideration of the mercy petition, the Court said, was entirely within the discretion of the President. The Court need not spell out specific guidelines for the exercise of power under Article 72. This was so because the power under Article 72 was of widest amplitude and could contemplate myriad kinds and categories of cases with facts and situations varying from case to case. The Court further said that the President could not be asked to give reasons for his order. It has been consistently said that the court's power of judicial review of decision taken by the President under Article 72 is very limited. The Court may interfere if it is found that the decision has been taken without application of mind to the relevant factors or that the same is founded on the extraneous or irrelevant considerations or is vitiated due to malafide or patent arbitrariness.<sup>2</sup> The power of pardoning of the President under Article 72 of the Constitution of India is an absolute power. The power has a very wide scope and applicability. The Court cannot simply interfere into the power exercised by the President under Article 72 unless it is found that the considerations made by the President while exercising the power to grant pardon is irrelevant or is exercised on the basis of malafide grounds or contains arbitrariness.

In the absence of violation of any constitutional limitation circumscribing such power, the Court will not interfere with a purely executive power which the President has to exercise on the advice of his Council of Ministers.<sup>3</sup> The expression "executive power" is not defined in the Constitution. But the constitution being a written one, the powers of the different organs of the Government, including the Executive must be spelt out from the Constitution itself.<sup>4</sup>

Former Chief Justice of India P.N. Bhagwati, in the case *Bachan Singh v. State of Punjab*<sup>5</sup>, was of the view that the President enjoys absolute powers under Article 72. An order passed under Article 72 of the Constitution is justiciable on any of the following grounds -

(1) That the authority which purported to have exercised the power had no jurisdiction to exercise the same.

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<sup>1</sup>A.I.R.1989 SC 653

<sup>2</sup> *Maru Ram v Union of India* A.I.R. (1980) SC 2147

<sup>3</sup> *Gupta v. Union of India* A.I.R.1982 SC 149

<sup>4</sup>A.I.R.1951 All 257 (309)

<sup>5</sup>1980 (2) SCC 684

(2) That the impugned order goes beyond the extent of the power conferred by provisions of law under which it is purported to be exercised.

(3) That the order has been obtained on the ground of fraud or that the same having been passed considering extraneous considerations not germane to the exercise of the power conferred or, in other words that the order is a result of mala fide exercise of power.<sup>6</sup>

The above case basically talks about the factors or grounds which justifies an order passed by the President under Article 72 of the Constitution of India. The first ground talks about the fact that the authority which was intended to be exercising the power had no jurisdiction to exercise the same. The second ground says that the order passed by the authority has gone beyond the extent of the power provided by any other law. The third ground lays down that the order passed by the authority has been passed fraudulently or is a malafide exercise of power.

## II. JUDICIAL REVIEW OF THE PARDONING POWER OF THE PRESIDENT

For establishing the definition and importance of ‘judicial review’, the case of *Marbury v. Madison*<sup>7</sup> is of utmost importance. The doctrine of judicial review was promulgated by Chief Justice John Marshall. Also, the Privy Council in considering how far the purpose of a statute is a relevant factor in determining whether the Crown is bound by necessary implication, laid down as follows: -

*“The apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the crown were bound, then it must be inferred that the crown has agreed to be bound. When the court is asked to draw this inference, it must be always be remembered that, if it be the intention of the Legislature that the Crown shall be bound, nothing is easier than to say so in plain words.”*<sup>8</sup>

The Constitution is the parent statute in a nation and for the President to be above it will indeed, for all intents and purposes, devalue the sanctity of the document. The fundamental rights are the backbone of this constitution that we are speaking of and it may be thus said that to give the President the power to supersede the authority that it creates, i.e., to allow him to not be questioned about his actions and decisions would be unjustified. Judicial Review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. The power of judicial review is an integral part of our Constitution system and without it there will

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<sup>6</sup>A.I.R.1975 Punj 148 (154)

<sup>7</sup> 5 U.S. 137

<sup>8</sup>Bombay Province v. Bombay Municipal Corporation, AIR 1947, PC 34, P.36

be no government of laws and the rule of law would become a teasing illusion and a promise of unreality.<sup>9</sup> Rule of law basically infers that Law is above all. To put it in another way one can, say that everyone is inferior to the law. Thus, the President is also inferior to the law and hence all his decisions and powers can be subjected to Judicial Review.

Unduly long delay has the effect of bringing about blatant violation of the rule of law and adverse impact on the common man's access to justice. In the case of *State of Bihar v. Subhash Singh*<sup>10</sup>, the Hon'ble Supreme Court held:

*A significant derivative from 'Rule of Law' is Judicial Review. Judicial Review is an essential part of Rule of Law..... In India, so much importance is given to Judicial Review that it has been characterised as the 'basic feature' of the Constitution which cannot be done away with even by the exercise of constituent power.*

In *Epuru Sudhakar v. Government of Andhra Pradesh*<sup>11</sup>, the Supreme Court has held that the pardoning power of the President under Article 72 is subject to Judicial Review on the following grounds: -

- 1) No application of mind.
- 2) Mala fide intention.
- 3) Irrelevant or Extraneous considerations.
- 4) Relevant materials not considered.
- 5) Arbitrariness

It is the duty of the Court to interfere if it is found that such decision has been taken without application of mind to the relevant factors or that the same is founded on the extraneous or irrelevant considerations or is vitiated due to malafide or patent arbitrariness.<sup>12</sup> The Supreme Court in the case of *Kuljit Singh v. Lt. Governor of Delhi*<sup>13</sup> said that the power conferred under Article 72 of Constitution of India should be exercised fairly and reasonably. In *Shamsher Singh v. State of Punjab*<sup>14</sup>, the Supreme Court held that the President is only a "constitutional or formal head." He exercises his powers and functions under the Constitution only with the aid and on the advice of the Council of Ministers. Wherever the Constitution requires the satisfaction of the President, the satisfaction is not the personal satisfaction of the President, but the satisfaction is the satisfaction of the Council of Ministers. Thus, there is a scope of Judicial Review as pointed out by the Honourable

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<sup>9</sup> S.P. Sampad Kumar v. Union of India (1987) 1 SCC 124

<sup>10</sup> AIR 1997 SC 1390

<sup>11</sup> AIR 2006 SC 3385

<sup>12</sup> Maru Ram v Union of India AIR (1980) SC 2147

<sup>13</sup> AIR 1982 SC 774

<sup>14</sup> AIR 1974 SC 2192

Supreme Court in the case of Maru Ram v. Union of India<sup>15</sup> which was further upheld in the case of Epuru Sudhakar v. Government of Andhra Pradesh<sup>16</sup>.

The power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of relief falling within that power. The said authority, viz., the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by any Court including the Supreme Court.<sup>17</sup> While exercising the pardoning power given under Article 72 of the Constitution of India, the President has been also given the power to examine the evidence of the criminal case and to decide for himself whether there is any scope of granting pardon to the convict. Therefore, the President can scrutinize or has the power to scrutinize the merits of the case in question.

### III. CONCLUSION

A study of the power to pardon under the Constitution of India reveals that this power is intended to be in the nature of a discretionary power, or a prerogative, a topic that runs through the course of this paper. I have attempted to demonstrate reasons why the President of State may need to exercise this power without being bound by the advice of the Council of Ministers, as well as the undesirability of putting in place guidelines that would hamper the discretion that should preferably be exercised upon an examination of the facts and circumstances of each case. In a mature democracy, it is expected that the different branches of the government would be reasonably capable of laying down limits for their own jurisdiction. It is precisely on this basis that my conclusions have been based on. I seek to propose a model wherein the executive and judiciary operate through self-regulation, by being reverent to the realms of each other's powers. Through such a disciplined exercise of their respective powers, justice would be ensured in the best possible manner. Any unjustified interference by one branch in the functioning of the other would grind down the authority of both the branches. Both the executive and the judiciary must also aim at dealing with cases pertaining to pardon in a prompt manner, since the damaging effects of an inordinate delay in decision-making is clear from cases such as that of Mohammed Afzal Guru, which have caused much controversy in recent times.

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<sup>15</sup> *supra.* 13

<sup>16</sup> *supra.* 12

<sup>17</sup> 1993 (6) OCR 476 (485, 486)