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The Indian Adaptation of Constitutional Mercy Provision

NACHIKET KULKARNI¹ AND MEGHA PHADKAY²

ABSTRACT

A Hamletian Dilemma- To Mercy or not to mercy. What are the responsibilities of the state when it decides to punish a person for a crime? The debate whether to retain or abolish the provision of mercy petition is unending. The negative implications of the provision have, in multiple cases, led to a public and media outcry for failure in the administration of justice, such as in the case of Afzal Guru, Nirbhaya, etc. This article traces the expediency of the powers to grant pardon prescribed in the Indian constitution, and the jurisprudence developed in the court of law. The article commences with the origin and the history of the provision, then explains its scope and intricacies. Furthermore, it justifies the necessity of the provision in spite of its repercussions, in the modern civilized society.

I. INTRODUCTION

‘An eye for an eye’ is condemned in the modern civilized society. On the face of it, stringent punishments such as the death penalty may satisfy the ‘collective conscience’, but it is nothing more than vengeance masked as retributive justice. The purpose of punishment is to create deterrence in the society from committing crime and to promote reforms in the behavior of the criminal. The provisions of pardons, remissions, suspensions, commutations, etc of sentences, prescribed in the constitution are reformatory measures in the light of human rights.

As Blackstone’s ratio rightly states ‘It is better that 10 guilty men go free than one innocent man that be wrongly accused’. Even if a provision protects one wrongly convicted prisoner, it serves its purpose. Exploitation/misuse of such provision does not render it bad and thus cannot be the ground for annulment of the same. Rather it should be subjected to amendments considering merits and its purview should be restricted to avoid any misuse. Since the judicial error cannot be precluded by virtue of human error, recourse from erogenous judgements has been provided in the Constitution in the form of executive power to pardon” Thus the act of pardoning is an adjunct necessary to ensure the administration of justice because of fallacies in human laws and tribunals.

¹ Student of ILS Law College, Pune, India.

² Student of ILS Law College, Pune, India.

The concept of pardon is almost as old as the concept of punishment. Ironically, the provision of pardoning power is believed to have its origin in ancient Athens, where the power was vested in the hands of the people. The convict needed the support of at least 6000 citizens, before he could receive the clemency.³ It slowly graduated as per the political structure and gave way to the understanding that the sovereign possesses the divine right and hence, can exercise this prerogative on the ground of divine benevolence. For centuries in England, the royal prerogative of mercy was the sole means to remedy an injustice. The Indian Legal system being an adaptation of the British Law, has extrapolated this provision to suit the Indian context.

Mercy Petition is a constitutional right under article 72 and 161 of the Constitution of India, reposed by the people in the highest dignitaries, the President and the Governor respectively. It is a constitutional remedy that envisages myriad kinds and categories of cases, and is not specifically limited to the death sentence cases, although these cases invoke the most sentiment. This provision confers a right to the accused that can be invoked only after confirmation of sentence. It is the last constitutional recourse that a convict can resort to after the exhaustion all the other constitutional and legal remedies. Sections 432 and 433 of CrPC which provide power to suspend, remit, or commute a sentence; compels the Government to take into account the opinion of the presiding judge of the court before, or by which, the conviction was had or confirmed while deciding the petition; along with other relevant documents. While exercising power, appropriate government may at any point in time without or with any conditions and subject to fulfilment by the convict suspend, remit, or commute any part of the sentence.

In the case of *Maru Ram Vs. Union of India*⁴ the Apex court held that the powers under section 433A are not violative of the provision under articles 72 and 161 because they derive power from different sources. The executive powers under articles 72 and 161 are absolute powers conferred by the Constitution. Further 433A does not in any manner control the unfettered power of executive but it would be desirable for the government not to overlook the spirit of section 433 while exercising power under article 72. Moreover the appropriate government may consider and grant remission under sections 432 and 433 of the CrPC, even if such remission was earlier considered under article 72 and 161. It is to be noted that it is not for the Supreme Court to exercise the powers u/s 432,433of the CrPC, but for the appropriate government.

In the case of *Sonu Sardar vs. Union of India*⁵ the Supreme Court held that this discretionary

³ (D Mac Dowell, *The Law in Clerical Athens* (25-259) 1978).

⁴ *Maru Ram v. UOI* (1981) 1 SCC 107

⁵ *Sonu Sardar v. UOI* 2017 SCC OnLine Del 8928

power cannot be taken away by any statutory provision or altered or modified further. It is a well settled proposition that there is a presumption that constitutional authority acts with due application of mind. Decisions of the president and the governor are immune to judicial review. Since both of them act on the aid and advice of the cabinet, which is not immune; ultimately renders mercy petition subject to limited judicial review avoiding any mala fide decision or decision based upon extraneous factors. Thus wherever courts found that relevant and pertinent considerations were not taken into account while deciding mercy petitions, they have set aside the executive orders and recommended the matter for fresh considerations to the executive.

In the judgment of *Epuru Sudhakara vs. Govt. of A.P*⁶ court held that, the executive clemency power has to be exercised on public welfare considerations alone, and it is to be weighed whether public welfare will be better served by inflicting less than what judiciary has fixed. The executive clemency power must be exercised keeping in mind the precedent it sets. This view of the court is in furtherance to the object of provision of mercy petition to reward positive reforms by remission or commutation of sentence. The redemptive school of thought justifies pardon based on the grounds of public welfare and compassion and gives importance to the post conviction achievements of the convict. This is in accordance with the Hegelian view. The Hegelian view advocates that pardons are justified only when they are justice enhancing. That is, in certain cases justice may not be served without grant of pardon because of unreasonably harsh sentence which is not comparable to the seriousness of the crime committed. For example death penalty is the punishment for apostasy (Afghanistan), economic crimes (China), adultery (Maldives, Saudi Arabia), etc.⁷ Lastly, the power of pardon should not be used indiscriminately, and arbitrarily. This will undermine the precedential value of the judicial decisions, and it will disrupt the equilibrium between the executive and the judiciary.

The Death Penalty India report 2016 (DPIR) published by National Law University Delhi, found that nearly 75% of all prisoners sentenced to death in India belong to socio-economically marginalized communities including Dalits, OBCs, and religious minorities. It was also found that 62% of the prisoners sentenced to death had not completed secondary school, and around 23% of them had never been to a school. These people are unable to get good legal aid due to the paucity of resources, where as public prosecutor is appointed in the case of victim resulting in a bias towards the victim during the judicial proceedings. This demographic shows the unequal opportunities and unjust circumstances which these convicts go through. Moreover, it is not just the accused or convict who alone suffers but also his entire family is adversely

⁶ *Epuru Sudhakara vs* (2006) 8 Supreme Court Cases 161

⁷ (M.Strasser, 'The Limits of Clemency Power on Pardons, Retributivists, and the United States Constitution', 41 *Brandeis Law Journal* (2002) p.85

affected by the conviction. Judiciary while deciding the case, is obliged to look at the crime and the convict in isolation. Such contextual factors surrounding the case cannot be taken into consideration by the judiciary. Thus conferring the power to grant pardon upon the executive helps to achieve public welfare and protection of fundamental rights.

In *T.V. Vatheeswaran v. State of Tamil Nadu*⁸, when the convict was kept in solitary confinement for over 8 years due to the delay in the disposition of his Mercy Petition, it was held by the Hon'ble Supreme Court that when a person is made to undergo inhuman and degrading punishment where execution is endlessly delayed and the accused is made to suffer most excruciating agony and anguish. (which includes the psychological and emotional trauma that the victim and his family undergoes- called the Death Row Phenomenon). The illegal solitary confinement inflicts more than the what is prescribed. Thus such violates the fundamental rights under the Articles 14, 19 and 21, in the Constitution of India. The Court could give relief wherever necessary by virtue of a writ petition. Late Justice Krishna Iyer, said in the late 70's 'Prison walls do not keep out the fundamental rights'. "Just as the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the constitutional mandate and not in violation of the constitutional principles" observed the court. In *Sher Singh v. State of Punjab*⁹, it was observed that rights under Article 21 required fair procedure at all stages, including the stage of execution. Even where death sentence was justified when passed, its execution may not be justified by reason of undue delay.

*Shatrughan Chauhan vs. Union of India*¹⁰ Apex court held that the president, under article 72 has the power to scrutinize the evidence and decide on merits whether it deserves grant of relief under that power. The president cannot amend or modify judicial records. The petitioner has no right to insist on presenting an oral argument in the decision of petition. If the president takes a different view then it does not amount of suppression of judicial decision. The contention that even if undue delay is caused the decision must be taken by the executive and not the judiciary, is rejected. Thus, on the ground of supervening circumstances violating fundamental rights, supreme court may intervene for protection of fundamental rights and such intervention does not constitute to be a part of limited judicial review. To obtain documents required for deciding mercy petition, correspondence with multiple authorities is required. This is a time-consuming process hence no specific time limit can be assigned. Additionally, there cannot be any thumb rule as to what amounts to inordinate delay and the same depends upon

⁸ (1983) 2 SCC 68

⁹ Sher Singh V. State of Punjab (1983) 2 Supreme Court Cases 344

¹⁰ Shatrughan Chauhan vs Union of India and Ors. (2014) 3 Supreme Court Cases 1

the facts of the case. Respectively it is the duty of the executive to expedite every matter. The apex court has taken judicial notice that the executive used to take average time of four years to decide mercy petitions between 1980- 1988, the same was reduced to five months between 1988-1997 and again increased to number of years post 1997. The delay post 1997 may be attributed to the interventions of courts.

II. CONCLUSION

Justice is an abstract, broad and subjective connotation that construed appropriately encompasses power to shape and nurture a healthy civilized society. The right of the victim to seek justice ends when the judicial process ends by awarding apt punishment to the convict. The right to file a mercy petition constitutes to be a part of justice and starts only after the exhaustion of all judicial processes and remedies. This right is completely exclusive from the right of the victim to seek justice. Therefore it cannot be construed that the commutation of the sentence is a failure to execute the sentence; and mere commutation does not nullify the purpose of the punishment. Rather this provision persuades to promote reforms in the behavior of the convicts. Provision of Mercy petition is a boon for all the convicts; who are not hardened criminals and may have committed an act out of necessity or with or without mens rea or in an act of self- defense etc, because it gives them an opportunity to restart their lives outside prison. Further to meet the ends of justice; by virtue of any injustice inflicted in exercise of the power, remedy is given to aggrieved under the limited judicial review available or by filing a writ petition under article 32 and 226 of Constitution of India. The prolonged process of exercise of executive power primarily aims to achieve public welfare although it causes a delay in execution of sentence. Therefore, the exercise of executive clemency power is an act of grace and humanity which paves a way for a just society and protects fundamental rights and the core values enshrined in the Constitution.
