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Clemency and Law: The Idea, Concept and Paradox in a Federal System of Governance

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Abstract

Ever since the idea of clemency has been introduced in the criminal justice system, there have always been controversies and conflicting opinions about the way it has been used in a federal system from time to time. There was no fierce resistance about its use in the times of monarchy. However, it has caused several rigorous debates about it's over use and lack of use also on many occasions particularly from the political point of view. The present paper Clemency and Law: The idea, concept and paradox in a Federal system of governance seeks to address All associated questions with historical overview and a focused consideration of some of the the contemporary instances which led to huge ambiguity as for the separation of powers between state and Centre is concerned.

Keywords: Clemency, Paradox, Paradox, Right to Information.

Introduction

The historical idea and concept of clemency which has been a subject of heated debates and controversies can be traced back to literary accounts in where there are multiple instances where the king/emperor was entrusted with powers to write off the criminal sentence against the individual A closer understanding of this reveals two fold understanding of the concept to underline the supremacy of the governing authority, and the others to accept the possibility and probability of some unintended gaps in the criminal justice system which can be addressed through clemency. The present paper seeks to analyse and probe all the dimensions of the concept of clemency from a National and International perspective particularly in a federal system of governance. This holds significance in view of some of the conflicting perceptions and observations of the concept in recent times.

Supremacy was visualized in light of the divine and godly status of the king and the emperor the other notion which can be attributed to you that mercy and kindness is a significant component any justice delivery system cannot deliver without the notion of clemency the whole premise of justice appear weak and fragile. Even though it is practised in extremely rare circumstances it is the exercise of pardoning power.

Aim of the Study

The aim of the study is to explain the Concept and Paradox in a Federal System according to the Governance. In the age of Transparency and Right to Information, administration should take all necessary measures so that the concept of clemency remains relevant.

Origin and Historical Overview

The concept of pardon is a part of historical continuity, of an age where an omnipotent monarch possessed the power to punish or remit any punishment; it became a symbolic attribute of a god equivalent king having control over his subject's life and death. Chronologically, the linking of punishment and pardon are at least as old as the code of Hammurabi, where the prescription of harsh penalties was balanced by rules to limit and specify mitigating circumstances. Royal authority to take life was matched by executive prerogative to exercise mercy. Some analysts observe that the clemency powers undermine the spirit of law particularly in the hands of some political leaders.

By the time the Athenian civil war ended in 403 BC, the procedural difficulties that attended obtaining clemency, one had to comply

with a unique process which required that at least 6000 citizen's supporting a petition for clemency in a secret poll.

In roman times, the triumph gave the returning war hero the status of dictator for a day with a right both to slaughter war captives and pardon them, national holidays provided occasions for monarchs to exercise their choice[1].

The Han Emperors in China employed the peach of issuing general amnesties for procuring additional work force as emergency provisions or as soldiers. The French and English later on were to adopt pardon as an executive practise although not with an intention to provide a last resort for correcting human fallibility but more in deference to the absolute authority of a king. Not surprisingly in France the power to grant pardon vanished, albeit for a short period. With the French revolution of 1789, as it was deemed to be a heinous fragment of a repressive monarchy, and viewing pardon biblically gives us the instance of crucifixion of Jesus being processed by executive clemency of Barabbas.

Under oppressive, harsh and unreasonable penal mandates of an earlier era where punishments inflicted without consideration being extended to the gravity of offence attitude disposition of accused and other unnecessary points,pardoning,prerogative gained much importance however as arbitrary and undemocratic penal judicial systems give way to modern complex and scientific penal procedure now to assess the methodology and merits of vast authoritative power vested in few who are often not answerable.

Clemency in International Scenario: examples from USA and UK

The U S President has pardon or clemency power under article 11, section 2, clause 1 of the constitution. Under the pardon clause, the clause says that the President shall have special power to grant reprieves and pardon for offences against the United States, except in cases of impeachment while the President's power to pardon seems unlimited. Presidential pardon can only be issued for a federal crime, and pardons cannot be issued for impeachment cases tried and convicted by Congress. The office of pardon attorney, which is the part of the justice department, has handled such matters for the president since 1893, and the congressional research service report[2].

Presidential pardon powers cite 5 types of clemency that fall under the President power. A full pardon relieves a person of wrongdoing and restores any civil rights lost commutation reduces a sentence from a federal court. A President can also remit fines and forfeitures and issue a reprieve in the course of a sentencing process. The CRC states courts and congress have a limited role in the pardon process in 1974 the decision of us district court for the district of columbia Hoffa v Saxbe, the court said the president has unfettered executive discretion to grant clemency the hoffa case involved conditions placed by the president RichardNixon on a commuted sentence for the former teamsters leader, jimmy Hoffa, barring him from resuming a union leadership position Nixon was able to receive a pardon under precedent 1866 supreme court decision is in ex parte garland as justice field wrote in his majority decision the pardon power extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency and after conviction and judgement.

Legal observer Bryan Kalt wrote extensively about President self-pardons. In 1990, he said during the Clinton Era that this concept was debated in constitutional convention in Philadelphia in 1787. He believed that the president does not have self-pardoning powers. Intent of framers: the word of constitution they created and the wisdom of the judges that the president cannot pardon themselves.

In recent years, questions have arisen about pardons issued by outgoing Presidents, for example President Barack Obama's commutation of a jail sentence for WikiLeaks figure Chelsea manning President Bill Clinton's pardon to his own brother recently with the end of Donald Trump's term for January 2020 much attention focused on the outgoing President's final pardons issued from the White House president Trump has issued pardon to more than 90 people since 2017.

The right of the Monarch to pardon a subject for crimes of which they have been convicted is treated as an Ultimate safety valve. It is exercised for many reasons. The historical root of the anachronism is, like most legal oddities, the British monarchy back in the day, the King's power was absolute and the law emanated[3] ultimately from the Crown. In other countries, for example in Pakistan, The clemency powers rests with the President. The case of Sarabjeet may be studied for further understanding.

That Power was significantly altered from the Magna Carta onwards first by the nobility, then the courts and finally parliament. Traditionally called Royal prerogatives they are undefined reserve power.

Case study in India

Indian Constitution gives power of clemency to the President to grant pardons. It empowers the president to grant pardons, reprieves etc. in the specified classes of cases against punishment awarded to a person by a court including a court martial similarly, article 161 empowers the governor of state to exercise such power as provided in that article[4]. As it is clear from the language of the provision, this power can be exercised only in respect of a person "convicted of an offence" and not before or without such conviction it cannot be exercised even when a person is convicted of an offence but an appeal is pending against such conviction while at some time in the past the exercise of similar power by the head of the state was considered a matter of grace under the constitution it is "a constitutional duty" and not a mere prerogative. More than it is constitutional right and not at the discretion or whim of the executive.

A pardon may be absolute or conditional; it is conditional where it does not become operative until the grantee has performed some specified act, or where it becomes void when some specified event happens. The effect of pardon is to clear the person

from all statutory or other disqualifications following under conviction pardon maybe in general be granted either before or after conviction, no pardon is pleadable in bar of an impeachment by the commons. Besides this the president can also grant reprieves i.e. postponement to the future the execution of a sentence. Commutation i.e. changing a punishment to one of a different sort then that originally proposed and remission i.e. reduces the amount of punishment without changing the character of punishment. Granting of pardon is an executive act and not a judicial act, it follows that the exercise of this power would not in any way alter the judgement of the court qua judgment, and that the exercise of such right would not in any way interfere with the course of justice and courts are free to adjudicate upon the guilt or otherwise of the person concerned.

The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to prevent it but whoever is to make it useful must have full discretion to exercise it. Our constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.

In K.M. Nanavati vs. state of Bombay[5] it was held that the power to suspend a sentence by the governor under article 161 is subject to the rules made by the Supreme Court with respect to the cases which are pending before it in appeal. In that case the governor had in the exercise of the power under the article 161, suspended the sentence passed against nanavati pending the disposal of appeal in the Supreme Court.

The order of the governor was held constitutionally invalid because it conflicted with the rules of the Supreme Court made under article 145 in regard to criminal appeals. The president can grant pardons and reprieves only in the following cases.

1. Offences against union laws
2. in all cases where punishments or sentence is by a court martial
3. In all cases of sentence of death

The scope of the power of the president under article 72 particularly to commute a death sentence into a lesser sentence has been left open by the court after observing a “case is appropriate for the exercise of power conferred by article 72 depends upon the facts and circumstances of each particular case however the constraints on the exercise of this power have not yet judicially laid down. The case of Afzal Guru is a major reference point in this and can be approached to derive more critical insights.

In Kehar Singh vs. Union of India[6], The court held that there are sufficient indications in the terms of article 72 and the history of power enshrined in that provision as existing in case law, and specific guidelines need to be spelled out.

Indeed, it may not be possible to lay down any precise clearly defined and channelized guidelines for we must remember that the power under article 72 is of the widest amplitude can contemplate myriad kinds and categories of cases with facts and situation varying from case to case, in which the merits and the reasons of state may be profoundly assisted by prevailing occasions and passing time[7] the court also held that president’s power under Article 72 is of executive character and petitioner has no right to insist on an oral hearing before the president but court has reiterated that scope of article 72 is judicially determinable and president was not right in rejecting kehar Singh’ petition on the ground that he would not go into merits of his conviction by courts.

By the criminal procedure code amendment act 1978, the Parliament inserted section 433a which made 14 years term, of imprisonment mandatory for 2 classed of prisoners sentence to life imprisonment i.e. those who could be punished to death, those who were sentenced to death but whose sentence was commuted to life imprisonment under section 433 CRPC.

In Maru Ram vs.Union of India[8], it was contended that by introduction of section 433A, 432 which empowers the government to suspend execution of a sentence or remit the whole or any part of it, excluded for certain classes of lifer. Although powers under 161, 72 and section 432,433A may be similar they are not the same or identical. The 2 powers differ in their source substance strength. The power under 72 and 161 is absolute and cannot be fettered by any statutory provision such as section 432 to 433A CRPC or prison rules[9].

The Jurisdiction of the Supreme Court under art 137 to review death sentence after having already rejected special leave and review petition in the same matter and presidential clemency are different in nature although some consideration may overlap. If an application for clemency by way of communication has been made by the prisoner, and is under consideration of the President. The Supreme Court has no jurisdiction to deal with the petition for state of death sentence and has no power to pass any order. The decision on a fresh petition rests under the power of the President.

Judicial Review

In Maru ram, the Supreme Court expressly stated that the power of pardon commutation release under art 72 sensible use, shall never be exercised arbitrarily or malafide. Later in few cases[10], it was laid down that judicial review art 72 and 161, is available on the following grounds that1. The order has been passed without application of mind.2.that the order is malafide3. That order has been passed on extraneously and order suffers arbitrariness. Thus exercise of the president's power under art 72,161 governor's power is subject to judicial review like any other power of executive.

In former Prime minister Rajiv Gandhi assassination case, (who was killed by LTTE at Chennai in 1991 by human bomb) the release of the convict (A. G. Perarivalan) matter to the central government that it is the president under article 72 and not the governor under article 161 competent to grant pardon/remission. While the constitution of India gives reformative principle to the president and

governor of a state to suspend remit or commute the sentence of convicts.

There is a legal opinion of experts that the governor had two choices either return the council of ministers recommendation to the government seeking further inputs or accept the remission proposal. Since his constitutional authority does not vest in him the power to reject in this Rajiv Gandhi case governor however preferred a new option that of placing the issue before the president thus giving rise to fresh debate on legal and constitutional issues relating to power of governor and president.[11]

In fact the case came from the Governor because of a Supreme Court intervention on the application filed by the Convict in SLP seeking his release he told the court that the constitutional authority was sitting over his remission for long without taking decision the court said the it was extraordinary delay so it became a long Battle of governments Meanwhile the convicts have completed 29 years in prison for The Assassination.

It is also important to see that the Governor cannot reflect the state's recommendation but there is no time frame prescribed for him to make a decision. The Governor has already returned the file to reconsider the government's decision but the government stood by its decision. The President cannot exercise his power of pardon independent of the government.

In several cases, the Supreme Court has ruled that the president has to act on the advice of the Council of Ministers while deciding Mercy pleas. Cases include Maru Ram vs. Union of India in 1980 and in 1994 Dhananjoy Chatterjee vs. State of West Bengal.

It is also relevant to note that if the president is bound by the cabinet advice, article 74 clause 1 empowers him to return it to reconsideration ones, if the Council of Ministers decides against any change, the president has no option but to give his consent to that.

It is important to understand that the scope of pardoning power of the president is wider than the power of the Governor. The power of the president to grant pardon extends in cases where the punishment is by a court martial but article 161 does not provide any such power. It is interesting to note that the president can grant pardon in all cases where the sentence is death but governors parting power does not extend to capital punishments.

Though the concept of Mercy petition exist in various forms in many nations for example in United Kingdom United States of America Canada among others including India, it is often a suggestion that Mercy petitioning suggest an as a much needed human touch to a countries judicial process with the provision of granting pardon aur showing Mercy to criminal sentences of the highest consequence through the office of the President or governor. Delay and Commutation remains a cause of constant concern. The time factor for the grant of pardoning or commutation depends on diverse factors and is largely political in nature and it is not surprising that this has been brought under judicial review. It has been pointed out that 88 some modalities may be worked out for the use of clemency as far as the Minimum and maximum time frame is concerned.

Conclusion

The present paper has come out with an overview of the concept of Mercy petition, the way it has been negotiated with in various forms in many nations for example in United Kingdom United States of America Canada among others including India, it deals with all complex dimensions such as Mercy petitioning as a much needed human touch to a countries judicial process with the provision of granting pardon aur showing Mercy to criminal sentences of the highest consequence through the office of the President or governor. Delay and Commutation remains a cause of constant concern. It has been pointed out that some modalities need to be worked out for the use of clemency as far as the Minimum and maximum time frame is concerned.

In the age of Transparency and Right to Information, administration should take all necessary measures so that the concept of clemency remains relevant.

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