NEW DIMENSIONS OF POWER OF PARDON IN INDIA

YUGDEEP KAUR

Officiating Principal, CT Institute of Law, Shahpur, Jalandhar, Punjab, India
E-mail: khehra2012@gmail.com.

Abstract - Power of pardon has been in use since time immemorial. This is not just a power but a duty also. Due to the lengthy procedure, there is some delay in disposing of the pardoning petitions. Delay adversely affects the prisoners' rights and sometimes even the mental health of the prisoners also. This paper discusses the various issues in relation to the power of pardon such as delay involved in disposal of mercy petitions, human rights of prisoners being affected by such delay and fruitful guidelines provided by the Hon'ble Supreme Court of India.

I. INTRODUCTION

Sentencing people to death has been known to human societies, including ours, ever since the chance to commit crimes and the power to punish those has been known.[1] When the concept of punishment arose then one more concept started taking shape, which was the concept of pardon. In all civilized countries, the executive exercises power of pardoning accused or convicts. Power exists for various reasons. Sometimes it is exercised to prevent injustice whether arising on account of harsh or unjust law or from judgments of Courts which result in injustice. Sometimes it is exercised as an executive expediency. If the enforcement of a sentence is likely to lead to bloodshed, insurrection or revolution, the executive might consider it expedient not to expose the State to such peril and pardon the convict or put off the execution of the sentence.[2]

II. INTERNATIONAL ASPECT OF POWER OF PARDON

Pardon means to forgive, to exempt from punishment, to erase guilt for, to make allowances to for a discourtesy. It means forgiveness, release from the consequences of a wrong act, forbearance for an offence or omission. It means the official warrant of a penalty remitted.[3] The power of the executive to pardon[4] has shown many faces through its long history. It was a sign and derivative of the absolute power of despots; it was a delegation of divine authority to earthly rulers; it was an implication of personal bonds of fealty between lord and vassal;[5] it was a propaganda tool;[6] it was a tool for quelling political division; it was a tool for enriching the public coffers and filling the navy;[7] it was an equitable ameliorative for harsh, unjust, or superannuated laws; and it was a place for pure, unjustified mercy.[8] Pardons may be either free or conditional, the latter being usually granted (in absence of express power of commutation of sentence) where a death sentence is commuted. The condition in such a case is the acceptance of the substituted penalty.[9] Power of pardon is being used since time immemorial; it has its unique place in the criminal jurisprudence. It is a last resort to escape the death penalty. It is also a chance for the reformation of the offender. Power of pardon is used in almost

---

1 Gopal Krishna Gandhi, "The power to pardon", The Hindu, April 18, 2013, Opinion *available at*: http://www.thehindu.com/opinion/lead/the-power-to-pardon/article4627717.ece (last visited on Nov. 17, 2017).

2 *Ibid*.

3 *The Living Webster Encyclopedic Dictionary of the English Language*, 688 (Delair Publishing Com., Inc. New York, 1980).

4 The differences between pardons, amnesties, and commutations are not central to the investigation here. My question is whether it is ever justified to give a defendant less than he or she legally deserves, regardless of whether the penalty is forfeited, reduced, or trial is waived altogether. Amnesties present special concerns for justice, democracy, and law because truth and memory are the basis on which even forgiveness is premised, as Adam Sitze's and Bruce Robbin's contributions explore. (One cannot forgive unless one has already been permitted to show that a fault has been committed.) while I take the point, I do not give separate treatment to amnesty here. That task will have to wait.

5 Trisha Olson, "Of the Worshipful Warrior: Sanctuary and Punishment in the Middle Ages", *St. Thomas Law Review*, 16, 473 (2004).

6 Douglas Hay, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, (1975).

7 Daniel T. Kobil, "The Quality of Mercy strained: Wresting the Pardoning Power from the King", *Texas Law Review*, 69, 569 (1991).

8 Austin Sarat and Nasser Hussain (Eds.), *Forgiveness, Mercy, and Clemency*, 64 (2007).

9 *Halsbury's Laws of England*, Vol. 6, 477 (1856); 15 Law Ed 421 (424): 18 How 307 (311), *Ex parte Wells*, as quoted in V.V. Chaitley and S. Appu Rao, *A.I.R. Commentaries, The Constitution of India with Exhaustive, Analytical and Critical Commentaries*, Vol. 2, 912 (1954).

all the countries. Each and every country has its own method of pardoning the convicts.

1. Power of pardoning under International Law

Power of pardon has its unique place under the International law also. There are many countries which have abolished the death penalty and those who have retained the death penalty, have the pardon clause. The power of pardon has its place under International Covenant on Civil and Political Rights, 1966, United Nations Economic and Social Council and United Nations Commission on Human Rights, 1946.

The State's power to grant pardon has been made a human right under Article 6(4) of the International Covenant on Civil and Political Rights, 1966 which runs as: Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of sentence of death may be granted in all cases.[10]

The Economic and Social Council (ECOSOC) further strengthened Safeguard No. 7 in 1989 by 'providing for automatic .... review with provisions for clemency or pardon in all cases'. Seven years later, in 1996, the Economic and Social Council called upon member states in which the death penalty may be carried out 'to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question'. The United Nations Human Rights Commission, 1946 has also stated that the imposition of death sentences without the possibility to seek pardon or commutation of the sentence is incompatible with the International Convention on Civil and Political Rights, 1966[11] and in resolution 2005/59, adopted on 20 April 2005, the UN Commission on Human Rights urged all states that still maintain the death penalty 'to ensure . . . the right to seek pardon or commutation of sentence'. As the ABA has made clear, 'Full and proper use of the clemency process is essential to guaranteeing fairness in the administration of the death penalty'.[12]

III. PROCEDURE FOR DISPOSAL OF MERCY PETITIONS IN INDIA

The powers conferred under articles 72 and 16 under the Constitution of India, 1950 to grant pardons, suspend, remit or commute sentences, etc., of any convict are not judicial in nature and they are to be exercised by the President or the Governor in the exercise of executive functions. There is no obligation to hear the parties concerned before rejecting or granting a mercy petition.[13] Thus, the power to grant pardons is purely an executive function.

IV. GUIDELINES FOR EXERCISING THE PARDONING POWER UNDER ARTICLES 72 AND 161 OF THE CONSTITUTION OF INDIA, 1950

Under the Constitution of India, 1950 there is no provision which explains about the manner of exercise of power of pardon of President and Governor. The Constitution of India, 1950 is silent on this point. Power is used by the Head of the State at the advice of the Council of Ministers. From time to time, the Supreme Court has considered the question whether there should be some guidelines for the exercise of power to pardon by the President. In Maru Ram v. Union of India, [14]the Court expressed a view in favour of laying down some guidelines for the purpose of exercising power under article 72 Constitution of India, 1950 in order to avoid any allegation of arbitrary exercise of power.[15]

In the case of Shatrughan Chauhan & Anr. v. Union of India & Ors.,[16] the Supreme Court has framed the following guidelines:

1. The Court held that in Sunil Batra,[17] it was well said that solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional.
2. On the point of legal aid the Court said that the present prison manuals do not provide for any legal aid for the preparation of appeals or mercy

[10] Paras Diwan & Peeyushi Diwan, *Human Rights and the Law: Universal and Indian*, 159 (1998).

[11] Concluding observations of the HRC; Uganda, UN Doc. CCPR/CO/80/UGA, 4 May 2004, para. 13 Also, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: E/CN.4/2001/9, January 11, 2001, para.88.

[12] ABA, *The Florida Death Penalty Assessment Report*, vii (September 2006) quoted by Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 258 (2008).

[13] Mahendra Singh, *V. N. Shukla's Constitution of India*, 544 (Eastern Book Company, Lucknow, 11th edn. , 2008).

[14] *Id.*

[15] *M.P. Jain, Indian Constitutional Law,* 176 (Lexis Nexis Butterworths, Wadhwa, Nagpur, 5th edn, 2011).

[16] *Shatrughan Chauhan & Anr.* v. *Union of India & Ors.,* (2014) 3 SCC 1.

[17] *Sunil Batra* v. *Delhi Administration*, (1978) 4 SCC 494.

petitions or for accessing judicial remedies after the mercy petition has been rejected. Article 21 remains with the convict till his last breath, even after the rejection of the mercy petition by the President..

3. The Court further went on to say that there should be fixed time limit within which the authorities should forward the necessary materials
4. The Home Ministry after getting all the details should send the recommendations/views to the President within a reasonable and rational time.
5. The rejection of the mercy petition by the President or the Governor should forthwith be communicated to the convict and his family in writing or through some other mode of communication available.
6. There is a right in the death row convicts to receive a copy of the rejection of their mercy petition by the President and the Governor.
7. It is necessary that a minimum period of 14 days be stipulated between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution.
8. There should, be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.
9. It is necessary that after the mercy petition is rejected and the execution warrant is issued, the Prison Superintendent should satisfy himself on the basis of medical reports by Government doctors and psychiatrists that the prisoner is in a fit physical and mental condition to be executed.
10. The copies of relevant documents should be furnished to the prisoner within a week by the prison authorities to assist in making mercy petition and petitioning the courts.

CONCLUSION AND SUGGESTIONS

The author has viewed that there is one major concern i.e. the delay involved in disposal of mercy petitions in India. Due to the procedural limitations there is a delay caused in disposing of the pardoning petitions. Delay adversely affects the prisoners' rights and sometimes even the mental health of the prisoners is suffered due to the sword of fear hanging on their heads that today or tomorrow they are going to be hanged. The guidelines provided by the Supreme Court of India are a light of hope in this regard and through proper implementation of these guidelines the procedure will become easy and transparent for the disposal of a mercy petition.

Apart from the proper implementation of the above mentioned guidelines provided by the Supreme Court of India, there are some other suggestions as discussed below:

[1] There should be some fixed time frame for the disposal of mercy petitions.

[2] The method of presenting a pardon petition to the President or the Governor should be made so easy that even an illiterate convict could present the application on their own without any help of others.

[3] There should be a duty imposed on the executive authorities to send a report to the prisoner about the status of their pending pardoning petition before the authorities. It could help the prisoner to know about the time left in disposal of their mercy petition.

[4] The clemency statistics should be made available on the internet, the total number of petitions disposed of, time of their filing the petition, present status of the petition etc. all the things should be made available on the Home Ministry website and the status of the petition should be upgraded with every new movement in the file of the convict.

★★★