Does Article 72 Transcend the Rule of Law ?

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With evidences of Presidents of India having pardoned many cases meted out death sentences in the past even of the outgoing President Prativa Patil having pardoned as many as 30 persons who have been given death sentences lying in the stacks of judicial history of India, the question crops up in the mind whether this act is in accordance with the nuances of natural justice and rule of law? When an accused is handed out death sentences it means he/she has gone through a rigorous integrated judicial process based on well verified and substantiated evidences. It is ultimately the Supreme Court of India, the highest seat of Indian judiciary after taking into proper account of all judgments of the High Courts and lower courts weighed properly against the nuances of natural justice, rule of law, procedure established by law with applicability of human values in the context of contemporary development, changes and cultural ethos pronounces the final verdict. This said does not mean that the Indian judiciary is adorned with the attributes of infallibility but it can be assumed that the Indian judiciary has adorable records of being above the vulnerabilities and human frailties which the common individuals and politicians suffer from.

But the provisions of Indian Constitution empower the President of India to cast pronouncements on judgments of the Supreme Court of India in cases where death sentences have been given to the accused by taking recourse to pardon, reprieve, respite, remission and commutation on the advice of council of ministers headed by the Prime Minister. The will of the political prevails over the will of the reasoned and constitutionally ordained with a long period of legal weighing and judicial gestation premised on facts and evidences. Being the highest court of appeal this uncontested power of Indian President is beyond the judicial review. Given the nature and characteristics of Indian politics where money, crimes and heinous activities not ethics, morality and honesty are the maxims of the day, to assume that the council of ministers and politicians are above the board and always take stringent stands on issues of morality, transparency, probity in public life is highly preposterous. The brutal and naked fact is that Indian body polity is scam stained. Since it is the very proclivity of political people to be guided always by their narrow political interests, it is not always that the advice the council of ministers will tender to Indian President regarding the exercise the power of pardon under Article72 of the Indian Constitution will always be premised on considerable reasonability, non-political denominations and seasoned sagacity emblematic of Indian judicial system. Hard criminals having the record of killing

many innocent children, women and men and widely condemned terrorists are to be mercied upon, where as the bereaved, suffering families and depraved people and society striving earnestly for justice remain neglected, overlooked and condemned to the vicissitudes of prevailing capricious political whims, myopic vision and petty political interests. That according to the Indian Constitution the President appoints the judges and the Parliament moves the impeachment motion against the judges does not imply that the judicial pronouncements are subordinate to political judgments. To argue that the President, the Council of Ministers and the Parliament represents the "We the People of India" is very much debatable keeping in view the prevalence of minority percentage of votes secured in the elections over the majority percentage excluded from the political mainstream. If the disclosure of assets and property of politicians, MPs, MLAs and Ministers is any indication then Indian democracy is masterminded by a very few dominant richest people of the country. What about the will of the marginalized and excluded majority poor so carelessly and willfully neglected, undermined and overlooked during these last six decades?

In this background is it justifiable to hold that to rationalize this provision in conformity with prevailing constitutional straightjackets in the world is one indication of our being christened as fulfilling the requirements of what a democracy is or likes to be? If the answer to this nagging question is in the negative, then abrogation of this article will in no way denude Indian democracy of its pith and marrow. Argumentation for its perpetual continuance in no way will enrich Indian democracy and its values and promote natural and social justice. Insistence on perpetuation of this provision then can ignite the debate on whether President's mercy power is subjected to judicial review.

With the working class militancy and success story of communism in former Soviet Union during the 20th Century the advocacy of the concept of possessive individualistic nature of state lost its strength and gave rise to a debate on transforming this laissez faire state into a concept of Welfare State with a view to stemming the exodus of working class into the fold of communism. With the upcoming of Welfare state there has been a vast and inevitable increase in the relationship between the parts and functionaries of the state. With globalization and the ubiquitous acceptance of western liberal market order the individual human life has been subject to myriad interference. For example, the very right to life and liberty under Article 21 of Indian Constitution has opened the floodgates for varied progressive judicial interpretation in cases where there have been executive lapses and excesses and legislative negligence and inaction. In order to prevent the concentration of power in one organ the governmental power was basically divided into (i) the Legislature (ii) the Executive and (iii) the Judiciary with the logic and rationale of Montesquieu and Locke's theory of Separation of Power. Accordingly the legislature cannot exercise executive or judicial power, the executive cannot exercise legislative or judicial power and the judiciary cannot exercise legislative or executive powers of the government. Strict adherence to the theory of separation and compartmentalization of power would not make the wheels of state move and bring it to an alarmingly standstill. As Frankfurter J. says "Enforcement of rigid conception of separation of power would make modern government impossible." This non enforcement has now laid down to a hectic situation where the three machineries of the state are now trying to overpower each other. The question put forward

here i.e. Can President's power of Pardon be subjected to Judicial Review is also an outcome of the tug of war between the three branches.

It is argued that if this power to pardon of President is subjected to judicial review it would be a clear cut encroachment of the judiciary in the executive and the separation of power is defeated. Whether Judicial Review disturbs the real spirit behind the concept of Pardon? Whether grounds be reviewed or decisions as a whole should be reviewed? Let us examine these questions in this article.

Generally the punishment dealt herewith is that of the capital punishment. When an act done by a person is penalized by the capital punishment the question arises whether the mercy pleading should be entertained, whether it is moral because generally such punishment in Indian prospective is only given in rarest of the rare cases. The defense given behind is that while every crime is an outrage that is deeply destructive of social and moral fabric, punishment can never undo the harm that has been suffered by the victims and the community. Therefore mercy pleading should be entertained and granted it is argued.

The British crown was given the power to pardon. But in India there is democracy. According to the Article 52 of the Constitution of India, the President is the Executive Head of the Union of India. Under Article 72 of the Indian Constitution the Indian President is empowered to grant pardon, he can reprieve, respite or remit the punishment. The Art 72 states:

The President shall have the power to grant pardons, reprieves, respites or remission of punishment or to suspend remit or commute the sentence of any persons convicted of any offence-

(a) in all cases where the punishment or sentence is by a court martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

By the virtue of this Article the president can grant pardon but the materialistic fact is that whether such power is an absolute one because the word "Shall" in clause (1) of the Article is ambiguous. Apart from it was also held that this power of pardon shall be exercised by the President on the advice of Council of Ministers.

The World Scenario

According to the Article II Section 2 of the U.S. Constitution the President can grant pardon except in the cases of impeachment. Unlike Indian President the American President has the absolute power; such power cannot be questioned or blocked by the court or the Congress. In case of misuse the only act which could be done is call for impeachment of the President. Thus there is no question of any judicial review.

Pakistan

Recently the question of granting of Pardon was in limelight in Sarabhjit's Case. By the virtue of the Article 45 of the Pakistan's

Constitution the President has an absolute power to grant pardon, reprieve, respite & remit, suspend or commute any sentence passed by any court, tribunal or authority. The power cannot be questioned.

France, Germany and Russia

The power of pardon and act of clemency are granted by President of France who has the sole discretion and power is non questionable and absolute.

A German President has pardoning power which he can transfer to someone else such as chancellor or the minister of Justice. An absolute power of pardon is given to the Russian President through the Art 84 of the constitution. Thus it could be easily seen that wherever the power of pardon is given to the President, it is absolute then question arises that why the framers of Indian Constitution didn't arm the president with an absolute power to pardon.

As discussed above the pardoning power of the President is not an absolute one but is governed by the advice of the Council of Ministers. Now we should think about what would have been the real issue in the mind of the framers of the Constitution for not imparting the President an absolute power. One thing should be made clear first that the framers were of the view that there should be a capital punishment and such capital punishment shall be pardoned on grounds of morality after a mercy pleading by the President, it could be said that the framers just wanted to put a check on the power as if the power would have been an absolute; it could be possible that a soft hearted President would pardon most of the mercy pleaders, for this it was the council of ministers who had to restrain the President by making his decision a bounded one. Thus the framers had the perception that the misuse of the power would be guarded by the Council of Ministers, they had a good faith on them but today the time has changed, whenever a government comes into existence the Council of Ministers appointed are generally having an absolute power and as Lord Acton has said "Power tends to corrupt and absolute power corrupts absolutely", the absolute power had encrypted a layer of corruption and due to it a danger of misuse of power always looms large which can only be checked by judiciary.

Judicial Review

According to the Merriam Webster Dictionary of Law "Judicial Review is the power of a court to review the action of public sector bodies in terms of their constitutionality in some jurisdiction, it is also possible to review the constitutionality of law itself. Judicial review in an independent judiciary is the cardinal feature as enshrined in the Constitution. Judicial review in India can be broadly divided into judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens rights of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds, which could be expended on building, hospitals, roads and the like, or overseas aid, or compensating victims of crime.

The question which arises here is that whether the judicial review has any limit. In **Syed T.A. Haqshbandi v State of J&K** the Supreme Court observed that:

"Judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the court

exercising powers of judicial review unlike the case of an appellate court would neither be permissible nor conducive to the interests of either the officer concerned or the system and institutions. Grievances must be sufficiently substantiated to have firm or concrete basis on properly established facts and further proved to be well justified in law for being countenanced by the court in exercise of its powers of judicial review. Unless the exercise of power is shown to violate any other provision of the Constitution of India or any of the statutory rules, the same cannot be challenged by making it a justiciable issue before the court".

Pardoning power and Judicial Review

Recently the pardoning power of governor was put under judicial review in the case of **Epuru Sudhakar & Anr. Vs Govt. of A.P. & Ors** .Before discussing the factual situations of the case let us revert back to some of the old cases.

In **Kuljeet Singh Vs Lt. Governor of Delhi** it was held that the President's Power

Under Article 72 will be examined on the facts and circumstances of each case the court has retained the power of judicial review even on a matter which has been vested by the Constitution solely in the Executive.

But the major case in which the concept of judicial review of the President power on grounds of its merit was that **of Kehar Singh Vs. Union of India**. In this case Supreme Court held that "It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelt out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme. The order of the President cannot be subjected to judicial review on its merit"

In **Epuru Sudhakar Case** the immunity of the pardoning power of governor from judicial review came up. Supreme Court set aside a decision of then Andhra Pradesh Governor Sushil Kumar Shinde, remitting the sentence of a Congress activist who faced ten years in prison in connection with the killing of two persons including a TDP activist, the SC bench of Justices S H Kapadia and Ajit Pasayat warned that the exercise of the power would be tested by the court against the maintenance of Rule of Law. "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 Bench warned.

Justice Kapadia, while concurring with the main ruling delivered by Justice Pasayat, sought to remind "exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty... the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future." "An undue exercise of this power is to be deplored.

Considerations of religion, caste or political loyalty are fraught with discrimination," he said. Thus this judgment reiterated the settled position of law that exercise or non-exercise of the pardoning power by the President or Governor would not be immune from judicial review.

Conclusion

The biggest question which could be laid down against the conception of Judicial Review of the power is that, a person pleads for mercy when all the doors of judiciary closes for him, in that case if President grants pardon on some moral and humanitarian ground whether in that case if judicial review is done then how come a judiciary would close its eyes from the previous judgments which it has given right from the lower courts against the pleader. It is more or less clear that it would revoke the pardon and would revert back to its final decision. As per my view the judiciary when given a chance to review a pardon should not go by the legal circumstances but it should deal with the moral values.

Questions are now arising on several clemency decisions given by various US Presidents. Amongst which most of them are given by Bill Clinton. Bill Clinton granted about 395 pardons during his presidency amongst which 140 were issued on his final day in his office. It could be clearly seen that pardon power could be misused for political expediency. Recently a House Judiciary Committee which was hearing into the decision to commute the sentence of former White House aide I. Lewis "Scooter" Libby has said that it would review all the previous pardon given by various Presidents.

Thus when the President's absolute power to grant a pardon can be brought under judicial review then why cannot the power granted to Indian President be reviewed. Justice P.N. Bhagwati in **National Textiles Workers Union Vs. P.R.Ramakrishnan** said "Law cannot stand still; it must change with the changing social concepts and values. Law constantly be on the move adapting itself to the fast-changing society and not lag behind". Thus it is the need of the hour that judiciary should prevail and pardoning power should be subjected to judicial review, if it is done so the judiciary would definitely stand up to the precepts of Rule of Law and natural justice without being tempted into the caprice and expediency of politicians. If political expediency becomes the ground of justifying adorning the head of the political executive with the power of pardon which is absolute, then who will act against or bridle the executive and legislative excesses? To see that the President and Council of Ministers headed by the Prime Minister exercise this power with a sagacity that is reminiscent of the venerated precepts of Rule of Law and natural justice without being sensitized to the slightest to the vagaries of political whims and caprices the imperatives of an active judiciary to be always on guard are certainly the healthy signs of a matured democracy. Averse to reviewing this power of pardon of President implies showing a short shrift to the unmitigated agony and the ordeal of the families of the victims and the society which do expect an exemplary punishment so that its moral foundation is not warped. To bring an end to all these controversies what remains the most pragmatic option is either to abrogate Article 72 or accept the human rights activists demands for abolition of death sentence from the constitution. The question remains whether we are more apologetic of the criminals doings and the punishment there upon than with the agonized and bereaved families and the society striving for justice and the consequences of abolition of capital punishment on the moral and ethical foundation of the society.

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