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Introduction

The authority to pardon offenders has long been a cherished privilege wielded by monarchs worldwide. In England, this authority constituted one of the Crown's royal prerogatives, allowing the Sovereign to grant clemency as an act of grace.

As Sir William Blackstone observes, the term "prerogative" signifies the unique superiority held by the King, transcending the bounds of common law, inherent to their royal status. Hence, the British Crown's power to pardon was a prerogative exercised to dispense justice tempered with mercy.

The authority of pardon has faced its share of challenges. Beccaria, for instance, criticised such a prerogative, viewing it as an implicit admission of the imperfections within the administrative system.

Moreover, conflicts between the British Parliament and the Crown have been a recurring theme surrounding this power, until the enactment of the Act of 1535, which fortified and affirmed the King's absolute authority to pardon, exclusively denying such privilege to other members of the Royalty.

The sole limitation on this authority emerged later in 1679 when the King was stripped of the power to pardon impeachments. Despite these hurdles, the power of pardon has endured over time and found its place in the majority of modern constitutions.

In India, the authority to pardon is vested in the President and the Governor by the people through constitutional means, not merely as an act of grace, but as an integral part of the constitutional framework. Consequently, it becomes imperative to scrutinise the text of the Constitution, as the exercise, expansion, and regulation of this power are governed by relevant constitutional provisions.

Purpose Underlying the Power to Grant Pardon

The rationale behind granting pardons often aligns with two distinct philosophical viewpoints: retributivism and rehabilitation/redemption. Retributivism focuses on enhancing justice and correcting failures within the legal system, while rehabilitation and redemption prioritise public welfare and compassion, considering post-conviction achievements and contributions.

Modern practices of granting pardons often combine elements of both philosophies. In the Indian context, the executive power to pardon, as discussed in **Kehar Singh v. Union of India**, serves to safeguard against judicial errors, acknowledging the fallibility of human judgement. The historical practice, inherited from the British tradition, reflects the use of pardons for reasons of state, although this term remains somewhat vague.

The concept of "reasons of state" implies considerations beyond the scope of judicial review, such as promoting general welfare or recognizing post-conviction contributions. **Satpal v. State of Haryana** illustrates how the executive can take into account an individual's conduct during their sentence, a factor not typically considered by the judiciary. Additionally, the executive can reflect widespread public opinion, ensuring accountability and fostering a sense of loyalty and affection towards the state's leadership.

In countries with elected heads of state, such as India, public sentiment plays a crucial role in the pardon process, aligning with the principle of representative democracy. This ensures that the executive's decisions resonate with the broader populace, reflecting their values and concerns.

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Constitutional Framework

The constitutional framework delineates the power of pardon, vested in the President and the Governor under Articles 72 and 161 of the Constitution, respectively. Article 72 outlines the President's authority to grant pardons, reprieves, or remissions of punishment, as well as to suspend, remit, or commute sentences in specific cases.

This power encompasses sentences handed down by court martial, offences under laws within the executive purview of the Union, and sentences of death. Notably, the President's authority extends exclusively to these aspects, distinct from the broader powers of pardon recognized in England and the United States.

Similarly, Article 161 delineates the Governor's power to grant pardons, reprieves, respites, or remissions of punishment, and to suspend, remit, or commute sentences, particularly in cases involving offences against laws within the executive domain of the State.

The distinction between the President and the Governor's powers lies in their jurisdiction over matters listed under List I and II, respectively, with concurrent authority over matters in List III. However, both share the authority to pardon death sentences, regardless of the law under which the conviction occurred. Article 72(3) ensures the President's power in this regard remains independent of the Governor's authority, provided the State's executive power extends to the same.

While the power of pardon is inherently executive, its exercise is subject to Article 74(1), mandating the President to act on the counsel of the council of ministers, distinguishing it from presidential systems where the President exercises personal discretion.

Interpreting the Exercise of Pardoning Power Under Articles 72 and 161

The interpretation of Articles 72 and 161 concerning the exercise of the power of pardon has sparked debates regarding its application to both convicted individuals and undertrials. While the constitutional language suggests that pardon pertains only to convicted offenders, Indian courts have, on various occasions, interpreted it differently without due consideration of the provision's wording.

In the case of **Re Maddela Yera Channugadu & others**, the validity of a Governmental Order granting general amnesty came into question due to its inclusion of condemned prisoners awaiting confirmation of their sentences from the High Court. The argument posited by the Government was twofold: firstly, that awaiting sentence confirmation constituted being "convicted of an offence" as per Article 161, and secondly, that the power under Article 161 could be exercised at any stage, pre- or post-conviction. The court, relying on American legal precedents, concluded that the power of pardon under Article 161 could indeed be exercised before conviction, validating the Governmental Order.

Similarly, in **State v. K.M. Nanavati**, a challenge arose against the Governor's order suspending a sentence while an appeal was pending before the Supreme Court. The Bombay High Court dismissed this challenge, asserting that the power under Article 161 could be exercised at any stage. The court emphasised the similarity between the Indian and American presidential powers of pardon and clemency.

However, in subsequent cases such as **Harshad S. Mehta v. State of Maharashtra,** criticisms were raised regarding the harmonious construction of Articles 161 and 142. Some jurists argued

that the distinction between executive and judicial powers should be maintained, suggesting that the powers under Article 161 are meant to be exercised post-conviction.

The correct perspective on the exercise of the pardoning power is that it extends only to punishments and sentences, thus applicable after a person has been tried and found guilty. Post-conviction, the power of pardon should be available without artificial restrictions. This interpretation aligns with the constitutional framework and avoids potential conflicts with the judiciary's role in dispensing justice.



Offences Eligible for Presidential Pardon

Determining which offences fall within the purview of the President's pardoning power under Article 72 raises questions regarding the inclusion of contempt of court or legislature, as well as offences entailing private interests, such as those under the Negotiable Instruments Act, 1882. Two approaches can be considered in addressing this issue, each potentially yielding different results in defining "offences."

Firstly, one may adopt the definition of "offences" as provided in the General Clauses Act, applicable to constitutional interpretation via Article 367. Alternatively, a broader approach could encompass all acts subject to punitive sanctions as constituting "offences." While both approaches may not significantly impact major offences covered by the Penal Code, they could diverge in cases where the nature of the act or omission is ambiguous.

In India, this issue arose in **State v. Padma Kanta Malviya**, where the Allahabad High Court examined whether criminal contempt of court constituted an offence under Article 20(3). Relying on the General Clauses Act's definition, the court concluded that contempt of court was not punishable under the Contempt of Courts Act, 1926, but recognized as an inherent power of the High Courts, thus not constituting an "offence" under Article 20(3).

Similarly, the Supreme Court of Indiana, in **State v. Shumaker**, reasoned that contempt of court did not qualify as an offence under the State Constitution, citing reasons such as the absence of jury trials and the summary nature of contempt proceedings. However, the US Supreme Court, in Ex Parte Philip Grossman, interpreted "offences" broadly under the American Constitution, distinguishing between civil and criminal contempt and granting the President the power to pardon criminal contempt.

The justification for including the power to pardon criminal contempt under Article 72 has garnered differing opinions. Judge Ryan in **State of New Mexico v. Magee Publishing Co.** dissented, arguing against extending the pardon power to criminal contempt, as it could frustrate judicial authority. Similar concerns have been raised regarding the power to pardon contempt of the legislature.

In India, the narrow view of "offences" under the General Clauses Act, as endorsed by the Allahabad High Court, would likely preclude the President from pardoning contempt of court. Additionally, offences entailing private interests, where the Crown is not the prosecutor and rights or benefits are vested in individuals, cannot be pardoned, aligning with English legal principles. Therefore, fines payable to complainants, such as those under the Negotiable Instruments Act, would not be subject to presidential pardon if they confer private rights.

Judicial Review and Procedural Considerations

The issue of whether there should be a specific procedure for the exercise of the President's power of pardon has been a subject of debate, with questions raised about the application of natural justice rules and prevention of arbitrariness. The Supreme Court has addressed this matter in various cases, providing insights into the extent of judicial review and the need for procedural guidelines.

In **Maru Ram v. Union of India,** the Supreme Court emphasised the importance of guidelines governing the exercise of presidential power, subjecting it to judicial review on Wednesbury grounds for administrative actions. However, in **Kehar Singh v. Union of India,** the Court held that the President's discretion in pardon matters was executive in nature, and therefore, no specific procedure or guidelines were necessary. This apparent conflict was later reconciled in A**shok Kumar v. Union of India**, clarifying that the recommendation for procedural guidelines in Maru Ram was not binding.

Instances of abuse of the pardon power have been highlighted in cases like **Swaran Singh v. State of UP and Satpal v. State of Haryana**, where orders were deemed arbitrary due to lack of proper consideration. However, the courts have intervened through judicial review, ensuring accountability.

Arguments for procedural requirements often cite concerns about potential misuse and the need for effective representation of the offender. However, imposing a standard procedure may impede timely decision-making and compromise the President's sense of responsibility.

While scholars like Prof. Upendra Baxi advocate for oral hearings for offenders under Article 21, it is argued that the pardon power is discretionary and does not confer rights on the petitioner. Granting personal hearings could transform the President's role into a quasi-judicial one, which is inconsistent with the constitutional scheme.

Although isolated cases of misuse exist, the current system of judicial review has generally been effective in preventing abuse. Therefore, maintaining the status quo until a compelling need for change arises seems prudent, as overly rigid procedures could undermine the efficacy of the pardon power.

Comparative Analysis of the Scope of Article 72 and Article 161

The comparison between Article 72 and Article 161 of the Indian Constitution underscores the superior nature of the President's power of pardon over that of the Governor. There are two key distinctions evident from the language of these articles: First, the President's power extends to pardons for sentences granted by a Court Martial, a jurisdiction not granted to Governors. Second, the President is explicitly empowered to consider all cases involving the death penalty.

While there is an area of overlap in cases involving matters within the executive power of the Governor resulting in a death sentence, Article 72(3) allows the Governor to forward such mercy petitions to the President. This implies a hierarchy where the President's pardoning power is superior, especially concerning cases of death sentences.

Despite the President's power being limited to matters within the Union Government's legislative jurisdiction, Article 72(1)(c) combined with Article 72(3) effectively extends the President's pardoning authority to matters under State Government jurisdiction, provided they involve a death sentence.

The Constitution does not prohibit mercy petitions rejected by a Governor from being subsequently submitted to the President. This highlights the significance accorded to cases involving death sentences, placing the President at the apex of the constitutional scheme for pardons. While this hierarchical structure acknowledges the importance of the right to life, it also prolongs the process for finalising death sentences, potentially delaying ultimate decisions.

Judicial Precedent: Council of Ministers' Role in Pardoning Powers

The judicial interpretation of the Indian Constitution, particularly in cases like Samsher Singh v. State of Punjab and Maru Ram v. Union of India, has established that the satisfaction required by the President or Governors in exercising their pardoning powers is not personal but that of the Council of Ministers.

In Samsher Singh, a seven-judge bench of the Supreme Court ruled that the satisfaction of the President or Governor is based on the advice of the Council of Ministers, whose aid and advice they rely upon to exercise their powers and functions. This precedent underscores the principle of

executive decision-making guided by the collective wisdom of the Council of Ministers rather than personal discretion.

Similarly, **Maru Ram v. Union of India** reiterated this principle concerning the power of pardon. The Supreme Court clarified that the President or Governor cannot make independent decisions regarding pardons but are bound by the advice of the Council of Ministers. This judicial interpretation emphasises the executive's accountability to the elected representatives and the collective responsibility of the Cabinet in decision-making processes.