CHAPTER VI
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POWERS TO GRANT PARDON

Almost in every democratic society the constitutional or the executive head is armed with the power to grant pardon, one to suspend, remit or commute sentences, in view of the fact that the judicial errors may be committed by a judicial authority which is likely to subject a particular person to harsh punishment. ¹ In view of this position, both the

1. In Ex-Parte Grecman, Chief Justice Taft of the Supreme Court of America, in delivering the Opinion of the Court, observed as follows

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the Courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments as well as in monarchies, to vest in some other authority, than the Courts to ameliorate or avoid particular criminal judgements. (1878) 68 Law Ed 527 (635, 636) - 687 93 57 cited in D.V. Chitale and S. Appu Rao, A.I.R. Commentary on the Constitution of India (The All India Reporter Ltd., 1974), 2nd ed., p. 810.

In the case of K.M. Hanapiti, Chief Justice Marshall stated

A judge cannot take cognizance of facts and circumstances which are not brought to his notice. Judicially... the law may sometimes be so rigorous that it may be in the interests of justice to mitigate its severity. Many laws such as 5, 397, I.P.C. prescribes minimum sentences of imprisonment for certain offences. Experience shows that these minimum sentences are sometimes unduly severe. The minimum sentence having been prescribed by law, the judge cannot reduce or remit it. Power must also exist to avoid miscarriage of justice or possible errors in judicial determination, e.g., where through a mistake a wrong person has been convicted. The wisdom of investing the head of the state with the power of pardon and mercy cannot, therefore, be doubted. A.I.R., 1960, Bombay 502 (503).
Governor and the President have been clothed with the power of granting pardons under the Constitution of India. Article 161 of the Constitution says:

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

Before we proceed to make the post mortem of this Article, it seems desirable to make the meaning of various terms used in the Article clear.

(1) Pardon was defined by the U.C. Supreme Court as "an act of grace proceeding from the power entrusted with the executive thereof, which exempts the individual to whom it is bestowed from the punishment which the law inflicts for a crime he has committed."

(2) Reprieve may be defined as the temporary suspension of the punishment. For example, if a pregnant woman is sentenced to death, it is common to stay execution of the sentence of death until the child is born.

(3) Remission may be interpreted as the reduction or diminution of a sentence without changing its character. For instance, a sentence of ten years rigorous imprisonment may be reduced to five years or four years rigorous imprisonment.

(4) Respite means awarding a lesser sentence than actually prescribed by law. For example, the death sentence of a pregnant woman may be converted into life imprisonment.

(5) Commutation is a change from a heavier to a lighter penalty. Section 402 Cr.P.C. provides that each of the following sentences may be commuted for the sentence next following it - death, transportation, rigorous imprisonment, simple imprisonment, fine.
As defined by Article 162, the pardoning power of the Governor is co-extensive with the executive power of the State. As such, the Governor is competent to grant pardon for offenses against laws pertaining to List II and against laws falling under List III subject to Union laws made in respect thereof. It is also pertinent to note that offenses against laws with respect to matters included in List I and List II are excluded from the scope of Entry I of List II of the Seventh Schedule. Besides, the Governor shall have no power to pardon a sentence of death, but shall have the power to suspend, remit or commute the same. Section 54 of the I.P.C. states that where a sentence of death has been passed, the concerned government may, without the consent of the offender, commute the punishment for any other punishment provided by this code. Besides, Section 401(1) of the C.P.C. says:

When any person has been sentenced to punishment for an offence, the appropriate government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

Therefore, it is clear that although the Governor has not been armed with the power of pardoning a sentence of death, he can commute, remit or suspend the same.

2. The Madhya Pradesh High Court pronounced: "The word 'remit' so used in Section 401 is not a term of Article. Some of the meanings of the word 'remit' are to pardon, to refrain from inflicting, to give up. There is, therefore, no obstacle in the way of the Governor in remitting a sentence of death." Deputy Inspector General of Police v. D. Rajendra and Others, A.I.R., 1966, A.P., 259 (362).
After having thrown a cursory glance at Article 161, it becomes quite clear that the Governor can use his powers (i) in respect of an act, which in the eyes of law, is an offense; (ii) which offense in respect of a matter over which the executive power of the State extends; and (iii) for which punishment has already been adjudged. In England and the United States, the position is somewhat different. In both countries the pardon may be granted before the trial of the accused. Article (3), Section 2 of the U.S. Constitution says: "The President shall have the power to grant reprieves and pardons for offenses against the United States except in cases of impeachment." If we compare this article with Article 161 of the Indian Constitution, we find a clear-cut distinction between the two. In Article 71, the word "punishment" has been used, whereas in the American Constitution it is "offense." Had there not been any distinction between the two, the phraseology would have been quite similar. In England also, ordinarily, the power is exercised after the trial. But, as decided in L.V. Boys in 1901, the pardon can be granted before conviction also. The reason of this distinction between India and the U.S. on the one hand, and England on the other is that in our country there were

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already legal provisions for meeting the contingency of an
accused being made a state witness or rebels being given an
assurance of not being criminally prosecuted, so there was
no possibility of a situation which arose in England and the
U.S., because of the absence of legal provisions in their
criminal procedural law in respect of these witnesses. So,
for these reasons it would appear in India the term "punish-
ment" was used instead of the term "offence" in respect of the
power of granting pardon. 5

Above all, whereas in the United States, owing to
the application of the doctrine of "separation of powers",
it has been held that the executive power shall not be subject

5. See Belurissen, p. 3, pp. 114. On the occasion of the for-
motion of Andhra Pradesh the Governor without reference to
any provision of law issued an order granting amnesty to
continued prisoners. Some of these persons were sentenced
to death and their cases were pending before the High Court
for confirmation of their death sentences. Some of them
had also appealed against their conviction. When their
cases came before the High Court a question arose as to
whether the act of the Governor was valid. In view of the
fact that the Advocate-General conceded that even though
the prisoners had been granted amnesty the High Court
could proceed as to whether they had been rightly convic-
ted, in its judgment the Court decided: "In many res-
pects the power of pardon and reprieves conferred under
the Indian Constitution by Article 72 on the President
and by Article 161 on the Governor of a State, is very
similar to the power of the President of the United
States of America in granting pardons and reprieves. The
wording of the corresponding articles is also similar
and with being the case, decisions of the United States
Supreme Court are useful in the decision of questions with
respect to the power of pardon and reprieves conferred
under Articles 72 and 161. In re Madielle, Lorea Channagadu
and others A.I.R., 1954, Madras 911 (613).
to legislative control, and the legislature cannot nullify the effect of a pardon granted by the President in the exercise of his constitutional powers; in India and England, the position is somewhat different in the sense that the competent legislature may impose limitations on the pardoning power of the Governor and the President. On the other hand, as Bom says:

the very fact that the pardoning power has been placed in Arts. 72 and 161 as powers belonging to the Executive and that the executive power is not subject to any general limitation of legislation by the legislature nor is there any specific limitation in Arts. 72 and 161 (as there are in many other Articles of the Constitution) that the executive power conferred by these Articles is subject to legislation by the appropriate legislature implies that the executive power conferred by these two Articles of the Constitution cannot be controlled by any legislation.


8. The majority of the Supreme Court in Ranavat’s case held that since the pardoning power in Articles 72 and 161 of our Constitution is a relic of the Royal Prerogative travelled through Section 295 of the Government of India Act 1935 and S. 401-2 of the Criminal Procedure Code, 1898, it is subject to legislation. Ranavat v. State of Bombay, A.I.R. 1961, 62, C. 112 (119).

9. In England, it has been decided that though Parliament had never chosen to fetter this prerogative by legislation, like all other prerogatives, it is subject to legislation by Parliament to which the Crown assents. Attorney-General v. De Kassier’s Royal Hotel (1920) 46, 520 (525), cited in Jbid, N. 4, p. 404.

Another limitation on the Governor's pardoning power stems from Supreme Court's judgement in Nanavati's case. The Court decided that the Governor or the President cannot exercise their pardoning power, when Article 142 is in operation and the matter is sub judice in the Court. Article 148 empowers the Supreme Court to make rules in aid to its power under Article 142, Order 21, Rule 5 of the Rules made under Article 148 requires the surrender of a convict before the Court when he moves a petition for special leave to appeal. In view of this position, it was held by the Court that the power of suspending a sentence cannot be exercised by the Governor or the President so as to interfere with the operation of Order 21, Rule 5 of the Rules of the Supreme Court or any other power of the Supreme Court under Article 142 of the Constitution during the period when the matter is brought before the Supreme Court under Article 138 or some other provision of the Constitution.

The most important aspect of the case of Nanavati was that the Governor of Bombay did not on the advice of the Prime Minister, and not according to his own judgement. As

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12. During a stormy debate in Lok Sabha over the Nanavati case the then Prime Minister, Nehru, said that the Law Minister advised him that it would be completely in order if this provision of the Constitution were to be used in order to suspend the execution of the sentence for the period till the disposal of the application for leave to appeal to the Supreme Court. Thereafter he got in touch with the Chief Minister of Bombay on telephone and told him that this was their view in this matter and they were...
it was considered the violation of rule of law, it met a
scathing criticism. While commenting on this case, Mr.
Nikkerjee said in the House of People that,

there is discrimination involved in this extra-
ordinary intervention of the Prime Minister in
a matter where the law might very well have
been permitted to take its course, where the
Governor might in his wisdom or on the advice
of the Chief Minister have suspended the
sentence concerned, in a matter where the Prime
Minister had no business to interfere. 13

There is no doubt that in this case 'political con-
considerations' played quite an important role, whereas the
Governor is supposed to use this power on the basis of some
set principles. Besides, the Governor is required, in the name
of justice, to exercise this power not in an arbitrary manner,
for the simple reason that section 401(2) of the Criminal
Procedure Code lays down that the Governor may obtain the
opinion of the presiding judge in a particular case with the
reasons for granting pardon. Though in practice, it is said
that the petitions are examined by the Home Ministry and
later on they are sent to the Governor or the President as
the case may be, it is well known about Sujandar Prasad that
he personally examined every case meticulously. In this
respect, Sri Premasa writes:

going to consider it. He also got in touch with the
Governor and told him this and asked him to confer
with and consult the Chief Minister. Lok Sabha Debates,

13. Ibid., col. 5669.
I was told by Pandit Govind Ballabh Pant, the
then Home Minister, that the President himself
looked into each case so very carefully that
the Home Minister simply forwarded these cases
to him and sided by his decision whatever it
might be, without question or delay. 14

In American states, the method of pardon varies.
The most common practice is to leave it in the hands of the
executive. A few states, such as Rhode Island, limit the power
of the Governor by requiring that the Senate must approve of
the pardons issued by him, and Maine requires the approval of
both, the board of pardoning, and the executive council. A
few states have gone further by granting the pardoning power
to a board of which the Governor may or may not be a member. 15
In view of the fact that there are no recognized set principles
for the use of this power it is used on humanitarian and politi-
cal basis. When the Communist Party came to power in Kerala
in 1957, it decided to free all political prisoners and to
commute all pending death sentences including death sentence
of Yash Pilles, a Communist, awaiting execution of death
sentence for murdering a Congressman, following the rejection
of his mercy petition by the President. The first thing to
be noted in this connection is that it became a political
matter; and secondly, this involved the question of Centra-

14. Sri Pranab, "Rajendra Prasad As Leader", The Indian
Indian (Patna), April 18, 1963, cited in P. Singh,
Indian's Office in Independent India (Deecher, 1961),
p. 181

15. Callen R. Connell and Howard M. Holland, State and Local
Government in the United States (New York, 1961), second
printing, p. 318.
state relationship. Though the Kerala Government accepted the interpretation given by the Central Government that matters pertaining to pardon of death rested with the President of the Republic and the Union Government alone, the State Government succeeded in its ultimate aim. Sometimes, it may happen that in granting pardon, the Governor may become more generous. For instance, the Governor of Texas in the United States granted 3,737 pardons within two years (1926-27).

This wholesale release of prisoners prompted the late W. Huges to remark that the next Governor would have to start by catching his own prisoners.16

Effect of Pardon

In the case of Nemagoli, it was held by the Supreme Court that:

e. pardon after the accused person has been convicted by the Court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal-offence. 17


Similarly in the United States, in John Knot vs. U.S., while delivering the opinion of the Supreme Court, Justice Field observed:

A person is any act of grace by which an offender is released from the consequences of his offence, so far as release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. 18

It does not, however, enable the offender to claim compensation from the government for what he has already suffered. 19

In this connection, it is also important to note that where a person has been granted, the person so pardoned cannot afterwards be punished for the offence for which he has been pardoned. Even the Legislature cannot make a law which will have the effect of imposing a punishment upon such a person. Thus where the President of the United States has granted a person for all offences arising from participation, direct or indirect, in the rebellion (of the Southern States) it was held that an act of the Congress subsequently passed, prescribing a test oath that the deponent had never voluntarily borne arms against the United States as a qualification for admission as an attorney, was unconstitutional and void. 20 Since it has been held by the Medes High Court that


19. Id.

20. Ex Parte Genious (1866) 12 Law Ed 353 (371) = 4 Wall 333, cited in Id.
there is similarity between the corresponding articles of
amendments and the Indian Constitutions, decisions of the U.S.
Supreme Court are useful in the decisions of questions with
respect to the pardoning power, the same can be applied in
the case of India.

The Court and Governor’s Pardoning Power

As in the United States, this is an executive
power, the Court has nothing to do with it. As such, the
Court cannot go into the legality of Governor’s decision on
the ground of vision or expediency. It is also worthwhile
to be noted that obviously this is judicial power and is
exercised by the Governor in the exercise of his executive
functions and that also not in accordance with rules of
natural justice, i.e., not after hearing the parties con-
cerned. Besides, the Court cannot interfere on the ground
that person has been refused on whimsical ground. Though

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    Madras 911 (913).
22. Robert D. Raskin, The Government and Administration of
23. In Re Meddales York Cheemmungam and Others, A.I.R., 1954,
    Madras 911 (916).
24. Tero Singh v. Director, Consolidation of Holdings, Punjub,
the Court has been desirous from interfering in the process of granting pardon, it can do so if the Governor or the President, as the case may be, exceeds his powers as defined in Articles 162 and 73 respectively. In view of Article 361 it is not possible to make an order against the Governor, but it can issue writ against the officer who is holding the accused in the custody. 20