The Power to Pardon

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The sovereign's right to pardon an offender has always gone together with the concept of sovereignty and hand in hand with the sovereign's power to punish. So far as the power to punish is concerned, as the sovereign functions of the State became divided between three equal but separate constituents, the Executive, the Legislature and the Judiciary, the power to judge an offence and to award punishment passed on to the Judiciary. The sovereign as personified by the ruler no longer personally punishes an offender because this is now the function of the Judiciary. However, after a judicial order was passed, the power to pardon, remit or commute the sentence of the convict continued to be enjoyed by the sovereign through the Executive. This anachronistic practice in which the Executive is virtually able to nullify a judicial order in a criminal case dates back to a period when the King was an absolute ruler. Can such a practice s be carried over into a democratic polity?

Under Article 72 of the Constitution the President has the power to grant pardon, reprieve, respite or remission of punishment and to suspend, remit or commute the sentence of any person convicted of an offence in all cases of trial by court martial, where punishment is for an offence against a law to which the executive power of the Union extends or where the sentence awarded is of death. Under Article 161 the Governor of a State enjoys similar powers in all matters pertaining to a law to which the executive power of the State extends. Because the President and the Governor are required to act according to the aid and advice of the Council of Ministers, every decision under Articles 72 and 161 would naturally be coloured by political considerations. Under sections 432 and 435 Cr.P.C there are similar powers of pardon, remission, commutation, etc., available to the Centre and State Governments respectively. There is large number of cases pertaining to death sentences pending before the President which, effectively, means the government.

A Court of Session tries the case as per the provisions of the Code of Criminal Procedure, with evidence being taken in accordance with the provisions of the Indian Evidence Act. Under Indian law there is a presumption of the innocence of an accused person. It is for the prosecution to prove beyond the shadow of doubt that the accused person is guilty as charged. If the prosecution is unable to prove this, or if there is any doubt, the accused will be acquitted. The judicial process, therefore, is weighted in favour of the accused. Under section 366 Cr.P.C. every death sentence has to be confirmed by the High Court. In addition there is the right to appeal under sections 374 Cr.P.C and under section 379 Cr.P.C. and 380 Cr.P.C there is the right of appeal to the Supreme Court. It is virtually impossible for an innocent person to be convicted and sentenced, especially to death. In any case the Supreme Court has ruled repeatedly that it is only in the rarest of rare cases that the death penalty should be awarded and, therefore, trial courts are reluctant to do so.

Under our judicial system wrongful conviction is a rarity, especially when there are concurrent judgements of the trial court, the High Court and the Supreme Court. Where, then is the question of the Executive having any power to pardon an offender or to commute a sentence? The judicial process is prescribed by law, the Code of Criminal Procedure, in which investigation

is the function of the Executive, but trial, acquittal, conviction and sentencing are all judicial functions. For the Executive to negate a judicial order under sections 432 to 435 Cr.P.C. or in exercise of the powers vested by Article 72 and 161, would make a mockery of justice because it allows the Executive to undo the punishment awarded by judicial process. The procedure of trial is prescribed by law, but there is no such legal procedure through which the Executive exercises its right of pardon, etc. In India this power is invariably exercised either on political considerations, through bribery, or according to the whims and fancies of ministers. Such arbitrariness has no place in a society of laws and must be done away with.

Let us take the case of Afzal Guru. The offence was heinous, the conviction was upheld all the way upto the Supreme Court and the nature of the crime merited nothing less than the death sentence. Despite this government sat on the matter for years because it did not want to displease the Kashmiris and had wanted to send a message to the Muslims that the government was sympathetic with them. After Ajmal Kasab was executed government obviously felt that if Afzal Guru was not hanged there could be a Hindu backlash.. Because of an increasing clamour by what was presumed to be the Hindu constituency government suddenly went ahead with the execution of Afzal Guru.

Under Chapter 32, Part A, Cr.P.C. the execution of a sentence of death is to be done under warrant of the Court of Session having jurisdiction. If a convicted person presents an application to the High Court for certification of an appeal to the Supreme Court the death sentence is stayed till disposal of such application. An executive stay of execution can delay indefinitely the carrying out of the death sentence awarded by a court. Therefore, in order to ensure that the judicial orders have finality Articles 72 and 161 should be removed from the Constitution. So far as sections 432 to 435 Cr.P.C. are concerned, I would suggest that a convict undergoing life imprisonment or awaiting execution of a death sentence may be allowed one petition to an Authority whose composition could be as under:

1. In all matters which come under the provisions of section 432 to 425 Cr.P.C. the Authority in matters relating to the Centre may consist of a judge of the Supreme Court nominated by the Chief Justice of India, the Chief Justice of the High Court in whose jurisdiction the trial and conviction took place, a High Court judge from any other High Court nominated by the Chief Justice of India, the Chairman of the National Human Rights Commission or a member nominated by him, the Attorney General and the Chairman of the Supreme Court Bar Council.
2. In matters falling within the jurisdiction of the State Government the Authority would consist of the Chief Justice of the High Court under whose jurisdiction the trial took place, a judge of the High Court nominated by the Chief Justice, the Chairman of the State Human Rights Commission or a member nominated by him, the Advocate General and the Chairman of the State Bar Council.

The recommendations of this Authority will be final and binding on the President or Governor as the case may be and the appropriate government. This would remove this whole issue of pardon from the purview of the Executive and restore the supremacy of the Judiciary in all matters relating to trial and sentencing.

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