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Chapter 6

Recommendations and Conclusion

6.1 Outline of the Study in Nutshell

The resilience of the power to pardon offenders is a remarkable phenomenon, in view of some seemingly powerful reasons for the disappearance of this institution. The ideological grounds derive from the fact that the pardoning power appears to be an archaic survival of an earlier era, during which the State was governed by an omnipotent ruler, who might have an occasional urge to demonstrate his benevolent disposition. This seems something of an anomaly in a twentieth century constitutional democracy having a commitment, at least in principle, to a delicate separation of powers designed to ensure the independence of the judiciary. This independence would appear to be threatened by vesting in a non-judicial authority the power to pardon offenders duly convicted and sentenced in the course of a judicial process. It is no coincidence that the ideological controversy regarding the desirability of the pardoning power reached its peak during the eighteen century, when the groundwork of much of our prevailing political theory was being laid. Thus while Montesquieu believed that there was room, at least under a monarchical system, for the institution of clemency; Beccaria advocated the total abolition of this institution, a path which followed in France for a number of years in the wake of the revolution of 1789. Beccaria held,"Let

the laws, therefore, be inexorable, and inexorable their executors in particular cases…… As punishments become more mild, clemency and pardon becomes les necessary. Happy the nation in which they might someday be considered pernicious".[647] However, Beccaria was criticized by his fellow critics included Filangieri and the philosopher Immanuel Kant. The English critics, such as Fielding, Eden and Colquhoun, mainly concentrated their attacks on the abuses evident in the exercise of the pardoning power, rather than its very existence.

If the ideological reasons for doing away with the pardoning power are rooted in the constitutional theory, the practical reasons are related to the development of modern penal systems. The pardoning power has historically served a number of functions, most of which are adequately provided for today by other legal institutions which have been developed to meet these needs. For example, the avoidance of imposing criminal liability on persons lacking in mental capacity or acting in self-defense is now governed by the penal code itself. The need to assuage doubts regarding the possibility of a miscarriage of justice is now commonly met by a system of appeals and rehearing before the Courts.

The individualization of punishment is provided for within the framework of the sentencing discretion now generally bestowed upon the Courts, and subsequent developments can be taken into consideration by Parole Boards. Even the most dramatic use of clemency powers, viz., the commutation of capital sentences, has lost much of its importance in view of the sparse use of the death penalty in contemporary times. Finally, the use of pardons to secure rehabilitation, by removing the stigma of a criminal conviction, has widely been superseded by special laws providing for judicial or statutory rehabilitation, or for the expungement of the criminal record.

Exception is noticed in only one recently adopted constitution where there was no reference to clemency found. The 1975 Constitution of the People's Democratic Republic of China is somewhat skeletal in form and provides minimal information on the functions of the various governmental bodies. The Standing Committee of the National People's Congress, to which the pardoning power was entrusted under the previous constitution, has the power to "enact decrees……. And exercise such other

[647] C. Beccaria, *An Essay on Crimes and Punishments*, pp. 58-59.

functions and powers as are vested in it by the National People's Congress,"[648] which is "the highest organ of State Power under the leadership of the Communist Party of China."[649] Whether the pardoning power has been deliberately and finally omitted from the state fabric is thus as yet unclear.[650] Subject to this exception, the overall picture which emerges is that neither ideological nor practical objections to the clemency power as a legal institution in the modern age have resulted in its omission from the constitutional scheme. The institution of clemency, having survived the ideological attacks launched against it by eighteen century political theorists, seems to have been no more intimidated by the encroachment of competing institutions developed by twentieth century penal systems. Thus, Beccaria's vision of a clemency-free millennium does not seem to have drawn perceptibly nearer.

The basic provisions for a pardoning power are nearly always found in the state constitution, the main departures being "basic" or "organic" laws, which in effect take the place of a constitution. Great Britain continues to rely on the royal prerogative, a recognized feature of her unwritten constitution, and this same prerogative, as delegated, also obtains in certain jurisdictions of the British Commonwealth, such as in Australia and New Zealand. It should also be observed that in countries with a federal structure, basic provisions may be found both at the federal level and within the constitutions of the individual provinces or States. The jurisdiction of the federal pardoning authority is not, however, necessarily coextensive with the jurisdiction of federal courts and laws (as in the United States). Thus, for example, in India the President may commute the death penalty even where state laws are involved.[651]

No doubt, there are a number of reasons for abolishing the pardoning power in the modern world, reasons based on the democratization of political power on the one hand and attainments in penal reform on the other. Nevertheless, this institution remains an integral part of the constitutional scheme in almost every jurisdiction. The decision-making power continues to be vested most frequently in the head of State or

[648]Constitution of the People's Democratic Republic of China, art. 18, (adopted 1954, repealed 1975).
[649]*Ibid*, art. 16.
[650]Leslie Sebba, The pardoning Power—A World Survey, *Journal of Criminal Law and Criminology*, Vol. 68, Issue 1March, 1977, p.84.
[651]The jurisdiction of the federal authority in Malaysia, where the Head of Federation's power to pardon is confined to certain special cases and the ruler or governor of the individual state retains such power in respect of all other offences.

chief executive. The most common alternative, mainly in Communist countries, vests the pardoning power in an executive or presidential body. The democratization of political power has merely resulted in a tendency for formal heads of State to share or transfer their effective authority to governmental figures who are more directly accountable to the legislature and/or to the electorate. This is achieved either through the designation of governmental ministers as advisors, or by the device of the countersignature. The impact of penal reform is sometimes reflected in the appointment of special advisory pardon boards or in the reliance on prior investigations by criminal justice personnel. The main exceptions to the general pattern are: (a) the nations which vest the pardoning power in the legislature alone, a system which appears inconsistent with the flexibility normally attributed to the clemency power, and (b) the recent Chinese constitution which omits all reference to clemency.

One element in the nature of the pardoning power is predominant when that power is analyzed through American constitutional theory. Alone among the powers enumerated in the Constitution, the power to pardon proceeds unfettered. Thus, of all the powers of the United States' tripartite system of government, this power has the greatest potential for abuse, for from "power unrestricted, comes impunity to delinquency in all shapes……."[652] Neither the Congress nor the courts can question the motives of the President in the use of the power. Although nothing higher than the laws should exist in a democracy, one constitutionally- sanctioned exception to this noble theorem permeates the American system. "To the executive alone is entrusted the power, and it is entrusted without limit."[653] The only "rule" governing the use of the power is that the President shall not exercise it against the public interest,[654] though he alone is given the discretion to define the public interest.

Naturally it is more difficult to be constructive than it is to be critical. There are four alternative methods of dealing with the pardoning power. First, one might leave the power as it is, unchecked, and hope that the American electorate continues to select, with just as few exceptions as in the past, highly ethical leaders. The people are, as Madison observed, the primary check, but he hastened to add that alternative checks

[652] J. Bentham, Works 530 (Edinburgh 1843).
[653] *United States v. Klein*, 80 U.S. 128, 147 (1871).
[654] W.Taft, *The Presidency*, 95 (1916).

are no doubt necessary.[655] Usurpations of power often build too slowly for any to see but the jealous eye of a co-equal partner.

Second, the power might be eliminated totally. In the United States, an individual is assured due process of law. He is allowed to confront his accuser and is permitted benefit of counsel. Indigents are given court-appointed attorneys. There are strict rules of evidence and procedure which, if disregarded, permit a motion for a mistrial. The accused is given the presumption of innocence in a trial before twelve of his peers, "good and true." There is one right of appeal and the possibility for further appeals. Arguably, pardons only produce an atmosphere of disrespect for the laws. In addition, it has been suggested that in a perfect system of laws, there is no need for a pardon: "To praise the clemency of the sovereign…… is to praise the surgeon who allows his patient to perish by not cutting off a gangrened finger".[656]

There is, however, a natural repugnance of the irretrievable and irrevocable that springs from man's recognition of his own fallibility. As Justice Story observed, "no man in his senses will contend, that any system of law can provide for every possible shade of guilt a proportionate degree of punishment".[657] Different circumstances in similar "crimes" often require necessary distinctions in degrees of punishment and guilt. To eliminate this means of mitigation would be unjust.

Third, the power of clemency might be concentrated in another branch of government. Beccaria argued that "clemency is the virtue of the maker, not executor of the laws ……."[658] It would be difficult, however, for a group as large and diverse as a legislative body to dispense mercy as effectively as a single executive. For such a group to debate each individual pardon would bring to a halt the urgent matters that require the forum of the legislative chambers. Alternatively, the power might be given to the judiciary; after all, justice is meant to be dispensed by the judicial tribunals. But the judiciary has a poor vantage point for observing the "political thicket." The principal reason, however, for not vesting the power in the other branches is that the power provides a needed check on the powers of the judiciary and legislature. It would serve the system of "checks and balances" little good if an unchecked power were

[655]The Federalist No. 51, in The Federalist Papers, 322 (1961) (J. Madison).
[656]1 J. Bentham, Works 520 (Edinburgh 1843).
[657]J. Story, *Commentaries on the Constitution of the United States*, 548 (1851).
[658]M. De Beccaria, *An Essay on Crime and Punishment*, 131-32 (1768).

eliminated while the existing forces operating against the branches other than the executive were diminished. The power can be used to correct the decisions made by a judicial department lacking total flexibility. It can be employed also to correct the inherent limitations of the legislative branch: the intrinsic inability of a legislative body to identify every combination of cases.

Iredell's query, "where could [the pardoning power] be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people,"[659] together with an analysis of the other choices, forces the solution. It is possible to leave the power in the executive office and yet bring it into balance with the otherwise poetic system of "separation of powers" and "checks and balances" proven so beneficial. The optimum solution lies in the adoption of the amendment proposed by Senator Mondale in the 93rd Congress. "No pardon granted an individual by the President under section 2 of Article II shall be effective if Congress by resolution, two-thirds of the members of each House concurring therein, disapproves the granting of the pardon within 180 days of its issuance."[660]

The proposal would provide a sufficient check on the prerogative of the executive which need be invoked only in controversial cases. "The dilatory process of convening the legislature, or one of its branches……. [and] letting slip the golden opportunity"[661] would be avoided. The effect of the pardon need not await the sanction of Congress, for the Congress is given the burden of going forward with the process. The proposed check is analogous to the courts' powers of judicial review, by which legislation is given complete effect until adjudicated unconstitutional.

Many may contend that the case for change has not been made here or that the need cannot be proven in the United States because the power has never been abused to such an extent as to require adoption of an alternative method. Obviously, the word 'abuse' has an individual meaning, and to some, the political uses of the power during the Reconstruction period and the aftermath of Watergate may not connote abusive exercises. But when one proposes adjustments to the system to bring it into conformance with the basic doctrine of American constitutionalism, the presumption

[659]4 Debates in the Several State Conventions on the Adoption of the Federal Constitution, 111 [J. Elliot ed. 1836].
[660]S. J. Res. 240, 93rd Cong., 2d Sess. (1974).
[661]The Federalist No 74, in The Federalist Papers, 449 (1961) (A. Hamilton).

rests with the apologists for constitutional balance. The constitutional framers of 1787 did not find it necessary to wait for unfortunate incidents to employ the safeguards of liberty. The Nixon pardon comes close enough to abuse to force speculations and inspire just apprehensions.

In the United States, the Constitution gives the President "power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment". Despite the spare wording, the pardon power has been the source of considerable legal debate. A number of different opinions exist as to whether the President may issue posthumous pardons, whether pardons may issue for crimes that violate constitutional rights and whether the pardon power extends to self-pardons. Despite the controversies, it remains largely true, as the Supreme Court said in the mid-1800s, that "this power of the President is not subject legislative control" and is otherwise "without Limit".

Apart from the scope of the pardon power, also contentious has been its susceptibility to judicial review. In a 1981 Supreme Court Case, the Chief Justice Burger remarked in an aside: "pardon and commutation decisions……are rarely, if ever, appropriate subjects for judicial review". In 1998, in *Ohio Adult Parole Authority v. Woodard,* the Court split on the issue. Four Members of the Court endorsed the proposition that executive clemency is an act of 'grace' and not capable of being judicially reviewed. The majority, however, indicated that, in certain circumstances, judicial review would be appropriate to correct arbitrary processes or outcomes in the field of executive clemency. In the years since Woodard, however, the Court has not had the opportunity to clarify exactly the circumstances in which judicial review will be available.

The justifications for a sweeping pardoning authority are not only found in its compassion dictate. In the abstract, a grant of pardon primarily serves as a check against the legislature and judiciary as "a negative execution of the Law."[662] But its exercise can empower its user, the President, in the US constitutional system. The formal limitations the US Constitution places on the executive branch are obvious. Its main function of law administration makes the executive the most passive and

[662] James D. Barnett, "Executive, Legislature, and Judiciary in Pardon", *American Law Review* 49 (1915), 686.

absolutist branch, in a policy sense. Due to this configuration, the President is permanently subject to the innovative laws and court decisions made by the coordinate branches. Current and prior laws as well as federal court opinion are expected to be enforced in their entirety. This republican framework of government effectively prohibits any resourceful policy creation and maneuvering from the President. The systemic disadvantages imposed on the President are evident.

Only the pardon authority, albeit in a narrow policy capacity, can put the Us President on the administrative level of the other branches. The US President has full control over choosing a pardon's application and its exercise. The President can measure the contours of its pardon grant to forgive an offense partially or entirely. When a pardon is conditionally granted, the President can independently enforce its expectations upon its recipient. In certain settings, a pardon can be fashioned to interpose the original framework of a criminal statute to achieve clemency. These pardon attributes are borne out of case law and should not be regarded as exaggerations. When these properties are considered as a group, they are proportional to the administrative maneuverings of Congress and the Supreme Court.

The study investigates the under recognized procedural and administrative properties accompanying grants of pardon. As already stated, of all the Article II powers of the US Constitution vested in the executive branch, pardoning authority confers the President with the most administrative and procedural liberties. Procedural and administrative properties like single-branch control, rearward application, discretionary design, statute interposition, and binding directive parallel those similarly exhibited by Congress and the US Supreme Court. These properties are inherent to the pardon power and are tacitly acknowledged by federal court opinions upholding this authority as a whole. Executive clemency's notable scholars and critics alike see it solely for its mercy dictate, not for the procedural and administrative benefits it can give the President. The primary objective of the critics' reforms is to bring transparency to the pardoning process. But their efforts to reform and rid the pardoning process of abuse simultaneously impair the procedural advantages it can offer the President. Historical and contemporary grants of clemency confirm this argument's perspective of pardon. Virtually all reforms would structurally vitiate one or many of the mentioned pardon properties. If their reforms are enacted, the President can no

longer be considered a procedural or administrative coequal in relation to Congress and the Supreme Court. Therefore, the President's policy lever of clemency must remain untouched.

In India, Article 72 of the Constitution, the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence where the sentence is a sentence of death. Unlike the USA president, whose powers to grant pardons are almost unrestrained, the President of India has to act on the advice of the Cabinet. The president of the USA has the constitutional right to pardon or commute sentences related to federal crimes. It has already been stated that the USA Supreme Court has held that this power is granted without limit and cannot be restricted by the Congress (legislature). The USA has a Presidential system. Clemency is a broad executive power, and is discretionary which means the President is not answerable for his pardons, and does not have to provide a reason for issuing one. However, in the USA, there are few limitations:

(1) The President shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment;

(2) Further, the power only applies to federal crimes and not state crimes;

(3) Those pardoned by the President can still be tried under the laws of individual States.

In India, having a Parliamentary system, too, there are certain limitations:

(1) The President cannot exercise his power of pardon independent of the government;

(2) In several cases, the Supreme Court has ruled that the President has to act on the advice of the Council of Ministers while deciding mercy pleas. These cases already stated include *Maru Ram vs. Union of India* in 1980, and *Dhananjoy Chatterjee vs. State of West Bengal* in 1994.

As regards to procedure, Rashtrapati Bhawan forwards the mercy plea to the Home Ministry, seeking the Cabinet's advice. The Ministry in turn forwards this to the concerned State Government; based on the reply, it formulates its advice on

behalf of the Council of Ministers, and the President is bound by the Cabinet's advice, Article 74(1) empowers him to return it for reconsideration once. If the Council of Ministers decides against any change, the President has no option but to accept it.

Thus, it is also found that under the US Constitution, the President′s clemency power extends to all federal criminal offenses, except in cases of impeachment; and he cannot interfere with state prosecutions. In India, there is no such classification of crimes as federal and state crimes. In respect of India, it states that the Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment 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. Indian law, particularly Articles 72 and 161is more specific as compared to the American provisions; or provisions of constitutions of some other countries. Moreover, the U.S. Constitution, being purely federal in structure, makes further distinction between the US states jurisdiction and the US as a whole.

The states within the federation, having autonomy and separate State Constitutions of their own may limit gubernatorial pardoning powers. This is quite opposite to the Indian situation, where only one Constitution is applied to the federating states or units as well as to the Union of India as a whole. There in the US jurisdiction, neither the courts nor the legislature can restrict or limit the pardoning power unless the State Constitution specifically says otherwise. Some States have procedural rules specifying when and how to apply for pardons, but any laws or rules that infringe upon a governor's pardoning power are most likely unconstitutional.

As indicated earlier, The Royal Prerogative of Mercy is indelible in Australian history. Modern Australia began as a penal colony of Great Britain where convicts were sent and utilized as a labour force. Some were sent because they had committed crimes that carried the penalty of transportation. Sentencing convicts to transportation was introduced by the Transportation Act of 1718, by which merchants were contracted to ship convicted persons to the United States and then Australia. Others

were sent in lieu of graver penalty. Most tried at the Old Bailey could be sentenced to death. Larceny of more than a shilling could see the culprit hang. Punishments imposed by the court, however, were frequently modified. Sixty per cent of those sentenced to death in the 18th century were pardoned. This figure rose to over 90 per cent in the 1830s.[663]

It is to be mentioned here that the Royal Prerogative of Mercy accounts for only one of the three powers constituting the 'Institution of Mercy'. For the Commonwealth Nations, the Institution of Mercy is a combination of prerogative and statutory powers, typically arising for exercise in response to a petition for mercy. In Australia, being a Commonwealth Nation, the powers operate as follows:

1. First, the Prerogative of Mercy by which the Governor, as the Queen's representative, of each Australian jurisdiction may pardon a convicted person or mitigate a sentence. The prerogative is exercised by the Governor on the binding advice of the executive government of the jurisdiction.

2. Second, to assist the executive in its exercise of the prerogative, Statute permits the chief legal minister, the Attorney-General (in the Federal and State jurisdictions) or Crown Law Officer (in the mainland territories), to seek assistance from the Supreme Court of the jurisdiction by way of referring to the court a question (of law, fact or both) relating to the petitioned case in respect of which the court must furnish the minister with its opinion. This is the 'opinion power'.

3. Third, Statute permits the minister to refer a petitioned case to the Supreme Court in full, to be dealt with by the court as an appeal. This is the 'reference power'.

As indicated, in Australia, these powers are vested in the executive arm of government, under the control of the chief legal minister of the jurisdiction.[664]

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[663] David Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon Press, 1998); J. A. Sharpe, *Judicial Punishment in England,* (Faber and Faber, 1990).
[664] Leslie Sebba, 'The Pardoning Power: A World Survey' (1977), 68 *Journal of Criminal Law and Criminology,* 83,84.

Thus, so far Australian position is concerned; it is not particularly wee known that under Australian Constitution, the government has the power to grant what amounts to a royal pardon. Its official title is the royal prerogative of mercy, and it can be granted by the Governor- General or State Governor as the representative of the British monarch, Australia's head of State, on recommendation of the Attorney- General. It implies that under the prerogative in Australia, the Governor- General may act on the advice of the government to grant a free and absolute pardon, a conditional pardon or remission of penalty, or to order a non-judicial inquiry into a conviction.

By virtue of the Australian Constitution and the Australia Act, 1986, the prerogative of power of mercy is vested in the Governor-General of Australia and in the Governors of each State. While this residual power undoubtedly remains today, it has been supplemented by a variety of legislative avenues to pardon, exoneration, remission of sentence, and conditional release. The result has been that the true prerogative of mercy is rarely exercised, and instead clemency is usually approached through the statutory framework.

Despite its enthusiasm to legislate for executive clemency, Australia has been slow to embrace the idea that any form of executive clemency (prerogative or statutory) might be susceptible to judicial review. In 1908, the High Court asserted that "no Court has the jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy". Almost a century later, that view appeared to be confirmed by the South Australian Court of Appeal, which described the power as "unconfined and uncontrolled". More recently, however, another Australian court arrived at a different view, ruling that while the outcome of an application for mercy could not be reviewed by the courts the *process* was reviewable. Similarly, a federal court recently observed that "the clear trend of authority is towards some degree of judicial supervision of, at least, the process by which the mercy prerogative is exercised". The High Court has not yet had a chance to settle this apparent conflict of authorities and has quite deliberately left the question open for future consideration.

Overall, it appears that, just as in the United States, Australian case law on the reviewability of executive clemency is currently in a state of uncertainty.[665].

In Canada, the Governor- General may grant two types of pardons, free pardons and conditional pardons, and may also grant respites from the execution of a sentence. In addition, sentences, as well as fines, penalties or forfeitures "due and payable to the Queen in right of Canada", may be remitted by the Governor- General. In Canada, a Pardon, also known as a "Record Suspension", is granted by the government of Canada to indicate that one's criminal record has been separated from publicly visible criminal charges in the national criminal record database; i.e., a pardon or record suspension allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated they are law-abiding citizens, to have their criminal record kept separate and apart from other active criminal records. Here, the issuer of pardons is a federal agency, the Parole Board of Canada. The law that governs pardons is known as the Criminal Records Act which provides a person who has prior convictions to be relieved of them. But if one does get convicted again, the government can choose to revoke his pardon and his criminal record will show up once again.

However, there are some rarely used processes that allow the Queen's representative (the Governor- General) or the federal cabinet to pardon people. The Prime Minister can also recommend pardons, but unlike the President of the United States, cannot simply use the power of his office to pardon someone.

Who cannot get a pardon in Canada? In other words, are there any crimes that cannot be pardoned? In answer, it can be put as that the persons who are found to have committed the following offences are not pardoned:

(1) sexual offences involving a minor,

(2) more than 3 indictable offences where the sentence was more than 2 years in jail each time, and

(3) any crime in which the sentence can never be completed (in some very serious cases the offender will receive lifetime in jail or lifetime probation).

[665]https://adminlawblog.org; 15 Oct 2018: Julian R Murphy: A power without limit? Pardons, prerogative powers and judicial review retrieved on 23/01/2023 .

6.2 Justifying Research Questions

After a thorough study done in the above Chapters, it is found that in almost all the States, Civil Law and Common Law countries, whether developed or developing, specific provisions for executive pardons, President or Crown, have been made through respective constitutional schemes or based on conventional practices and traditions. Though in terms of the nature, scope and extent of the pardoning power exercised by the executives, some similarities are found generally, but differ from jurisdiction to jurisdiction, to some extent, depending on how this power is actually exercised and controlled. While the US President's pardoning power is seemed to be absolute, the Indian President exercises this power upon recommendations of the Home Ministry, and the British Crown, while exercising the Royal Prerogatives, by convention, the advice of the Prime Minister or the Cabinet, accountable to the Parliament is required, particularly the Ministry of Justice after receiving letters from or on behalf of a convicted person asking the Secretary of State for Justice to recommend to His Majesty to grant a pardon. The history of England shows that the King's pardon was a general one, but in due course of time, by making the Parliament central to the process of bestowing it, the King had cleverly demonstrated his respect for the institution.

Similarly, in Canada, the Parole Board of Canada plays a role in making recommendations for criminal pardons to be granted by the Governor-General who, in practice, grant an act of clemency only after receiving the advice of the Minister of Public Safety and Emergency Preparedness Canada, or that of at least one other minister. The New Zealand's position (not discussed in this work) is a little bit different. There, at present, the Royal Prerogative of Mercy has been an important constitutional safeguard in New Zealand's criminal justice system, providing a special avenue for criminal cases to be re-opened where a person may have been wrongly convicted or sentenced. Where it appears that a miscarriage of justice is likely to have occurred, the Governor-General has normally exercised the Royal Prerogative of Mercy to refer a case back to the courts, under Section 406 of the Crimes Act. From the year 2020, the Criminal Cases Review Commission has taken over from the Governor-General the responsibility for reviewing criminal convictions and sentences, and deciding whether to refer them back to the courts. The grant of a pardon, or

suspension or remission of a sentence is, therefore, extremely rare in New Zealand. Thus, besides the Chief Executive Head or nominal head of a State, there is Primary or Recommendatory Executive Body or Bodies which properly guide the executive head of a State in exercising pardoning power as practiced in many countries of the world including India and the UK. On the contrary, in the communist countries like China and Russia, the pardon powers of the Presidents are not subject to judicial review as evident from the study.

It is also observed that absolute discretion in exercising pardoning powers by the executive heads is neither expected nor desirable in in any democratic republic, quite evident from the study and such a practice often frustrates the operation of the doctrine of separation of powers, and violates the constitutional mandate of the principle of check and balance incorporated in Constitutions by various independent nations. There should be some limitations controlling the pardon power exercised by the Executives, which should not base on only the personal satisfaction of the President or Crown or any executive body empowered with this power. The exercise of this power should not be politically influenced and be independent and just and fair. At the same time, the judiciary should not be allowed to feel that its independence is impaired.

So far exercise of pardoning power is concerned, almost all the Constitutions provide constitutional guidelines and the role of respective governments or executive body formulated is well-demarcated to be played in terms of recommendations or suggestions to be provided to the pardon power exercising authority. However, it is very difficult for the judiciary to set beforehand the guidelines binding the executive head or the authority how pardoning powers are to be exercised. There should be a reasonable time limit for disposal of mercy petition, though it can't be directly determined as to how much; and it depends on the facts and circumstances of each case presented. On that ground, it is also not possible to set uniform principles for the exercise of pardoning power not only in India, but at the world at large.

Pardon is generally that aspect of justice caused and concerned with post-conviction stage when no judicial remedy is made available. In many states, pardons can't be issued until after the person has been convicted. In other words, only after the accused

has been convicted, and punishment has been declared; and accordingly, pardons can be issued.In the United States, only in respect of certain crimes, pardons can be issued, but in not all crimes. This makes it clear that some states don't allow pardon for certain types of crimes, such as treason and impeachment, or for prisoners on death row. Again all the crimes cannot be pardoned. For e.g., in Canada, pardon cannot be granted in case of the following:

(a) sexual offences involving a minor;

(b) more than 3 indictable offences where the sentence was more than 2 years in jail each time;

(c) any crime in which the sentence can never be completed (in some very serious cases the offender will receive lifetime in jail or lifetime probation).

However, in India, the President can grant pardon to persons who have been tried and convicted of any offence in all cases where the punishment or sentence for an offence against a Union Law. Under Article 72, the President can grant pardon only after the trial and on the sentence of conviction, particularly when the sentence imposed is a death sentence.

As regards to the limitations on exercise of pardon power, as is evident from discussion above studied through different Chapters, they are mostly definitional as prescribed by the constitutional provisions of respective countries in the world led by traditional practices, and supported by social and public opinion as well as policy from time to time. The exercise of executive pardon and its scope has also been limited, to a great extent, by the emerging practice of judicial review in many democratic republican countries, including India where the Apex Court has even prescribed certain guidelines when such review upon the executive decision of pardon power can be put into motion. Even in some countries where death sentences have been abolished, the scope of executive pardon power has been made limited. So, like that of France, executive pardon need not to be exercised in respect of death penalty as this has been abolished there by its Constitution. And the procedures for granting pardons are also not similar, some unique differences are found and vary from country to country based on respective constitutional provisions and well established conventions, traditional

practices, party-based ruling as well as political motives and philosophy besides the role of executive body statutorily constituted for recommending purposes.

Again, as to the question of Judicial Review, a uniform principle cannot be drawn. In some countries, judicial review on executive decision of pardon power is not allowed, or not well pronounced, e.g., like a country as China or Russia; and in some countries, the scope of judicial review is very limited e. g., countries like Pakistan and few other Islamic countries. On the other hand, countries like the USA and UK, under specific situations, the Courts exercise the power of judicial review as check upon the executive decisions. In India too, we find limited power of judicial review only under certain circumstances, as evident from precedents set by the Supreme Court of India. In *Kehar Singh case,* Pathak, CJ states, by means of citing *Ex parte William Wells*[666],that the prerogative power can be subjected to judicial review when the circumstances of any case disclose such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. However, unlike *Maru Ram*, the court refrained from laying down specific guidelines. It seems to us that there are sufficient indications 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 spelled out.

The court also appreciated the position and functionality of the court, stating that it is within the capacity of the judiciary to address any question relating to any act of the executive, whether it falls within the boundaries of the constitutional power so conferred or whether there is an omission of performance of the act or whether there has been flawed understanding of the scope of the power. The Court has also characterized the power to pardon as "executive" for two reasons: (1) there is no inherent right in the petitioner to claim an oral hearing. (2) the President acts in this matter on the advice of the concerned Minister. But even though, it is an executive function, the power to grant pardon is more quasi-judicial in nature. However the power does involve interference with the judicial process.

[666] 59 U.S.18 How,307 (1856).

6.3 Recommendations

In the light of findings of the present study and foregoing discussion on pardon powers of the President, the researcher makes his humble submission by way of suggestions for making the exercise of this power more effective to suit a particular jurisdiction as to administration of criminal justice system including India. The suggestions may be made in three specific areas. First, the nature and source of pardon power under different constitutions of the world. Second, the crimes in respect of which pardon power is generally exercised by the Presidents or in other words, the types of sentences the convicted offender is awarded to suffer or imposed upon. Third, the limiting of the power exercised to be tested in the light of judicial review. It is hoped that these suggestions may be helpful in channelizing proper directions to exercise this power to achieve desired goals within the criminal justice system without being there any dispute between the judiciary and the executive power. The suggestions are:

(1) The provision of pardon power incorporated in almost all the constitutions irrespective of the nature whether unitary, federal or republic, is, no doubt, a noble provision embodied with a particular philosophy of balancing powers between the judiciary and the executive, as well as a check on both of them, as a correcting machinery in case of miscarriage of justice done by the judiciary under certain circumstances. In a federal country, this philosophy strongly holds good; and in other republican countries too, such power should exist.

(2) The pardoning power of the Executive is very significant as it corrects the errors of judiciary. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The process of granting pardon is simpler, but because of the lethargy of the Government and political considerations, disposal of mercy petition is delayed. Therefore, there is an urgent need to make amendment in law of pardoning to make sure that clemency petitions are disposed of quickly. There should be a fixed time limit for deciding on clemency pleas.

(3) There should be time frame within which the executive should be asked to decide over cases in order to prevent undue trauma to the applicant and his family members and back logging of cases. The clemency power can be refined to operate as a principle means of correcting some of the flaws extant in our penal system. There should be establishing an independent commission with the requisite expertise which is directed to focus on justice–enhancing reasons for remitting punishment.

(4) There is also a necessity on the part of the Legislature to bring an amendment to the Constitution, as regard to barring self-pardoning. The reason for this being that in such a case, there would be bias and chances of abuse of this power may not be overruled as in the process, the Executive is involved.

(5) Regarding the judicial review debate, pardoning power should not be absolute as well as judiciary should not interfere too much in exercise of this power. As judicial review is a basic structure of our Constitution, pardoning power should be subjected to limited judicial review. If this power is exercised properly and not misused by executive, it will certainly prove useful to remove the flaws of the judiciary.

(6) Generally, the punishment dealt herewith is that of the capital punishment. When an act done by a person is penalized by the capital punishment, then the question arises that whether mercy pleading should be entertained, whether it is moral because generally such punishment in Indian perspective is only given in rarest of the rare cases. The defence 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. But the exercise of this power is to be allowed subject to certain limitations; and those limitations should be well prescribed.

(7) Since there is no parity found among different jurisdictions worldwide in respect of crimes for which pardon power is exercised by the executives; therefore, it would seem just, to allow this power to be exercised considering the public

interests and welfare of the nation as a whole in respective countries, as they vary in social and political norms comprising of criminal justice systems.

(8) In more than 90 nations where the death penalty has been abolished for all crimes since 1976, the utility of the exercise of pardon power by the respective President, a constitutional mandate, is lessened as compared to the countries retaining death penalty which include apart from India, the US, Japan, China (China's case is exceptional), Iran, Saudi Arabia etc. A thought of such practice with some genuine guidelines may also be taken into account

(9) A review of the strengths and faults of the current federal or state clemency scheme reveals that a proposal for reforming the system should have three main goals. First, a reformed clemency procedure must be sufficiently agile to respond to the public interest. Second, the reforms must reinvigorate the pardoning process so as to make the system more responsive to those offenders, federal or state, deserving of clemency. Third, a proposal for reform must take action to prevent any presidential abuse of the pardoning authority. Therefore, the creation of a small, partisan Presidential Clemency or Pardon Board could achieve these three goals. This recommendation has been made considering the prevailing position particularly in the USA and Canada and few others.

6.4 Conclusion

Globally, the power to exercise clemency or pardon a convicted person is typically vested in the equivalent of the executive arm of government, with the equivalent of the justice minister having responsibility for them.[667] It is very important to have pardon power in the Constitution of all the countries. The reason for this being that there should be some authority which should be present to keep a check and rectify the mistakes made by the judiciary. The pardoning power of the executive is noteworthy as it amends the blunders of the judiciary. It impersonates the impact of conviction without tending to the convict's blame or honesty. The way toward allowing pardon is less complex but since of the negligence of the political and government contemplations, removal of benevolence petitions is postponed. In this manner, there

[667] [Leslie Sebba, 'The Pardoning Power: A World Survey' (1977), 68 *Journal of Criminal Law and Criminology*, 83,84]

is an earnest need to make a change in the law of pardoning to ensure that clemency petitions are arranged rapidly. Further, there ought to be a fixed time limit for settling on clemency supplications, there ought to be a time allotment inside which the executive ought to be approached to choose over cases so as to forestall undue injury to the convict and his relatives and accumulating of the cases. The clemency power can be refined to work as a principled method for rectifying a portion of the imperfections surviving in our reformatory system. There ought to set up a free commission with the efficient skill which is coordinated to concentrate on equity improving purposes behind dispatching punishment regarding the legal discussion, pardoning power ought not to be outright just as judiciary ought not to meddle a lot in the exercise of its power of review. In the event that this power is practiced appropriately and not abused by the executive, it will unquestionably demonstrate valuable to expel defects of the judiciary. That the objective behind the introduction of such power with the executive is more or less enshrined on similar lines in many sovereign states in the world. That it is not out of the place to state that the power of pardon can be used as checks and balances by the judiciary by way of review or writ petitions and executive by way of observing correction or error the part of the Judiciary against each other.

In regard to India, in *Kehar Singh v. Union of India, Pathak*, CJ rightly observed, "The power of pardon is a part of a constitutional scheme and we have no doubt that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the head of the state and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. The court also justifies the existence of a Pardon, by acknowledging the fallibility of human judgement being undeniable even in a supremely legally trained mind and therefore any such errors can be remedied by entrusting power to a higher authority, which shall scrutinize the validity of the threatened denial of life or the continued denial of personal liberty".

The Law Commission[668] also stressed on the need for the existence of an executive Pardoning Power citing the following as reasons (although not exhaustive):

[668] Report on Criminal Punishment, 317-18 (1967).

1. Facts not placed before the court,
2. Facts placed before the court but not in a proper manner,
3. Facts disclosed after the passing of the sentence, and
4. Events which have developed after the passing of the sentence.

The Law Commission of India also stated that there is a plethora of other reasons which do not lend themselves to codification and therefore the Law Commission insisted on retaining the scope of the pardon prerogative.

Nevertheless, there are some permissible limits on pardons. The Power so entrusted is actually a power belonging to the people and reposed in the highest dignitary of the state. It has been reposed by the people through the Constitution in the head of the State and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied that the power to pardon rests on the advice tendered by the executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice.[669]

However, in this context too, we find two views. The first view is that the presidential pardon power is unlimited; the President can pardon at any time, can pardon anyone, and can pardon that same person unlimited times. The second view says that actually, this pardon power is not unlimited. Intent for the pardon matters a lot. If the pardon power is used with criminal intent then, pardon power is not unlimited. Typically, the same person can't be pardoned twice unless a majority of the state Supreme Court approves. Also there is no limit as to how many people a President can pardon, as for instance, President, Franklin D. Roosevelt holds the record with a whopping 2,819 during his time in office from 1933 to 1945.[670] This aspect is, no doubt, put forward to clear the American position and from her jurisdictional point of view.

Thus, it is found that the limits of exercise of pardoning power in each individual State are itself well-prescribed by the Constitution. The limits to this regard found in one country may not be the limits for the other country, as the very nature of the exercise of this power varies with its political environment and other ideologies

[669] *Shatrughan Chauhan v. Union of India,* [Writ Petition (Criminal) No. 55 of 2013.
[670] https://www.cnbc.com 2018/06/06

apart from the influence of traditional practice and institutional pressures besides public opinions often determining the course of actions.

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