

ABSTRACT

An important function of the Executives of the States under the Constitution is the power to pardon. In the functioning of the criminal justice system, clemency has an important role in the context of prerogative. From the Constitutional tradition almost all prerogatives went off, but not quite in the matter of the pardoning power. The basic provisions of the pardoning power are nearly always found in the States' Constitution. The main departures are from basic or supplementary laws which 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 Bangladesh, India, Pakistan, South Africa and Sri Lanka; but not in Canada. It is also reflected in the United States, but not in the Commonwealth nations and this pardoning system has been based on the system of the British tradition. It has also been observed 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 the States as are available in the United States as well as in India, but with little difference. The jurisdiction of the federal pardoning authority does not necessarily co-exist with the jurisdiction of federal Courts and laws as in the United States. For example, in India the President may commute the death penalty even where State laws are involved.

The theory behind the power of pardon is that "every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgements are always tempered with mercy."¹

A comparative approach confirms that the conferment of the pardoning power to the head of the State or chief executive authority is not universal. The primary clearance of this study is that in no case the pardoning power is invested in a judicial authority. Further, this study clarifies that the pardoning power is not regarded

¹*Epuru Sudhakar & others v. Govt. of A.P. & others*, (2006) 8 SCC 161

universally as a prerogative of the head of the State. Under some Constitution or other equal legal system, this power invested in authorities of collective body rather than an individual. In a few countries, it is conferred rarely in the hands of the legislature. But this study highlights the pardoning power which is conferred on the executives. Further, it clarifies that in some countries this power is vested with the President, but his character differs from State to State.

The study is confined to those items of information relating to commonwealth countries with the description of developed and developing countries. It includes the legal source of the pardoning authority, the mechanism whereby pardoning decisions are made. The categories of offences or penalties are excluded from the pardoning power for which special provisions are made and the types of pardon are available in the jurisdiction concerned.

This research work seeks to delve into a study of this power by examining some of the problematic issues that it poses. For the purpose of convenience, the work has been divided into the following main Chapters:

CHAPTER 1: Introduction

This Chapter mainly deals with the inroad into the topic giving an idea about the total plan of project highlighting the basic objectives to be achieved. It contains the statements of problems, literature review, and scope of study, research questions and hypothesis followed while heading towards completion of the research works.

CHAPTER 2: Historical Background: Nature & Objectives

This Chapter deals with the historical origin, background of the pardoning power and the nature of such power exercised in different jurisdictions including, in India and abroad and the various purposes sought to be achieved through the exercise of this power.

CHAPTER 3: Pardoning Power in Commonwealth, Developed, and Developing Nations

This Chapter analyzes the manner in which countries with federal structure, the developed and developing countries, the pardoning power may be found both at State and Centre level. The developed or the developing countries under the study may

either be a commonwealth countries (common law) or civil law countries as the distinction between developed and the developing is not made on the basis of legal system followed or available in those countries; but on some economic criteria. Irrespective of the legal system, the individual country follows; it concentrates only on the pardoning power conferred upon the executives, but not upon the legislatures. Thus, this study includes pardoning system from developed and developing countries but most of them are commonwealth nations for comparative discussions. For Commonwealth countries, this study includes Bangladesh, Canada, India, Pakistan, South Africa, and Sri Lanka. Developed countries include Canada, France, Germany, Russia, UK and USA. Few of them are civil law countries, like France, Germany. Developing countries include Bangladesh, China, India, Sri Lanka, South Africa and Pakistan.

CHAPTER 4: Pardoning Power in India: Interpretation & Limitations

This Chapter pertains to study of the power to pardon in the realm of executive and judicial organs of the States and understand that in no case the pardoning power is invested in a judicial authority. Further, this study clarifies that the pardoning power is not regarded universally as a prerogative of the Head of the State. Under some Constitutions or other equal legal systems, this power invested in authorities of collective body rather than an individual, for example, in India the importance of the advice of the Council of Ministers with regard to the pardoning power along with Constitutional Interpretation and judicial decisions are discussed. Further this chapter also explains that in few countries, it is conferred rarely in the hands of the legislature. But this study highlights the pardoning power which is conferred on the Executives. Further, it clarifies that in some countries, this power is vested with the President, but his character differs from State to State.

This Chapter also examines the schemes or statutes from where the executives in India derive their power to pardon in the background of Constitutional provisions and other statutory laws dealing with such power in the light of Apex Court Judgements and to what extent this powers are delved by the Executive's and also discusses the exercise of Judicial restraint by the judiciary on such power along with enumeration of certain limitations if any on the Judicial power.

CHAPTER 5: Pardoning Power & Judicial Review

This Chapter examines the areas where the executive power to pardon could potentially interfere with the legislative and judicial branches of the government, thereby upsetting the theory of separation of powers and attempts to ascertain the extent of the discretionary power to pardon by the executives along with the effect of such discretion. This chapter also deals with the concept of judicial review present among the aforesaid legal systems as a mechanism to check upon the misuse or abuse of such discretion by the Executive organ of the state.

This Chapter also highlights the importance of Judicial Review power in India as a mechanism to check the arbitrariness in exercise of the pardoning power by the executive's and other measures through which this power can justifiably be used. It also deals upon the limitations on the use of judicial review power in light of relevant precedents.

CHAPTER 6: Recommendations and Conclusion

Lastly, this Chapter puts an overall view of study emphasizing on summary reviews of few representative states like the USA, Australia, Canada and India to make ease and efficiently justify the research questions and provide recommendations which is followed by a conclusion.
