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Introduction

The acute problems faced worldwide today is the exercise of constitutional pardon powers by the executives as opposed to judicial verdict administering criminal justice by independent judiciary based on doctrine of separation of powers, absolute in nature in some countries with pure federalism structure, and relative in some other countries where philosophy of pure federalism is not followed like that of the USA. The USA Constitution confers absolute pardon power on the US President while in some other countries, the power has not been constitutionally declared to be so absolute. There is no parity generally found in conferment and exercise of this power throughout the republican nations, except in many countries where judicial review on this power is exercised to a greater or lesser degree by the higher judiciary and the exercise of this power has been restricted; or certain guidelines are provided.

The exercise of the presidential power of pardon can be traced to a very ancient ancestry with the earliest roots in practices among the Romans. Despite being very old its exercise has always been under criticisms for being inconsistent with a solid theory of criminal law. For example, Beccaria, C. B. contends that pardons are capricious and irregular and thus inconsistent with a good theory of criminal justice.[1] Pardons are also argued to be an inherently idiosyncratic arbitrary exercise of presidential authority. It is further argued that in exercise of presidential power of pardon one person makes a decision without standards or formal guidance.[2] This is so because in granting pardon

[1] Moore, K.D., Pardons 39 (1989) citing Beccaria, An Essay on Crimes and Punishment, pp.158-59, (1953).
[2]Rosenzweig, P., Reflections on the Atrophy Pardon Power, Journal of Criminal Law and Criminology, Vol. 102, Issue 3 (2012), P. 603.

'the supposition of the connivance of the judge is entirely excluded.' The pardon is the presidential decision to allow any person to be absolved of guilt for any alleged crime charged as if the crime never occurred.[3] The power of the President to grant pardon is discretionary, final and conclusive and no appeal can be made against the decision of the President in exercise of power to grant pardon. This is so because pardon power is not the subject of legal rights but begins where legal rights end.[4] That is why from the earliest years of the Republics, pardon was used to benefit ordinary people for whom the results of a criminal prosecution were considered unduly harsh or unfair. However, the power of the President to grant pardon can be challenged by way of Judicial Review in some countries.

The power to grant Pardon is a legal, although controversial, instrument with a long history that persists in many different judicial systems across the world, such as the United Kingdom, United States of America, Italy, India, Switzerland etc. The juridical literature often considers it to be a perversion in the separation of powers within the State, and the motivations behind it are always under scrutiny. Nowadays it is employed by the executive branch of government as an important instrument to totally or partially commute fines and/ or prison sentences levied on convicts.

Pardoning power of the Executive of States is a common feature of almost all the constitutions of the world. The system seems to be unique in the sense that all is familiar to its existence and practices. In most of the states, the executive head or the president is the elected representative of the people, while in few states, particularly in Great Britain, the executive head is by virtue of his or her birth in the royal family i.e. he or she becomes so, on hereditary basis; and not directly or indirectly elected by the people. Apart from this difference and difference in mode of exercise of the power to pardon, the power is generally exercised by the executive head of all states. This is found to be true in respect of all the countries in the world irrespective of fact that the concerned country belongs to Common law countries or Civil law countries or that the country happens to be a developed or developing country. Only the important things that are noticed, after critical analysis and perusal upon traditional practice seemed inherent in historical background, that the developed countries are placed in a

[3]Weihofen, P., The Effect of Pardon, 88 *U. Pa. Rev.* 177, (1939), p. 179.
[4]Lords Diplock in the case of *De Freitas v. Benny* (1976) AC 239.

dominating position; and have been influencing the developing nations, even to imitate what has taken place in those developed countries, particularly the UK, and after the World War-II, the USA. After the great Industrial Revolution in England, becoming economically and politically powerful, she started influencing her colonial States to follow her dictates even in respect of criminal justice administration system infusing political doctrine of pardoning power. This type of demonstration is not an exception even today. Now a days, in many cases we all look to the American situations and take American instances into consideration for incorporating its principles of law, and often refer to our jurisdiction. Not only this, but also we make reference to our chief patron, the British heritage to our use, though we have no hereditary State head, but elected nominal head, the President of India upon whom the pardon power has been vested. This is not only the practice on our part to a reasonable degree; but equally applicable to some other jurisdictions; and we mostly follow our super power.

'Clemency' and 'Pardon'- both are species of 'Mercy'. "Mercy is not the subject of legal rights. It begins where legal rights end", Lord Diplock observed. No one can claim Mercy to be granted either from the King or the President, the executive head of modern State. In every modern State, there is a procedure established by law which is to be followed, and if then someone is convicted and punished which may seem to be very harsh or severe, for such convict, an alternative door is opened to move the executive head for pardon; because he has, now, no legal rights to move further even by way of any appeal. In other words, there is an end to his legal rights, and he is barred now; or the sentence imposed upon him is either to be instantly executed, or if the prevailing circumstances permit him, be allowed to try for a presidential pardon.

This clearly implies that mercy cannot be claimed as a matter of right, but when the doors for judiciary become locked, the last remedy available to the convict is to go for pardoning by the Executive Head of the State. Most of the people are probably aware of what a pardon is. Usually, a pardon is when a government executive forgives a certain criminal offence. While the offence stays on the person's criminal record, he is not subject to any further restrictions or criminal penalties that other convicts or ex-convicts may be subject to. But for those who know what a pardon is may experience

some confusion when they hear about a governor or the president of a state offering clemency. The question arises: What is clemency then? Is it the same thing as a pardon or something different? Can it be obtained in the same way as a pardon?

It has been observed that while clemency and pardon are not interchangeable, a pardon is a specific form of clemency. Clemency is a general term for reducing the penalties for a particular crime without actually clearing the criminal record of the offender. A clemency can come in the form of a pardon, which is forgiveness of a sentence, a commutation, which is reduction of a sentence, or a reprieve, which is a temporary putting off of punishment while the situation is analyzed further. Therefore, a pardon is always a clemency, but when someone receives a clemency, it does not necessarily mean a pardon.

A pardon is meant to indicate forgiveness of a particular crime, either because a person was wrongfully convicted or the punishment was not appropriate for the crime committed. A commutation is a merciful act offered when it is determined that the penalty given was too harsh. A common use of commutation is to reduce a death penalty verdict to life in prison. A reprieve may be given when more information is needed before it can be determined that it is appropriate for a person to serve a particular sentence. This is also often used in death penalty situations.

It is important to note that in all cases of clemency, pardon or otherwise, the person's conviction is not overturned or removed from the public record. In fact, some people feel that accepting a pardon is tantamount to an admission of guilt. Those seeking to remove a criminal record will need to pursue expungement or having their record sealed. When a conviction is expunged, it is as if it never happened. There is no need for any kind of clemency because the crime is deleted from the record. This is obviously the ideal situation, and it happens more commonly than one might think. For many first offenses, even felonies, expungement is a real option.

Clemency is a mechanism for granting a person convicted of a criminal offense relief from a court-ordered sentence or punitive measure. There are two main methods through which clemency can be given – pardon or commutation of sentence. Some common synonyms of clemency are grace, mercy, charity, and leniency. While all these words mean "a disposition to show kindness or compassion", clemency implies a

mild or merciful disposition in one having the power or duty of punishing. Clemency and pardon are not always same, but familiar. Clemency is the process by which a governor, president, or administrative board may reduce a defendant's sentence or grant a pardon. Clemencies have generally been granted in death-penalty cases for a variety of reasons. Clemency is, thus, a general term used for the act of reducing the penalties of a crime, similar to commutation. There is no doubt that pardons are also actually considered a form of clemency. Any one receiving a pardon means he is always receiving clemency; but if he or she receives clemency, he or she is not always receiving a pardon. The executive authority (President or Governor) may grant clemency in the form of commutation (reduction) of a sentence, remission (relief) of a fine or restitution, or a reprieve (temporary suspension) of punishment. Clemency is, thus, another alternative to a pardon. The most common form of clemency is a pardon. Clemency is in essence a broader term, which includes the authority to pardon crimes and commute sentences. A pardon is a sign of forgiveness for those who accept responsibility for their crimes and demonstrate rehabilitation. When one is asking for a pardon, he or she is basically asking for the return of his or her 'good name' and towards that end, he or she must generally convince the executive (the President or the Governor) that he or she has led a law-abiding, moral and responsible life since his or her conviction. People who are pardoned regain the rights of a citizen, such as the right to vote, etc. But pardon is not a vindication and does not erase or expunge the record of conviction.

Clemency is an important tool for checking the unjust outcomes produced by the criminal justice system. The U. S. Supreme Court has called clemency the "fail Safe" of the judicial system, since it empowers chief executives to correct injustices on a case-by-case basis. The U. S. Constitution gives president the power to forgive Americans of criminal offenses. There are at least five forms of presidential clemency: pardon, amnesty, commutation, reprieve and remission of fines and forfeitures. Experts say that the pardon power is "broad and absolute", but there are limits.

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.

Thus, the basic source of this power as is apparent from the above is both traditionally developed British Prerogatives originated in the United Kingdom or the Constitutions of the independent sovereign States where this practice has been subsequently followed and relevant provisions to this regard have been categorically stated. This power to pardon is an executive power to be exercised for making corrections or removing errors in the criminal justice system.

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 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 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.

1.1 Statement of Research Problem

The power to grant pardon is an extraordinary power. It is extraordinary in its nature; because it can undo and negative the efforts done for years by the judiciary and the prosecution for punishing the guilty offender. This power is ancient in origin and recognized even today in almost every modern nation in the world. It is generally vested in the executive's hands or Executive Head of the country by the Constitution of respective nation concerned. Pardon is the forgiveness of a crime and the penalty associated with it. It is granted by a sovereign power, such as, a Monarch or Chief of the State. The term "pardon" has been used by the researcher in this study in general sense that includes each and every act of clemency, such as a pure pardon that completely exonerates a convict from all consequences of the crime committed by him, a reprieve that can stay the execution of sentence for a temporary period of time, such as till the pendency of mercy petition, a respite that may postpone the punishment of a criminal on some special grounds, such as pregnancy, insanity etc. or a commutation of sentence that can replace a more severe sentence into a less sever sentence, e.g. death sentence commuted to life imprisonment or rigorous imprisonment of the offender is commuted to simple imprisonment. It also includes a remission of a sentence that is basically a premature release of the convict from the prison, e.g. if a person has been punished for 5 years imprisonment, he may be released from the prison earlier if remission is granted to him.

The Executive Head of a State enjoys all types of pardon power mentioned herein above. This power is similar to the power of the head of a family, and found to have basically originated from the concept and sociological philosophy of the family itself, where the head of the family was or is having power to forgive the family member if he committed or has any wrong against the wishes of the family. Later on, with the development of the society and coming of a political State into the existence as a result of social contract, the King, the powerful man or Monarch started the use of this power. Initially, it was exercised for the purification of the offender. Under the Hindu law too, this practice was found to have existed and it was termed as *Prayaschita* (expiation). This *Prayaschita* or expiation is the oldest method of corrective measures for criminals. In the beginning, it was exercised by the sinner himself. The *Vedas* contains so many measures for *Prayaschita.* Austerity, sacrifices,

fasting and gifts were the main or principal measures. These methods remained in force even after the emergence of statehood in ancient India. Thereafter , the observation of this *Prayaschita* did not remain the subject matter of the sweet will of the wrongdoer only, but the Sovereign or a *Parishad* also imposed *Prayaschita* for the purpose of the purification of the wrongdoer. Therefore, it is clear that the power to grant pardon had been exercised by the King himself for the betterment of the person concerned. This was not unknown in this country.

In England, this power historically was vested in the Crown. It is one of the prerogatives which have been recognized since time immemorial as being vested in the Sovereign. Whether the Sovereign happened to be an absolute Monarch or a popular republic or a constitutional Head - King or Queen, sovereignty has always been associated with the source of power – the power to appoint or dismiss public servants, the power to declare war and conclude peace, the power to legislate and the power to adjudicate upon all kinds of disputes. The King, using the term in a most comprehensive sense, had been the symbol of the sovereignty of the State from whom emanated all power, authority and jurisdictions. As kingship was supposed to be of divine origin, an absolute King had no difficulty in proclaiming and enforcing his divine right to govern, which includes the right to rule, to administer and to dispense justice.

In the United States of America, the power to grant pardon has been conferred on the Head of the State i.e. the President. Although there in the U.S., the specific provision is contained in the Constitution, but this power has been conferred upon the President analogous to the norms and conventions that remained in existence in the soil of United Kingdom. As a matter of fact, it has been accepted by the Supreme Court of United States that by choosing to repose the clemency power in the Chief Executive alone, the framers of the Constitution of United States aligned themselves with a vision of the power that was decidedly British in nature. The basic reason for adopting the same pattern is quite obvious that United States was colonized by Great Britain and after independence it adopted so many existing customs, usages or the laws.

Just like United States, in India also when the Constitution was framed, the framers or our Constitutional Fathers were well aware of the position of the pardoning

power in these two countries and they adopted almost the same pattern that was applicable in these two countries. India being a former colony of the British Kingdom was also very much influenced by the British model, but with little difference after it became independent and has its own Constitution in operation. No doubt, there are different philosophies underlying the pardoning power. The main philosophy as per the American Jurisprudence is that every civilized country recognizes, or should recognize and has therefore provided for, the pardoning power to be exercised by executive organ 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 judgments are always tempered with mercy.

However, in another rationale felicitously enunciated by the celebrated noted *Justice Holmes* of American Supreme Court, a pardon is not a private act of grace from an individual happening to possess power, rather it is a power of the constitutional scheme which when granted, is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. These observations of Justice *Holmes* have also been approved by different benches of Judges of the Supreme Court of India.

Keeping in mind the same rationale of public welfare, *Justin Miller,* one of the great jurists, called it as 'crime treatment' and imposed the duty of treatment on the authorities. He believes that in the field of crime treatment, the persons who are charged with the custody and control of persons convicted of crime occupy much the same position as do the pathologists in the field of treatment of disease.

Moreover the question that arises over here is that whether such a power is at all required in cases where the judiciary had already applied its brain. For example, in India whenever a criminal is sentenced to death by the Court of law, he always or most often in practice likes to file a mercy petition before the Governor or the President of India, whatsoever the case may be. As far as the death sentence is concerned, the courts, only due to this reason, in our country generally avoid ordering this punishment. It is only the rarest of rare case where the court pronounces the death sentence, when other alternatives do not serve the purpose. Since the death sentence is

rare in our country, therefore, the question arises whether the Executive shall interfere with the judgment delivered by the honorable Courts, or judiciary. In every case where a death sentence is awarded, it usually takes ten to fifteen years for final disposal of the matter and thereafter, the power is given to the Executives to decide whether the criminal is to be hanged or not. Thus, this question of hanging the culprit is to be decided by the President or the Governor, as the case may be. But as a matter of fact, these Executives are to decide the fate of the criminal only on the advice of the concerned Council of Ministers. This Council of ministers is nothing but a bunch of politicians who will decide the fate of the criminal. In other words, it is the ruling party that enjoys the power to grant pardon. Therefore, the misuse or abuse of the power cannot be ruled out. Our system puts the politicians above the judiciary. The politicians are known to politicize each and every matter according to their own wishes. In such a situation how the pardoning power can remain untouched.

Therefore, the researcher is willing to find out that do we really need to have this power? Since the separation of power is the cardinal principle of law, now the question is whether the exercise of pardoning power is an interference with judiciary? The researcher is interested to know that whether this act is executive or judicial? What shall be the object and scope of this power? What shall be the parameter for the exercise of this power? Whether the executives shall exercise this power on its own discretion or on the aid and advice of some collective organ of States? Whether there are some more authorities who can exercise the similar power? Should there be any time limit for disposal of a mercy petition? Last, but not the least whether the court is empowered to exercise the power of judicial review in the exercise of power of pardon? Keeping in view the above mentioned research problems the researcher has conducted a study in deep regarding the use and abuse of the pardoning power and tried to find out the extent and scope of this power.

1.2 Research Objectives of the Study

Keeping in view the nature of the research problem to be a comparative study, the researcher confines his research study specifically on the Executive's power of pardoning among some selected commonwealth countries, including few developed and developing nations and the prevalence of judicial review as an important weapon of a check on this power. To limit the focus of the study it mainly concerns on the countries with federal structures i.e. countries where powers are distributed among

Centre and States, with special reference to the Indian Constitution and thus draws out the following objectives:

i. To find out the prevalence of the pardoning power historically and the way it prevails today among different legal systems of Commonwealth countries that specifically includes Bangladesh, Canada, Pakistan, South Africa, Sri Lanka and India; some specific developed nations, such as United Kingdom, United States of America, and Russia; as well as the pardoning power enjoyed by the executives in few developing countries.

ii. To find out whether the exercise of pardoning power by the Executives in the aforesaid countries is an executive or a judicial function and to know whether this pardoning power is a discretionary power or private act of grace or they are bound to exercise this power in accordance with the cardinal principle of law, in public goodness and thus primarily concerns with the Constitutional and Non-Constitutional sources.

iii. To explore the scope and the exercise of judicial review power by the aforesaid countries in the sphere of the Executive's pardoning power and to study the limits, if any, within which this power of judicial review is to be exercised.

1.3 Research Questions

The research questions formulated to achieve the desired objectives are:

1. What are the nature, scope and extent of the pardoning power exercised by the executives under different legal systems of commonwealth, developed and developing nations especially in India?
2. Whether the executives have absolute discretion in exercising pardoning power and how this power is abused or used even for political considerations?
3. Whether there should be uniform guidelines framed for exercising pardoning power and what role be played by the government or the courts in this regard?
4. Whether the Court should be empowered to exercise power of judicial review on executive decision and if so, to what extent?
5. Whether the Court should interfere in a matter of pending cases for early disposal? Or should there be time limit fixed for disposal of mercy petitions?
6. Whether a uniform procedure is followed for filing mercy petitions throughout the countries?

7. Whether uniform guiding principles shall be evolved for exercising pardoning power worldwide including India?

1.4 Scope of the Study

The Constitutional scheme for pardoning in India is on the models followed in U.K .and U.S.A. Several developed and developing nations has endowed this power on the executive and extended on the subjects. A comparative study on the pardoning power of the executive has been made herein so as to find:

a) The existence of the pardoning power in the legal system of Commonwealth countries and other Developed Nations.

b) The authorities are invested at both primary and secondary levels of decision making to grant pardon.

c) To the possible extent, the pardoning power is exercised properly and fairly in other countries.

1.5 Hypothesis

On the basis of the above, the following Hypothesis related to the present study has been formulated:

The exercise of pardoning power by the executive organ of States amounts to interference in the Judicial functions and at the same time, there is every possibility of misuse and abuse of pardoning power by the executives due to undue influence by the ruling political party, in absence of proper guidelines to be followed by different nations including India in exercising pardoning power.

1.6 Research Methodology

The present study is purely based on Doctrinal method of conducting research. The researcher used the multi - pronged approach to collect as much relevant information as possible through different sources. For this purpose, the researcher put honest efforts to have access to different Constitutional and non-Constitutional sources of different aforementioned countries, Constituent Assembly Debates in India, books of reputed authors, articles, newspapers, research papers, leading cases decided in India and abroad, legislative enactments, debates, reviews etc.

The data so collected/generated has been subjected to be in comparative analysis put on at appropriate places so as to attach more truthfulness to our findings. Since the present study is mostly doctrinal in approach, not purely based on empiricism, the main focus of the researcher was on comprehensive collection of research material through secondary source. The data and information so collected has been analyzed in the light of the needs of the society and the judicial interpretation given by various courts. All of these efforts enabled the researcher to conduct and complete the present study in satisfactory spirit.

1.7 Review of Literature

The research questions raised above do not have ready answer. The present study, therefore, is aimed at exploring these questions in depth with special reforms in the field of pardoning power in India. In order to understand above raised questions properly, it would be appropriate to review the existing literature pertaining to this research problem understudy. In this context, some books and research articles have been written and published and a few of them have been reviewed by the researcher are listed hereunder:

1.7.1 The Presidential Pardon Power (2009) by Jeffrey P. Crouch published, University of Kansas printed in United Sates of America:

This first book-length treatment of presidential pardons in twenty years updates the clemency controversy to consider its more recent uses-or misuses. Blending history, law, and politics into a seamless narrative, Jeffrey Crouch provides a close look at the application and scrutiny of this power. His book is a virtual primer on the subject, covering all facets from its background in English law to current applications.

An up-to-date scholarly synthesis, Crouch's book provides the fullest historical account and legal analysis of the presidential pardon power published in two decades. He begins by explaining that the clemency power began in ancient Babylonian, Greek and Roman societies and became a favorite instrument of English kings, but stirred up controversy at the American Constitutional Convention of 1787 as to whether such a "kingly" power belonged in republican government. Only after some debate did the Framers decide to vest unlimited authority to grant clemency in the executive branch alone – without senatorial consent, before or after criminal convictions, even for

treason, though not for impeachment. Crouch acknowledges Anti- Federalist Luther Martin's prescient warning in the ratification debate that presidents might abuse clemency authority to cover up treason in the executive branch, but he asserts that the pardoning power otherwise evoked little discussion. He consequently accepts Alexander Hamilton's Federalist Nos. 69 and 74 as the definitive statement of the clemency clause's original meaning: presidents need broad pardoning power to serve "humanity and good policy" (p.18), and can be checked by impeachment if they misuse that authority.

Crouch usefully delineates the legal components of the clemency power. The phrase "reprieves and pardons", he says, allows the president to select one of five gradations of clemency – full pardons, commutations of sentences, remissions of fines and forfeitures, reprieves or postponements of punishment, and amnesty or general pardons. Congress institutionalized the pardoning process in 1865 by creating the Office of Pardon Clerk (Pardon Attorney as of 1891), and federal courts clarified the character and scope of the president's pardoning power over the tears.

1.7.2 Executive Clemency in the United States: Origins, Development, and Analysis, By Ruckman, P. S., Jr., *Presidential Studies Quarterly* Vol. 27, No. 2, Spring 1997-Peer-Reviewed Periodical.

This study briefly reviews the current literature with respect to the origins and development of executive clemency in the United States and explains procedural guidelines for federal clemency applications. An examination of the literature's more prominent explanations for the actions of the president follows. Summary statistics on clemency from the administration of William McKinley (in 1900) to that of George Bush are then provided. After a review of summary statistics more appropriate for comparative analysis (between administrations), attention is given to trends in clemency actions throughout the century. Concluding remarks address the importance of this study as well as the need for (and appropriateness of) multivariate statistical analyses of clemency decision making. Origins and Development of Executive Clemency at common law, the king possessed broad powers to pardon offenses, with or without condition, either before or after indictment, conviction, and sentencing. Although the clemency power ultimately became an exclusive royal prerogative, the

crown originally had many competitors vying for this power; including the church, the great earls, feudal courts, and Parliament.

1.7.3 Indian Constitutional Law, By M. P. Jain, (2014), 7th Edition (LexisNexis publication: a Division of Reed Elsevier India Pvt. Ltd., 14thfloor, Building No. 10, Tower – B, DLF Cyber City, Phase – II, Gurgaon, India).

The book under review in its Part II, Chapter III titled Central Executive, under the sub-heading functions and powers of Executive, the provisions relating to the Power of Pardon of the President and under Part III Chapter VII The Governor's Judicial power has been discussed by the author wherein citing various Supreme Court Judgments and opinion of different eminent Judges were highlighted. While reviewing the text of this chapter it came to light that in some of the most important judgments pronounced such as in *Kehar Singh* and *Maru Ram,* the Apex Court has opined on the plenitude scope of the Power of pardon and held that the President's power is 'not absolute' and completely beyond Judicial purview and held that the Courts will interfere only if the power is exercised in *malafide* or in arbitrary or discriminatory manner.

The author also incorporated the case of *State of Punjab v. Joginder Singh*[5]*,* wherein the Supreme Court ruled that power under Article 72 'is absolute' and cannot be fettered by any statutory provision such as Sections. 432, 433 and 433A of the Criminal Procedure Code, and held that this power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or Prison rules and is subject to Judicial review but on very limited grounds. In this book the author have discussed many case laws and point out the nexus between crime and politics and have suggested for a necessary to develop a non-political mechanism for exercise of the pardoning power but fails to give any definite suggestions as to how this mechanism can be developed or in what way the political influence can be minimized or diluted to break the aforesaid nexus and only focuses on the *ratio decidendi* of various precedents.

1.7.4 Sentence of Pardon and Rule of Law, ByS. Musharraf AN, 9 *Aligarh Law Journal,* 1988 at 72-82.

[5]AIR 1990 SC 1396

This article the author discussed the position of law of pardon in England, United States and India. The author raised a few important questions regarding the scope of the pardoning power of the President and the Governor. But while dealing with these questions he relied on the High Court judgments only despite the fact that there were so many precious Supreme Court on this topic. In absence of such judgment the study seems to be less authentic or appropriate or insufficient.

1.7.5 Presidential Power of Pardon and the Constitution, by R.C. Chhangani, *Journal of Constitutional and Parliamentary Studies*, Jan-Dec, 1989.

This article is general in nature wherein the author kept his focus on the pardoning power of the executive head of a country and refrained himself from going into the depth of this power. The author quoted a few cases of United States and United Kingdom but forgot to quote even a single case of his own country i.e. India. This article had been published in the year 1989 and till this time our Supreme Court delivered so many landmark judgments in the field of pardoning power e.g. *K.M. Nanawati v. State of Bombay,* AIR 1961 SC 112, *Maru Ram* v. *Union of India,* AIR 1980 SC 2147 and *Kuljeet Singh* v. *Lt. Governor of Delhi,* AIR 1982 SC 774 etc. It appears as if the author is having more faith in foreign judgments only. Last but not the least the author failed to comment on the necessity of pardoning power and to put some suggestions for the betterment of the institute of pardoning power.

1.7.6 Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting, By Roldan Jimeno, Routledge, 2018.

In a consolidated democracy, amnesties and pardons do not sit well with equality and a separation of powers; however, these measures have proved useful in extreme circumstances, such as transitions from dictatorships to democracies, as has occurred in Greece, Portugal and Spain. Focusing on Spain, this book analyses the country's transition, from the antecedents from 1936 up to the present, within a comparative European context. The amnesties granted in Greece, Portugal and Spain saw the release of political prisoners, but in Spain amnesty was also granted to those responsible for the grave violations of human rights which had been committed for 40 years. The first two decades of the democracy saw copious normative measures that sought to equate the rights of all those who had benefitted from the amnesty and who

had suffered or had been damaged by the civil war. But, beyond the material benefits that accompanied it, this amnesty led to a sort of willful amnesia which forbade questioning the legacy of Francoism. In this respect, Spain offers a useful lesson insofar as support for a blanket amnesty, rather than the use of other solutions within a transitional justice framework, such as purges, mechanisms to bring the dictatorship to trial for crimes against humanity, or truth commissions, can be traced to a relative weakness of democracy, and a society characterized by the fear of a return to political violence. This lesson, moreover, is framed here against the background of the evolution of amnesties throughout the twentieth century, and in the context of international law. Crucially, then, this analysis of what is now a global reference point for comparative studies of amnesties, provides new insights into the complex relationship between democracy and the varying mechanisms of transitional justice.

1.7.7 ***Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective*** **(Paperback),Andrew Novak, Taylor & Francis Inc., ISBN -13: 9780815355366/ Routledge 2016**

This book presents a comparative analysis of the clemency and pardon power in the common law world. Andrew Novak compares the modern development, organization, and practice of constitutional and statutory schemes of clemency and pardon in the United Kingdom, United States, and Commonwealth jurisdictions. He asks whether the bureaucratization of the clemency power is in line with global trends, and explores how innovations in legislative involvement, judicial review, and executive consultation have made the mercy and pardon procedure more transparent. The book concludes with a discussion on the future of the clemency and pardon power given the decline of the death penalty in the Commonwealth and the rise of the modern institution of parole.

Pardoning power is, now, a constitutional power entrusted upon the executives worldwide and is not uniformly exercised in all the States, but abused to more or less extent based upon variety of factors by executives in power as will be seen evidently in the subsequent Chapters. This is one of the limitations that no particular rule or rules could be framed for universal application to be followed by all the countries as they are often influenced by their respective political considerations and state philosophy.

There are evidences of misuse of this power by the executives in some countries which becomes possible due to lacking of specific guidelines to control a discretionary or an absolute power like this, for e.g., granted to the US President under the Constitution. There is another major limitation reflected in the lacking of the power of judicial review in many countries upon pardon power, not exercised judiciously by the executives; or in some having only this power exercised to a limited extent. Thirdly, the guidelines, if framed by the judiciary of any country, for e.g., the Supreme Court of India is only persuasive for another Commonwealth country like Pakistan or Bangladesh, not authoritative. Similarly, India may or may not be a follower of the US instances or may under certain circumstances adopt to suit our soil and system in the interests of the people. So, it is very difficult to bring into a symmetric effect; rather than presenting a comparative analysis of the issues, the main problems faced in current jurisdictions.

1.8 Limitations

The study on pardon power of the Presidents, when studied comparatively in different contexts, in world-wide perspective, has, no doubt, been faced with some problems. First, there is no parity found in constitutional provisions in the way prescribed the power to be conferred on the Presidents and the mode or way how this power is exercised in different countries is also different. In some countries, the elected Presidents have been empowered with this power whereas in few other countries, this power has been exercised traditionally on hereditary basis by the Kings.

Second, in some Constitutions, the pardon power is unrestricted, and absolute; while in some others Constitutions, the power remains unbridled with wide discretion provided to the executive and hence, some restrictions have subsequently been imposed. In most of the democratic republican countries, the power has been made subject of judicial review under certain situations, whereas in the majority of the Islamic countries including Pakistan, no judicial review is encouraged; rather they prefer to remain stick to their personal laws based on holy *Quran* and in no way to violate the *Shariat* law. In Islamic States, absolute sovereignty belongs only to God. For e.g. in Pakistan, the Council of Islamic Ideology (CII) has found Article 45 of the Constitution, which gives power to the President of Pakistan to grant pardon to

convicts un-Islamic. While considering a reference made by the Ministry of Law and Justice an amendment sought in the constitutional provision, the Council noted that the President could not pardon any punishment given under Islamic laws of Hadood and Qisas [These are fixed punishment and therefore, cannot be altered, changed or reduced]. The Council further said that empowering the head of the state with such powers of pardon is against the Islamic *Shariah*. The Council, however, said that the President has full right to exercise such powers in punishments given under Penal Code (man-made law) and which does not relate to *Haqooqul Ibaad* (duties towards mankind in Islam). It is further said that the President in the interest of the country and the nation could grant pardon or remit the sentence.[6]

Third, Pardoning power is, now, a constitutional power entrusted upon the executives worldwide and is not uniformly exercised in all the States, but abused to more or less extent based upon variety of factors by executives in power as will be seen evidently in the subsequent Chapters. This is one of the limitations that no particular rule or rules could be framed for universal application to be followed by all the countries as they are often influenced by their respective political considerations and state philosophy. There are evidences of misuse of this power by the executives in some countries which becomes possible due to lacking of specific guidelines to control a discretionary or an absolute power like this, for e.g., granted to the US President under the Constitution. There is another major limitation reflected in the lacking of the power of judicial review in many countries upon pardon power, not exercised judiciously by the executives; or in some having only this power exercised to a limited extent.

Fourth, the guidelines, if framed, by the judiciary of any country, for e.g., the Supreme Court of India is only persuasive for another country, even for a Commonwealth nation like Pakistan or Bangladesh, and not authoritative or binding. Similarly, India may or may not be a follower of the US instances or may under certain circumstances adopt to suit our soil and system in the interests of the people. So, it is very difficult to bring into a symmetric effect; rather than presenting a comparative analysis of the issues, the main problems faced in current jurisdictions.

[6] https://www.thenews.com.pkretrived on 02/03/2023.

Fifth, there is no uniform guideline(s) to be followed in the world jurisdictions and no time limit framed within which pardon petitions are to be disposed of as it is purely executive decision independent of judicial interventions. Therefore, delay is often caused. For instance, the exercise of pardon by the Presidents of India is often delayed so long that legal opinion has, at times, considered it sufficient ground to commute the death sentence. This delay is partly due to the confusion over the nature of the pardon which has its origins in the monarch′s grace, but has been redefined as a constitutional duty of the Republic to be undertaken for the public good. To quote Justice V. R. Krishna Iyer, ″Judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws, are not always just, and the lights are not always luminous.″

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