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Chapter 3

Pardoning Power in Commonwealth, Developed & Developing Countries

In this Chapter, the researcher aims at finding the of pardon power country wise with a specific reference to few selected countries of the world. The researcher finds in actual practices or in theory and principles, political and economic that some countries, even amongst the Commonwealth countries are more developed as compared to others within the same class; and the trend that big powers are followed by others, mainly the developing nations. Each country has, no doubt, its own constitution today, but is also by each other, particularly the developing countries, like UK's rules are being followed by its colonies over a considerable period of time or still being followed, to some extent by such colonies after independence; and accordingly, a place with due recognition to pardon power has been given in their respective constitutions. After the USA has become developed since its independence, most of the followers or actors look into what are taking place in this country or happening there including the role of the US President in regard to pardon power or how or in what manner, this power has been exercised by him. The role of the US Supreme Court is taken into consideration many times regarding its jurisdictions and power exercised in context of judicial review of pardon power. Thus, in the modern world, these two

countries' namely, the UK and USA's practices have been widely practiced and they are usually followed as role model by not only the developing countries including India, but also by few developed nations which became independent since 1970's; though they have developed their own constitutional mandates and provisions in regard to the exercise of pardon power by their respective executive head of the state. Even now–a-days, India is also considered to be such a role model by some developing countries like Sri Lanka, Bangladesh, Pakistan etc.

Even amongst the civil law countries, we also find almost a similar tradition, to a great extent, as Roman system remained most dominating, and we often referred to this exercise of pardon power by their respective executive heads that have been entrusted with pardon power by their own constitutions. Thus, the study under the above head, on a dividing line as classed under developed, developing and commonwealth countries seems to be reasonably justified, and may help the readers in having a more deep insight with clear vision into the current practices of pardon power amongst different jurisdictions of the world.

As one of the main objectives of the researcher is to present a comparative study of clemency provisions of few selected countries of the world, and to discover (a) the extent to which the institution of clemency is a universal feature of contemporary legal systems; (b) which bodies are formally invested with decision-making authority to grant pardon; (c) whether those or other bodies hold the reality of power in this respect; and (d) to determine the main types and functions of clemency under the various systems.

Pardoning power or Executive clemency is, no doubt, a power vested with or in the hands of Head of the States, and is purely an Executive action. The very nature of pardoning power which is being exercised is almost same; but is found to vary in terms of its empowerment upon the Executive Heads of different countries of the world. In some countries, the power is vested upon the nominal Head of the Statewhile in some other upon the Executive Head or the real Head of the State. It is generally found that in the conceptually, and politically and philosophically too, a nation or a country differs from others, and there may even be few countries which are founded basically on the same socio-economic and political ideology; but still differ from each other to a

greater or lesser extent, in some aspects, and are apparently visible in the systems they are following including the administration of criminal justice in respective jurisdictions. Besides this, most of the countries have their own background either in terms of their origin, growth and development or in terms of creation how they come to exist and appeared before the world community. There lies the difference in empowering the Heads of the States with the pardoning power, though the difference is only in respect of political and philosophical ideology, and implemented through Constitutions or enactments and being followed with modifications, and after minor amendments from time to time whenever situations demand.

In the above background or in context, it is considered to be just and reasoned to have a discussion of pardoning power of the Heads of Nations classified into three categories of States mentioned below:

1. Commonwealth of Nations.
2. Developed countries, and
3. Developing countries.

3.1 Commonwealth of Nations

Before analyzing the nature and extent of pardoning power of the Heads of Commonwealth of Nations, it seems pertinent here to know about what is the Commonwealth of Nations. The Commonwealth of Nations, also known as the Commonwealth, is a political association of 54 member States, across all inhabited continents; and almost all of which are former territories or colonies of the British Empire.

The Commonwealth dates back to the first half of the 20th century with the decolonization of the British Empire through increased self-governance of its territories. It was originally created as the British Commonwealth of Nations through the Balfour Declaration at the 1926 Imperial Conference where Britain and its dominions agreed that they were "equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations". All such aspects to the relationship were formalized by the United Kingdom through the Statute of Westminster in 1931. The current Commonwealth of Nations

was formally constituted by the London Declaration in 1949, which modernized the community and established the member States as "free and equal".

Thus, after the Second World War ended in 1945, the British Empire was gradually dismantled. Most of its components, i.e., the colonial States have become independent countries, whether Commonwealth realms or Republics, and members of the Commonwealth. There remain the 14 mainly self-governing British overseas territories which retain some political association with the United Kingdom. In April, 1949, following the London Declaration, the word "British" was dropped from the title of the Commonwealth to reflect some of its changing nature, and therefore, this Declaration is often termed as marking the beginning of the modern Commonwealth. Under the London Declaration, India also agreed that, when it became a republic in January, 1950, it would remain in the Commonwealth and accept the British Sovereign as a "symbol of the free association of its independent member nations and as such the Head of the Commonwealth". Following India's precedent, other nations became republics or constitutional monarchies with their own monarchs. While some countries retained the same monarch as the United Kingdom, their monarchies developed differently and soon became essentially independent of the British monarchy. The monarch is regarded as a separate legal personality in each realm, even though the same person is monarch of each realm.

3.2 Common Law Countries

At this juncture, it let's have some idea about common law countries too, as many parts of the present world or in different jurisdictions, we have countries which generally follow common law system, or have some specific kind of its influences in their respective jurisprudence. In law, common law signifies to the body of law created by the judges and similar quasi- judicial tribunals by virtue of being stated in written opinions. It mainly arises as precedent. It is a body of unwritten laws based on legal precedents established by the courts. In simple words, common law which is also popularly known as the case law is that body of law that is derived from judicial decisions of courts rather than statutes. This law influences decision-making in cases where the outcome cannot be determined based on written laws or legislations. A

common law court usually looks to the past precedential decisions to apply the principles of those cases to the present or current cases of similar nature.

The original source of the common law system can be traced back to the English monarchy, which used to issue formal orders called "writs" when justice needed to be done. Because writs were not sufficient to cover all situations, courts of equity were ultimately established to hear complaints and devise appropriate remedies based on equitable principles taken from many sources of authority (such as Roman law and "natural" law). As these decisions were collected and published, it became possible for courts to look up precedential opinions and apply them to the current cases; and thus the common law developed.

The common law tradition emerged in England during the middle Ages and was applied within British colonies across the continents. In other words, the British Empire spread its legal system, including common law, to its colonies, many of which still retain it today. Common law is practiced in Australia, Canada, Hong Kong, India, New Zealand and the United Kingdom. Common law was introduced in countries colonized by the British, and it applies even today in territories such as India, Malaysia and Singapore. In short, this model is found today in countries throughout the former British empire, particularly in the United States, Canada, Australia, India and In Africa, particularly Ghana, Kenya, Nigeria as well as South Africa. The legal system in the United States is a common law system with the exception of Louisiana which has a mix of civil and common law. The Philippine legal system of today is a unique blending of common law and civil law principles. Its public law is substantially patterned after common law doctrines while its private law follows the civil law tradition of Spain. Today, one-third of the world's population lives in common law jurisdictions or in systems mixed with civil law including Antigua and Barbuda, Bahamas, Belize, Botswana, Burma, Cameroon, Cyprus, Guyana, Israel, Liberia, Malta, Marshall Islands, Micronesia, Namibia, Sierra Leone, Sri Lanka, Trinidad and Tobago.[228]Other few countries following the common law legal systems also include Bangladesh (family law is heavily based on Shariah law), Bhutan (Common law as well as religious law), Dominica, Fiji, Gibraltar, Grenada, England and Wales, Ireland,

[228]*https://en.m.wikipedia.org.*

Jamaica, Myanmar, Nepal, Palau, Pakistan (with provisions of Islamic law), Uganda, and few others.[229]

It is to be mentioned that China has no common law. Instead, China has mainly a civil law system. In China, the law means Statutes and excludes case law. In other words, court cases are not law; only rules codified by the legislature, the executive and the judiciary are laws.

So far the Pardoning Power of the Executives is concerned; it is generally found that this type of pardon appears to be confined exclusively to countries influenced by the common law system modelled by the British Empire. This does not, however, mean that in the civil law countries, the practice of pardoning power by the Executives is totally ruled out.

3.3 Civil Law Countries

It is equally important to get some idea about the civil law countries, and to find out whether the practice of pardoning power by the Executives is existent in those countries or not; and if such power does exist, then to find out the nature of this power exercised in those countries. As is evident, there are two main types of legal system in the world, with most countries adopting features from one or other into their own legal systems, Common Law and Civil Law. It has already been stated that countries following a common law system are typically those that were former British colonies or protectorates, including the United States. A common law system is less prescriptive than a civil law system. Civil law is a legal system originating in mainland Europe and adopted in much of the world. The civil law system is intellectualized within the framework of Roman law and with core principles codified into a referable system, which serves as the primary source of law. The civil law system is often contrasted with the common law system, which originated in medieval England, whose intellectual framework historically came from uncodified judge-made case law, and gives precedential authority to prior court decisions.[230]

[229] *https://worldpopulationreview.com.*
[230] Husa, Jaakko (2016-05-02), The Future of Legal Families, Vol. 1, Oxford University Press, ISBN 978-0-19-993535-2.

Civil law in the European nations is generally traced back to the code of laws compiled by the Roman Emperor Justinian around 600 C.E. Authoritative legal codes with roots in these laws (or others) then developed over many centuries in various countries, leading to similar legal systems, each with their own sets of laws.

Historically, a civil law is the group of legal ideas and systems ultimately derived from the *Corpus Juris Civilis*, but heavily overlain by Napoleonic, Germanic, canonical, feudal and local practices,[231] as well as doctrinal strains such as natural law, codification, and legal positivism. Conceptually, civil law proceeds from abstractions, formulates general principles, and distinguishes substantive rules from procedural rules.[232] It holds case law secondary and subordinate to statutory law. Civil law is often paired with the inquisitorial system, but the terms are not synonymous.

There are key differences between a statute and a code.[233]The most pronounced features of civil law systems are their legal codes, with concise and broadly applicable texts that typically avoid factually specific scenarios. The short articles in a civil law code deal in generalities and stand in contrast with ordinary statutes, which are often very long and very detailed.

The civil law system is a codified system of law. It takes its origins from Roman law. The main features of a civil law system include: (1) There is generally a written constitution based on specific codes; for e.g., civil code, codes covering corporate law, administrative law, tax law and constitutional law) enshrining basic rights and duties; (2) Only legislative enactments are considered binding for all. There is little scope for judge-made law in civil, criminal and commercial courts, although in practice judges tend to follow previous judicial decisions; (3) In some civil law systems, e.g., Germany, writings of legal scholars have significant influence on the courts; (4) Courts specific to the underlying codes – there are therefore usually separate constitutional court, administrative court and civil court systems that opine on consistency of legislation and administrative acts with and interpret that specific code.

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[231]Charles Arnold Baker, *The Companion to British History, s. v. "Civilian"* (London: Routledge, 2001), p.308.
[232]Michel Fromont, *Grands systemes de droit etrangers,* 4th ed., (Paris: Dalloz, 2001), p.8.
[233]Steiner, Eva, *"Codification", French Law*, Vol. 1, (2018), Oxford University Press, ISBN 978-0-19-879088-4.

A civil law system is generally more prescriptive than a common law system. However, a government will still need to consider whether specific legislation is required to either limit the scope of a certain restriction to allow a successful infrastructure project, or may require any specific legislation for a sector.

Countries following a civil law system are typically those that were former French, Dutch, German, Spanish or Portuguese colonies or protectorates, including much of Central and South America. Most of the Central and Eastern European and East Asian countries also follow a civil law structure.

Thus, most nations today follow one of two major legal traditions: common law or civil law. The common law tradition emerged in England during the Middle Ages and was applied within British colonies across continents. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth centuries by countries formerly possessing distinctive legal traditions, such as Russia and Japan that sought to reform their legal systems in order to gain economic and political power comparable to that of Western European nation-states.

3.4 Developed Countries

For the purpose of analyzing pardoning power, the division of jurisdictions as developed and developing nations seems apparently immaterial; but inherently relevant considering the traditional growth and spread of the follow-up of its pattern and concept spreading over to few colonial countries after the great Industrial Revolution of England which made her economically and politically more powerful thereby to be categorized as a developed nation. The main basis of such a classification is, no doubt, economic one; but without strong economic basis, no nation can be politically strong enough to spread its wings to other nations even to establish colonies over the foreign soils. History has clearly established the close relationship between the two, and without one, the other remains weak in many fronts. The British classical concept of pardon power had been carried with, no doubt in some form or the other, over to its colonies' criminal justice system like that of the fish which follows the river, the reverse being untrue that the river does not follow the fish. It was the economic might

which enabled the United Kingdom to establish her supremacy over other territories with mighty political hands. Therefore, the British model of pardon power strongly supports that such a possibility exists, and hence, the classification of jurisdictions as developed and developing nations is just and still holds good as the developed countries have something directly or indirectly to be followed or borrowed from the developed nations even in case of administration of criminal justice system.

A nation is typically considered to be 'developed' if it meets certain socio-economic criteria. Developed countries are the countries which have a high level of economic growth as well as security. These countries already have high technology and an evenly distributed economic level. The general criteria for measuring the development of a State include per capita income, per capita gross domestic product, industrialization level, the standard of living of people, and the level of technology and infrastructure. There are also certain non-economic factors such as the likes of the Human Development Index[234]which acts as a measure of the country's progress. The developed countries (or economies) generally have a stable government, good governance and substantial capital investment. The people within such countries enjoy a high standard of living and economic stability. They have high rates of employment and manufacturing. The social infrastructure is high and rate of inflation is favourable. The inhabitants of developed countries tend to have mastered science and technology from which new useful products such as industrial pendant lights were introduced to the market. In their daily life, they have also used sophisticated technology and modern tools to facilitate their workings and styles. The level of exports in these countries is higher than the level of imports because of the superior human resources and technology possessed. The mortality rate in these countries can be suppressed due to a variety of adequate health facilities, such as hospitals and medical staffs who are well trained and reliable resulting in an increase in the life expectancy of the population which is high. The countries that have been able to meet these requirements are today known as the developed nations. According to the UN, in the year 2020, 35 (thirty five) countries were considered 'developed'. All the developed countries were located

[234]It is a measure introduced by the UN. This particular parameter is used to determine the extent of human development in a nation.

either in North America, Europe, or 'Developed Asia and Pacific'.[235]Examples of developed countries include the United States, Germany and Japan.

3.5 Developing Countries

There is no single definition of a developing country. A country is typically considered to still be 'developing', if it does not meet the socio-economic criteria fulfilled by a developed country. It is mostly defined in terms of low income and investment, poor industrialization and level of unemployment, and infrastructure etc. Generally, developing countries are those that have a low gross domestic product (GDP) per person. They tend to rely on agriculture as their prime industry. They have not quite reached economic maturity. Annual income in these countries is not as high as in developed countries due to the high unemployment rate. The lack of proper health facilities makes the population in developing countries more vulnerable to disease. The mortality rate in developing countries is also greater than the mortality rate in developed countries which then results in a low life expectancy. These countries have a very large average population compared to the developed countries because of uncontrolled population growth which is also a result of the lack of proper education and health facilities. Due to the low or inefficient management of natural resources and also human resources in these countries, the developing countries more often buy goods from abroad causing imports higher than exports. According to the UN, in 2020, 126 (one hundred twenty six) countries were considered 'developing'. All the developing countries were located either in Africa, Asia or Latin America and the Caribbean.[236]Examples of developing countries include Indonesia, Brazil and almost all the African countries. However, due to definitional discrepancies, countries such as Mexico, Greece, and Turkey are considered developed by some organizations and developing by others.

3.6 An Analysis in the Present Context

It is generally believed that the economic classification of the countries of the world as developed and developing seems to be less relevant, but yet very important to justify the present status of political set-ups and standards of the concerned country

[235]United Nations, *"World Economic Situation Prospects"*,page. 165.
[236]*Ibid*. p. 166.

because of the fact that without economic stability, political stability sometimes becomes impossible; and in the absence of political stability, the internal structures including constitutional development become hampered. It is factually now established that the developed countries have their strong constitutional mandates which are most followed by the developing countries to line up to their set-ups with philosophical differences. Economic strength and political standards are both related, and psychologically as per human instincts, the poor generally follows the rich. The wise people do also believe that one becomes qualified by others, and the rich are always followed by the poor. This too equally applies to the nations of the world. A nation is generally become qualified through learning from others nations, and imitating and accepting the good norms suitable to their own soils, best suited to the past traditions and cultural norms the people are widely following for long. History makes it clear that many times, the powerful nations were involved in power- gaming which directly and indirectly influenced other nations and even their political philosophy resulting a major change in the internal governance of the country and towards world politics.

What the researcher emphasizes is that in the mutual existence, we are all influenced by each other and learn something from other's experiences. In this process, the concept of pardoning power originally exercised by the British Crown got modified with the changes of time and with the changes effected in the modes of governance of the country. Once England was the most developed and advanced country in the world, and other countries took the British model so far pardoning is concerned; but varied in a form acceptable to and depend on the structure of the government. But now-a-days, the USA's model too becomes operative and influential to many countries in the world.

The ups and downs in terms of civilizations, cultures, language, and political and economic powers that occurred to different nations resulted in creation of a distinction called developed and developing country; but this classification does not mutually exclude or include that all the developed nations should belong either to common law countries or the civil law countries, as they had their own legal and constitutional history. A country belonging to the developed category may either be a common law country or a civil law country. For example, China is a developing country; but civil law plays a vital role in the People's Republic of China's legal

system. Civil law is a fundamental law there that governs the property and personal relationships of equal subjects and serves as the foundation for many types of special enactments and economic regulations in the economic sectors. Similarly, being a developed country, Japan's legal system is characterized as a civil law system based on codified law. The legislative heart of the system is formed by the Constitution and the five primary Codes: civil, civil procedure, criminal, criminal procedure, and commercial. In Germany, Germany's federal Constitution is known as the Basic Law, which is drafted and codified. The federal states also have their own written and codified Constitutions. Although, they are of secondary importance in practice because federal law supersedes state law. France is also a developed country. France has a civil legal system, which implies that legislation is contained in numerous codes and takes precedence over the case law.

It has already been stated that the countries that use the common law system are usually former British colonies or protectorates. The United States of America, which was once a British colony, is now a leading and developed country in the world. The American legal system is a 'common law' system that largely depends on court precedent in formal adjudications. Even when a statute is in question, judicial judgements in previous court cases are highly important to the court's resolution of the subject before it. In India, a developing country, its judicial system is founded on the common law system, which was acquired from the British colonial heritage and is based on documented court precedents. The Supreme Court of India, High Courts and subordinate courts at the district, municipal and village levels make up India's court system. But Canada, yet another developed country have its unique characteristic. Canada is a bijural country in which common and civil law co-exist except for the province of Quebec; the common law tradition applies across Canada in all aspects of public law, e.g., criminal law and administrative law. In Quebec, civil law governs all aspects of private law, including family and child law.

In regard to pardon power to be exercised by the Executive Heads of the States in different countries in the world, the power exercised seems to be almost familiar as will be seen from below; normally exercised by either the President or the Crown or his representatives appointed for the said purpose. Let's have some idea about it in context of some leading countries which more or less are representing the whole theme

under study. Basically it has been seen that the subject has been more elaborately associated and discussed in few leading advanced countries like the U.K., the U.S.A., Canada and Australia plus the developing nation, particularly India and these countries' model in connection of the exercise of this power are found to generally be embraced or be followed by other countries with modification or without modification to suit their own systems desired to be achieved in dispensing justice.

3.7 Pardon Power in UK

The UK is a developed country, and her Constitution is unwritten and based mostly on conventions. In UK, it is known as the Royal Prerogative of Mercy. In the English tradition, the Royal Prerogative of Mercy is one of the historic royal prerogatives reserved to the British monarchs, in which the Queen (or the king) can grant pardons to persons convicted of criminal offences. The original use of the Royal Prerogative of Mercy arose as a result of the imposition of the death sentence; and then being used to commute such a sentence to a less draconian form of punishment.The power to grant pardons and retrieves in the United Kingdom, as is evident, was traditionally the absolute power of the monarch to pardon an individual for a crime, whether or not he or she had been convicted, and thereby commute any penalty; the power was then delegated both to the judiciary and the sovereign's ministers. Since the creation of legal rights of appeal, the royal prerogative of mercy is no longer exercised by the person of the sovereign, or by the judiciary, but only by the government.

Until the 19th century, for many crimes the sentence was mandatory and was formally pronounced in court immediately upon conviction, but judges and ministers were given powers to exercise the royal prerogative of mercy out of court, in order to mitigate the rigour of the law. Before there was any general form of criminal appeal, a judge might grant a pardon either by way of clemency, because he felt in his opinion that the law was unduly harsh (for example, in the case of convictions of minors), that the verdict was dubious, to seek public approval, or it was otherwise in the public interest. Capital sentences imposed by the assizes were generally executed when the assize was concluded and as the circuit judge left the town, so there was a limited window of time to apply to a judge or directly to the Crown for a pardon. Especially for assizes that were far away from the then capital and major cities of London, York,

Durham, Edinburgh, or Dublin, a pardon might well arrive too late. Perhaps as a form of temporary punishment, to give solace, to avoid public disorder, to consult or obtain further evidence, or to maximize the public approval of the King's mercy, judges often did not grant their pardons until their departures; the convict often hoped until his last moments that the sentence of death would not actually be executed, and it was generally popular for a retrieve to arrive at the scaffold at the very moment of the execution. In a 1655 case during the Commonwealth, a Roundhead judge rode from Cornwall to London and returned with Lord Protector Cromwell's pardon for the Royalist rebel William Wake whom he had himself sentenced to death; Wake had taken a beating for him when they were schoolboys together at Westminster School twenty years before.[237]

Today, pardon power can be used to change any sentence or penalty imposed upon a convict. The justice secretary has responsibility for recommending the use of the Royal Prerogative of Mercy to Her Majesty, the Queen (now the King). The defence secretary is responsible for military cases. The Royal Prerogative of Mercy is now exercised sparingly and only in cases of great exceptionality. A decision by the justice secretary to recommend the use of the Royal Prerogative of Mercy is usually restricted to cases where:

(1) It is impractical for the case to be referred to an appellate court; and

(2) New evidence has arisen, that has not been before the courts, which demonstrates beyond any doubt that no offence was committed; or

(3) That the defendant did not commit the offense.

In UK, there are mainly two types of pardon that may be granted: (i) a Free Pardon; and (ii) a Conditional Pardon.Conditional pardons were granted to many in the 18th century, in return for transportation to British colonies overseas for life in lieu, especially to the Australian colonies.

Thus, at present, the sovereign only grants pardons upon the advice of her ministers: currently they are the Lord Chancellor, for England and Wales; the First Minister of Scotland, or the Secretary of State for Northern Ireland. The Secretary of

[237] *Budgell, Spectator* No.313, Thursday, February 28, 1712.

State for Defense is responsible for military cases. It is the standard policy of the government to only grant pardons to those who are considered "morally" innocent of the offence, as opposed to those who may have been wrongly convicted by a misapplication of the law. Pardons are generally no longer issued prior to a conviction, but only after the conviction. The use of the royal prerogative of mercy is now a rare occurrence, given that the Criminal Cases Review Commission and the Scottish Criminal Cases Review Commission are now avenues to statutory remedies against miscarriage of justice.

One recent case was that of two drug smugglers, John Haase and Paul Bennett. They were pardoned in July 1996 from their sentences of imprisonment both of 18 years, having served some ten months, on the advice of Home Secretary, Michael Howard. This was intended as a reward for their information given to the authorities, but there were speculations as to the motives of the Home Secretary.[238] In 2008, they were sentenced to imprisonment for 20 and 22 years respectively after subsequent discovery that the information they gave was unreliable. In 1980, after the courts had dismissed their appeals, the Home Secretary, William Whitelaw, used the royal prerogative of mercy to free David Cooper and Michael McMahon from their imprisonment, both having been convicted of murder on poor evidence.[239]

3.8 Pardon Power in United States of America

The United States of America is also a developed country. It has its own Constitution. The Constitution of the United States was the first written Constitution. It has also influenced the Constitutions of many countries worldwide including India.

The American model of pardon seems to be more relevant and representative to those countries with federalism ideology where the pardon power has generally been entrusted upon the President to be exercised on his own or with advices rendered by an executive body statutorily constituted of for this purpose besides others. This needs a more detailed and elaborative discussion as being a federal and developed country, this model has been followed this way or that way with modification or no modification by others, those were once British colonies and particularly the developing countries with

[238]http://www.newstatesman.com/200502140015
[239]Woffinden, Bob (1 August, 2003). "Dead men finally cleared of murder" (https://www.theguardian.com/uk/2003/aug/01/ukcrime).*The Guardian.*

basic federal structures including India. The United States of America (U.S.A.) commonly known as the United States or America is a transcontinental country located primarily in North America. It consists of 50 states, a federal district, five major unincorporated territories, nine Minor Outlying Islands, and 326 Indian reservations. It is the third-largest country by both land and total area.

The United States is a federal republic with three separate branches of government, including a bicameral legislature. It is a Federal Presidential Constitutional Republic. It is usually said that pardons are usually far more common in the federal system

Although one may encounter numerous references to the exercise of the prerogative of mercy in Mosaic Law, Greek law, and Roman law, but so far pardoning power of the US President was or is concerned, is made quite associated with the statutory history of the power in early England. The pardoning power of England was applied in the American colonies, and subsequently was incorporated into the United States Constitution. The power of Article II, Section 2, therefore, finds its root in early England, and has passed through a long journey of colonial history to achieve the goal of modern America. Hence, it needs a detail discussion presented as follows:

3.8.1 The British Colonies in America : It seems to be unfair if historical background is not traced out at all of the British colonies in America which happens once to be under the British rule. When England broadened its boundaries to the "New World", the pardoning power followed. The prerogative was delegated by the Crown to the executive authority in the colony, with few limitations on the power. The Virginia Charter of 1609 granted the governor "full and absolute Power and Authority to correct, punish, pardon, govern, and rule all such the Subjects of US, our Heirs, and Successors as shall from Time to Time adventure themselves" into the colony.[240] In 1624, Virginia became a royal colony and all executive authority was placed in the royal governor. It is to be mentioned that in April 1606, King James I of England granted the Virginia Company a charter to establish colonies in Virginia. The area of Virginia was part of the original territory of the United States. Virginia was nicknamed the Old Dominion for its loyalty to the exiled Charles II of England during the Puritan Commonwealth and Protectorate (1653-59). It has one of the longest continuous

[240]F. Thorpe, *American Charters, Constitutions and Organic Laws*, 3800-01 (1909).

histories among the American states dating from the settlement of Jamestown in the early 17th century.

The Charter of New England (1620) was much like the second Virginia Charter of 1609; "full and absolute Power and Authority to correct, punish, pardon, govern, and rule" was bestowed upon the "Council and their Successors, and to such Governors, Officers, and Ministers as shall be by the said Council constituted and appointed."[241] Before a government was organized, the Council for New England was replaced by the Massachusetts Bay Company, whose 1629 charter empowered the Governor and Company to exercise "full and Absolute Power and Authority to correct, punish, pardon, govern, and rule."[242] Under Governor Winthrop, however, the *Body of Liberties* circumscribed the executive power by giving the governor and deputy governor jointly consenting, or any three Assistants concurring in consent, only the power to reprieve a condemned malefactor until the next quarter or General Court. The General Court had exclusive power to pardon.[243] Sir Edmund Andros was commissioned by the Crown in 1688 and was given "full power where he shall see cause and shall judge any offender or offenders in capital and criminal matters, or for any fines or forfeitures due unto us, fit objects of our mercy, to pardon such offenders and to remit such fines and forfeitures, treason and willful murder only excepted, in such case he shall likewise have power upon extraordinary occasions to grant reprieves to the offenders therein until and to the intent our pleasure may be further known".[244]

The Charter of 1691 provided for a governor appointed by the King who represented the Crown in all things in the colony, and thus dispensed the royal prerogative of mercy.[245]

Both Baron Baltimore in Maryland[246] and Sir Fardinando Gorges in Maine[247] were given full and absolute power to pardon. In 1664, Maine was granted to James, Duke of York, who possessed "power and authority to correct, punish, pardon, govern,

[241]Ibid. at 1883.
[242]*Ibid*., at 1858.
[243]The Body of Liberties of 1641, No. 72, reprinted in W. Whitmore, A Bibliographical Sketch of the Laws of the Massachusetts Colony, 49 (1890).
[244]F. Thorpe, *American Charters, Constitutions and Organic Laws*, 1866 (1909).
[245]*Ibid*., at 1870-86 .
[246]*Ibid.,* at 1680 (Charter of 1632).
[247]*Ibid*., at 1629 (Charter of 1639).

and rule".[248] After 1677, Maine was governed by the Charter of New England. The colonists of both Connecticut[249] and Rhode Island[250] provided the General Assembly with the power to pardon, provided that the governor and six executive assistants were present.

The Lord Proprietors of North Carolina were given power "to remit, release, pardon and abolish (whether before judgements or after) all crimes and offences whatsoever".[251] The Charter of 1665 renewed the power.[252] The Fundamental Constitution of Carolina (1669), written in part by John Locke, empowered the palatine's court, which consisted of the palatine and seven proprietors, to issue pardons.[253] The constitution gave the proprietors' court the power to mitigate all fines and to suspend all executions in criminal cases before or after sentence.[254]

The proprietors of New Jersey were authorized in 1664 to pardon or to command execution of a sentence.[255] The Quaker Fundamental Law of 1676, operating in Western New Jersey, contained a pardoning power clause unique among the colonies: "That all and every person and persons whatsoever, who shall prosecute or prefer any indictment or information against others for any personal injuries, or matter criminal, or shall prosecute for any other criminal cause, (treason, murder, and felony, only excepted) shall and may be master of his own process, and have full power to forgive and remit the person or persons offending against him or herself only, as well before as after judgement, and condemnation, and pardon and remit the sentence, fine and punishment of the person or persons offending, be it personal or other whatsoever."[256]

The Fundamental Constitution for the Province of Eastern New Jersey (1683) vested the pardoning power in the twenty-four proprietors; eighteen concurring votes

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[248] *Ibid*., at 1638.
[249] *Ibid*., 533-34 (Charter of 1662).
[250] *Ibid*., at 3215 (Charter of 1663).
[251] *Ibid*., 2746 (Charter of 1663).
[252] *Ibid*., at 2764.
[253] *Ibid*., at 1776.
[254] *Ibid*., at 2778; The North Carolina Act of 1749, "An Act to Put in Force in this Province the several Statutes of the Kingdom of England, or South-Britain……" which incorporated 10 Edw. III c. 2 and 12 & 13 Will. III c. 2.
[255] F. Thorpe, *American Charters, Constitutions and Organic Laws*, 2540 (1909).
[256] *Ibid*., at 2551.

were necessary for an effective pardon. The governor, in conjunction with four proprietors, judges of the Court of Appeals, could grant a one month reprieve.[257] In 1702, New Jersey became a royal colony, and the power to pardon rested with the royal governor.

William Penn, proprietor of Pennsylvania and Delaware,[258] had power to "remit, release, pardon, and abolish whether before Judgement or after all crimes and Offences whatsoever committed within the said Country against the said Laws, Treason and willful and malicious Murder only excepted, and in those Cases to grant Reprieves", until the king's pleasure was made known.[259] The governors of New York were endowed with similar power.[260]

The power to "sell, impose and inflict, reasonable pains and penalties upon any offender ……and to mitigate the same" was given the Corporation of Georgia in 1732.[261] When Georgia became a royal colony, the pardon power was given the royal governor.

After the Revolutionary War, the states, bound by a weak confederacy, drastically curtailed the powers of their suspect executives. No national pardoning power existed. Most states provided for the ascendency of the legislative branch and the executive power to pardon was weakened. For example, Article XIX of the Georgia Constitution (1777) provided that "the governor shall, with the advice of the executive council, exercise the executive powers……save only in the case of pardons and remission of fines, which he shall in no instance grant ……", though he was given the power to reprieve a criminal or suspend a fine until the next meeting of the assembly.[262]

The confederation Constitution of Delaware (1776)] gave the executive pardoning and reprieving powers "except where the prosecution shall be carried on by the house of assembly, or the law shall otherwise direct, in which cases no pardon or

[257] *Ibid*., at 2578.
[258] *Ibid.,* at 557-61 (Charter of 1701).
[259] *Ibid*., at 3038 (Charter of 1681).
[260] J. Goebel & R. Naughton, *Law Enforcement in Colonial New York*, 748-59 (1944).
[261] F. Thorpe, *American Charters, Constitutions and Organic Laws*, 770 (1909).
[262] *Ibid*., at 781.

reprieve shall be granted, but by a resolve of the house of assembly.[263] The Constitution of Virginia (1776)[264] and North Carolina (1776)[265] contained similar provisions.

The New Hampshire Constitution of 1784 provided that the "power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature, or by authority derived there from, to be exercised in such particular cases only as the legislature shall expressly provide for."[266]

The Massachusetts Constitution of 1780 allowed pardons only after conviction and eliminated impeachments from the scope of the power.[267] Pennsylvania (1776)[268] and New York (1777)[269] were guided by constitutions that excluded from the purview of pardons cases of treason and murder, which the governor could reprieve until the next session of the legislature. Pennsylvania further accepted cases of impeachments.

The 1776 Constitution of New Jersey provided for the annual legislative election of the governor who, along with the executive council, composed the court of last resort in all cases of law. This court was empowered to grant pardons subsequent to condemnation.[270]

After a long season of irresponsible executive authority in the realm of, among other things, the power to pardon, the young states (the independent USA) reacted with a variety of restraints on the executive power. Simultaneously, forces were mounting in favour of a more centralized government with a strong chief executive.

3.8.2 Impacts of the Convention of 1787 : The Convention of 1787 is very important to eventualize the development of theme of pardon after the USA became independent. In 1787 a convention assembled at Philadelphia to establish a more perfect union. The delegates agreed that the new government called for a Chief Executive. Although the major plans (the Virginia Plan and the New Jersey Plan) did

[263] *Ibid*., at 563.
[264] *Ibid*., at 3817.
[265] *Ibid*., at 2791.
[266] *Ibid*., at 2457.
[267] *Ibid*., at 1901.
[268] *Ibid.,* at 3087-88.
[269] *Ibid*., at 2633.
[270] *Ibid*., at 2596.

not contain a power of pardon, Charles Pinckney, Alexander Hamilton, and John Rutledge fought for and won inclusion of a pardoning power. A preliminary draft of the clause was quite similar to the 1700 Act of Settlement; the power of pardoning vested in the Chief Executive, but his pardon shall not be pleadable in bar of an impeachment.[271]

The Convention failed to approve a motion introduced by Roger Sherman to limit the power "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate".[272] George Mason averred that the Senate already had too much power. A motion to insert "exception in cases of impeachment" after "pardon" and to remove the words "but his pardon shall not be pleadable in bar" of an impeachment was passed.[273] Luther Martin moved to insert "after conviction" after the words "reprieves and pardons", but withdrew the motion after the persuasive argument of Mr. Wilson that a "pardon before conviction might be necessary, in order to obtain the testimony of accomplices".[274] Thereafter Edmund Randolph sought to amend the articles to except "cases of treason" from the pardoning power.[275] Randolph considered the power too great to be entrusted to one man, because the President himself might be guilty and the traitors might be his own instruments. During the debates that followed the Constitutional Convention, Mason elaborated upon the objection: "The President of the United States has the unrestrained power of granting pardons for treason; which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt".[276] In answer to the objection, James Iredell replied: "Nobody can contend upon any rational principles, that a power of pardoning should not exist somewhere in every government, because it will often happen in every country that men are obnoxious to a lawful conviction, who yet are entitled, from some favorable circumstances in their case, to a merciful interposition in their favor. The advocates of a monarchy have accordingly boasted of this, as one of the advantages of that form of government, in preference to a republican……..[It is a wise aim], in forming a general government for America, to

[271]5 Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia, in 1787, at 380 (J. Elliot ed. 1845).
[272]*Ibid.,* at 480.
[273]*Ibid.*
[274]*Ibid.*
[275]*Ibid*., at 549.
[276]Pamphlets on the Constitution of the United States, 350 (P. Ford ed. 1968).

combine the acknowledged advantages of the British constitution with proper republican checks to guard as much as possible against abuses, and it would be strange if the power of pardon is omitted. It could scarcely be avoided, that when arms were first taken up in the cause of liberty, to save us from the immediate crush of arbitrary power, we should lean too much rather to the extreme of weakening than of strengthening the Executive power in our own government. In England, the only restriction upon this power in the King is that his pardon is not pleadable in bar of an impeachment. But he may pardon after conviction, even on an impeachment; which is an authority not given to our President, who in case of impeachments has no power either of pardoning or reprieving".[277]

The initial part of Iredell's reasoning, the need for flexibility in a criminal justice system so that it operates in congruence with the end of all government – justice, is sound. Today, however, the criminal justice system of the United States is steeped in flexibility. At each step in the process, arrest, prosecution, and sentencing, discretion exists. One found guilty at the trial level in the United States' court system also is given one appeal as of right. In England, the criminal justice system did not provide for adequate judicial review of the judgements of criminal courts until 1908. The Criminal Appeals Act of 1907, 7 Edw. 7, c. 23, s. 3 established the Court of Appeals. Accordingly, the method of rectifying any injustice before that time was via a grant of pardon. This was still a limited appeal, however, though section 19 of the Act gives the Home Secretary the privilege of referring a case to the Court of Appeals before considering the desirability of pardoning.[278] When the power to pardon first evolved, the punishment for many crimes was death. In 1787, the situation was changing; today it is drastically different. In addition, Iredell's parenthetical remarks for vesting the power in the Executive are misleading. In England, impeachment extends not only to removal from office but also to the more severe forms of punishment. The latter development of the impeachment process empowered the king, after the Danby affair, with a wide latitude in pardoning. Thus, because the President may abort any criminal proceeding, including one that may be subsequent to and directly initiated because of an impeachment proceeding, the power of the English

[277] *Ibid*., at 350-51.
[278] O. Marshall, The Prerogative of Mercy, 1948 Current Legal Problems 107.

monarch of the eighteenth century and the power of the President of the United States are essentially equivalent. It was the more lenient extent of the impeachment power in America that motivated the insertion of the word 'except' for the phrase 'in bar of' noted above. In English law, although the king could not pardon to block an impeachment, he could pardon subsequent to impeachment and conviction. In the United States, impeachment extends only to removal from office; thus there was no humane reason for extending the power to impeachment cases at all.

Iredell continued his faulty analysis by adding: "When a power is acknowledged to be necessary, it is a very dangerous thing to prescribe limits to it. The probability of the President of the United States committing an act of treason against his country is very slight. Such a thing is however possible, and accordingly he is not exempt from a trial……I entirely lay out of the consideration of the probability of a man honored in such a manner by his country, risking like General Arnold, the damnation of his fame to all future ages……. One of the great advantages attending a single Executive power is the degree of secrecy and dispatch with which on critical occasions such a power can act.[279]

The greatest safeguard of American liberties has been the concept of "checks and balances". The framers provided for such checks and limitations on all other powers set forth in the Constitution because they recognized the "encroaching nature" of power.[280] As Madison explained, in a government of limited powers "ambition must be made to counteract ambition".[281] He continued: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions".[282]

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[279]Pamphlets on the Constitution of the United States, at 351-52 (P. Ford ed. 1968).
[280]The Federalist No. 48 (J. Madison).
[281]The Federalist No. 51 in The Federalist Papers 322 (1961) (J. Madison).
[282]*Ibid.*

Experience, admittedly not available to Iredell, has shown that a President could partake in a subversion of the Constitution and risk "the damnation of his fame to all future ages". Iredell also overlooked the possibility that an ex- President, through the use of the power in question, exercised by himself before departing from office, [President Ford revealed in testimony before a House subcommittee that this was a possibility under consideration by former President, Nixon.] or by his successor, might be exempt from trial. The argument fails to recognize the disadvantages connected with secrecy and pardoning power: "If the history of civilization proves nothing else, it proves that where secrecy cloaks the use of power, it also cloaks the abuse of power."[283]

Randolph's motion was defeated largely because of the imperfect reasoning of his colleagues. The power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, was ready to be displayed to the states.

There was little discussion of the pardoning power at the state ratifying conventions. One critic argued that the President not be given the power;[284] another suggested that pardons for treason should not be allowed without Congressional consent.[285] Because the power could be used before indictment, it was obvious to some that great opportunities existed for the President, via the pardoning power, to subvert the Constitution, stop investigations, and thus avoid detection. Speaking to the people of New York, Alexander Hamilton. Hamilton's initial plan was to give the executive "the power of pardoning all offenses except Treason; which he shall not pardon without the approbation of the Senate" attempted to quell those apprehensions:

"Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel…….[286]

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[283]Clark, *The Impact of Mass Communications in America*, 1968 ANNALS 68-73.
[284]3 Debates in the several State Conventions on the Adoption of the Federal Constitution, 497 (J. Elliot ed. 1836) (Mr. Mason, Virginia Debates).
[285]*Ibid*., at 408 (Mr. Livingston, New York Debates).
[286]1 Records of the Federal Convention of 1787, 292 (M. Farrand ed. 1911).

The reflection that the fate of a fellow-creature depended on [the President's *sole fiat* would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government than a body of men …….I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of the Congress, or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of the act of mercy towards him to the judgement of the legislature. And this ought the rather to be the case, as the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. It is not to be doubted that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever……But the principal argument for reposing the power of pardoning in…….the Chief Magistrate is this: in seasons of insurrection and rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth;……The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity".[287]

The power was adopted unchanged. With little discussion, and arguments not strong enough to meet the test of time, the Philadelphia Convention, with the concurrence of the state ratifying conventions, incorporated into the Constitution, by non-definitive language, the presidential power to pardon.

3.8.3 The American Theory of Democratic Government : It may truthfully be said that no department of government has received so little real study as the exceptional jurisdiction of clemency created by the federal and state constitutions. As

[287]The federalist No. 74 (A. Hamilton).

the theory was inherited with the common law of England, the assumption has been general that its early English traditional bases of mercy and caprice have remained unmodified. This is an error. Many judicial decisions have indicated its true scope and defined the nature and effect of the charters issued. No court, however, has ever attempted to declare what grounds or motives should prompt the exercise of the pardoning power, nor has any court ever attempted to ascertain or review the reasons for a pardon. Manifestly the exercise of such power would be unwarranted under the scheme of US government. The jurisdiction of clemency is far removed from that of the courts. The American theory of democratic government was at the outset stamped with the recognition of the people as the source of all power and a delegation in written constitutions of so much of that power as might become necessary to establish and maintain individual, community and governmental rights. These have in all instances been entrusted to clearly separate legislative, judicial and executive departments. The legislative is endowed with all the power the people would have in primary or original general assembly not specifically reserved or bestowed upon another department. The judicial branch is made the hand-maiden of the people for sustaining the organic purpose and plan and their will as legislatively expressed from time to time.

The executive department, however, is clothed with all the discretion of the people as a collective sovereign and is the least restrained of all the branches. Indeed, the chief of the state, for the preservation of the peace and the orderly operation of all other departments of government, is the depositary of every power to be implied from the terms of the constitution and not therein limited or specifically vested in other branches. He is the voce and the servant of the sovereign people and represents and ought to exercise all their reserved powers which may be required to carry out their general organic declaration. No man or other branch of government can supervise, direct or review his actions; he is not subject to mandamus, injunction, certiorari, writ of prohibition or even subpoena in respect of his executive conduct.[288] In this vast reservoir of discretionary power the several constitutions have expressly placed the prerogative of clemency, in some instances with restrictions, in others without limitations. It is significant that it has never been overlooked in any scheme of government from the dawn of history. It is born of the realization that human

[288]*State v. Ward*, 9 Heisk., 100; *Com v. Ahl*, 43 Pa. St. 53.

institutions administered by human agencies must always have a residuum of imperfection. That tradition has kept abreast of every step in civilization. While the people have delegated their legislative power to constitutional assemblies they have also deposited a general corrective force in the courts. It matters pertaining to the life and liberty of citizens they have likewise lodged an additional power in the executive, intended to be above the law, the legislature and the judges in respect of particular instances where the generality of legislative enactment and the unyielding impersonal course of the courts would work hardship and injustice uncalled for by the general purposes of government.

The former Chief Justice Mitchell of Pennsylvania said, "The constitution deals with the pardoning power not as a prerogative claimed by divine right, but as an adjunct to the administration of justice, recognized in all civilized governments as necessary by reason of the fallibility of human laws and human tribunals."[289]

In the very nature of things legislatures must enact criminal laws in general terms. It is not possible to conceive a community existing subject to criminal laws of such particularity as to meet every case. "No human wisdom can contrive to make laws which will precisely cover all complex cases that may occur, whatever attention may be paid by the law-makers to the variety of compound cases which they are able to imagine."[290] Nor is the imperfection capable of cure or amendment through construction or application by the judiciary. The judgement of every court is molded by the precept "*Sic scripta est*." There is no power to make new statutes there nor to withdraw particular cases from their operation The judicial field is circumscribed by the regularity and rigidity of procedure in which the party most concerned ever remains an impersonal factor – a mere figure in a problem.

It seems plain, therefore, that there may happen cases which the legislature, had it been cognizant of the particular facts, would have excepted out of the general terms of the enactment, and that the courts, had they the power, would say should not be subject to the specific statute. "The law may be broken and yet the offender be placed in such circumstances that he will stand, in a great measure, and perhaps wholly,

[289]*Diehl v. Rodgers*, 169 Pa.St., 328.
[290]Francis Lieber: *Legal and Political Hermeneutics*, 194, ed. 1880.

excused in moral and general justice, though not in the strictness of the law."[291] The same thought was expressed by Chitty, one of England's greatest legal scholars: "It must be admitted that there are many cases to which no general rules can apply, where *summum jus* would be *summa injuria*."[292]

There are also defects, some of which are inherent in every system of criminal jurisprudence, and others that are peculiar to trials by jury. Jeremy Bentham pointed out some of these: "Is there, or could there be devised, any system of penal procedure which would insure the judge from being misled by false evidence or the fallibility of his own judgement? No Judges will continue fallible, witnesses to depose falsehood or to be deceived." After referring to the weakness of circumstantial evidence by reason of chance or arrangements, instances of even confessed guilt of crimes never committed and undoubted cases of innocent persons being convicted, he proceeds: "When the pretended crime is among the number of those that produce antipathy toward the offender, or which excite against him a party feeling, the witnesses almost unconsciously act as accusers. They are the echoes of the public clamor; the fermentation goes on and all doubt is laid aside."[293]

Chancellor Kent said: "Under the most correct administration of the law men sometimes fall a pray to the vindictiveness of accusers, the inaccuracy of testimony and the fallibility of jurors."[294] Judge Story, in his great constitutional treatise, approvingly uses the words of Kent and adds to the fallibility of jurors that of courts. In the course of time there have been improvements, but the history of criminal law reveals a long, persistent and ofttimes discouraging struggle to overcome brutality, ignorance, vagueness, partisanship and blind prejudice, and it has taken centuries to establish the present enlightened safeguards.[295] The system is admittedly still in evolution toward that ideally perfect state which must ever prove illusory because of human limitations and the fundamental error of dealing with the crime instead of the criminal. No theory of criminal procedure will ever produce the results rationally desirable until crime is dealt with by individual study and treatment of the offender and

[291]Story: *II Const. of the United States*, sec. 1494.
[292]*I Crim. Law*, p.769, Am. ed., 1836.
[293]Bentham, *Principles of Penal Law*, Works, vol. I, p.449.Bowring ed., 1843.
[294]Kent, *I Com. on Am. Law,* 283.
[295]Stephen, *"Hist. of the Crim. Law of Eng. : II Select Essays in Anglo-Am. Legal Hist.*, 443.

the old, impersonal, mechanical and manifestly ineffectual method is abandoned. However, until the movement that is rapidly gaining force to this end shall have been legislatively and judicially recognized the jurisdiction of executive clemency must be maintained and exercised in the light of the traditions which have produced the existing system of criminal law. It must continue to be the ultimate resort for the administration of natural equity in exceptional cases which by reason of the generality of legislative enactments and the imperfections of human tribunals fall within the reserved discretionary power delegated to the executive by the people, a power which, by its very nature and the manner of its delegation, was intended to be and is above the law, the legislature and the courts. Said the great Gibson, Chief Justice of Pennsylvania: "It is certain that so much of the prerogative as appertained to the King by virtue of his *dignity*, is excluded by the nature of our government, which possesses none of the attributes of *royalty*; but so much of it as belongs to him in the capacity of *parens patriae*, or *universal trustee*, enters as much into our political compact as it does into the principles of the British constitution."[296]

It is by virtue of this doctrine that the executive of the federal and state governments have been invested with the pardoning power. The people have thereby reserved to themselves the right, to be exercised by their unfettered agent, to avoid the legislative will, reverse the verdicts of juries and nullify or modify the judgements of courts in exceptional cases. It is the common and honest admission of human weakness, the recognition of human fallibility, the cry of human compassion. It is a confession of imperfect wisdom and voices mankind's universal repugnance to the irretrievable and the irrevocable. It is the cautionary protest of the multitude against unanticipated and cruel consequences of governmental deficiencies. Whenever a case by its attendant data comes within the relieving remedy of this exceptional jurisdiction the beneficiary is no longer hampered by the ancient and exploded theory of admitted guilt and sovereign grace which in ancient times required a pardon to be pleaded on bended knee.[297]

On the contrary, it is now conceded under American constitution that an application for clemency is of legal right, whether based upon a claim of innocence or

[296] *Com. V. Baldwin*, 1 Watts, 54.
[297] *Com. V. Lockwood*, 109 Mass., 322.

excessive punishment, and that a moral duty is imposed upon the executive to afford relief if a rational interpretation of all the data marks the case as entitled to remedy by that higher justice which planes above all positive law, all civil procedure and all civil equity, for such is the people's will. It is not a question of guilt or innocence alone; clemency is not trammeled by terms which belong to the judicial branch of the government. Every circumstance pertaining to the event and the individual is relevant in *foro clementiae* which is beyond all rules of legal procedure, legal maxims and formalities, and in which doctrines like *Ignorantia legis non excusat* have no place.[298] By this advanced view of the power the old, illogical position of an innocent person who accepted a pardon is eliminated. Victims of judicial errors no longer have to accept liberty under false colors. A pardon no longer necessarily implies guilt for it may flow from clearly established innocence. Sir Henry Maine, so long ago as 1862, while a law member of the Indian Governor's Council, referring to pardons in a minute on Suspension and Remissions of Sentences, said: "Originally, as might be inferred from the old theory, the exercise of the power was a matter of grace and favor; more recently it came to be controlled by considerations of state policy or popular sentiment; and now, at length, it is rapidly becoming identified with a rehearing of the whole case."[299]

In this country, there is not only a rehearing or review of the entire case as judiciary presented, but all the surroundings are considered, even to the punishment imposed, and notwithstanding the fact that the legal conviction itself may not be within clemency the penalty may be mitigated.

The depositary of clemency need not consider the legal effect of his character. That is for the court. He must be guided by the broader principles that govern his exceptional jurisdiction which he has sworn to exercise. Most all the constitutions in substance or words contain the clause: "The supreme executive power shall be vested in the governor, who shall take care that the laws are faithfully executed."[300] Among his enumerated "supreme executive" powers is that of clemency, which requires him to withdraw from the regular operation of the laws such particular cases as in his wise

[298]William W. Smithers, *Nature and Limits of Pardoning Power*, Journal of Criminal Law and Criminology, vol. 1, issue 4 ,p. 553, (1911).
[299]*Ibid*.
[300]Const. Pa., art. IV, sec.2.

and merciful discretion he may deem the people intended to except from the results of the application of a particular law or the consequences of the rigid procedure of courts. He can no more rightfully refuse a pardon in a proper case than he can rightfully refuse to call out the militia when the preservation of public peace demands it. His oath to "take care that the laws are faithfully executed" must be construed with the qualification "subject to the pardoning power", and his duty in respect of the latter is as high as in respect of the former. The obligation to enforce the laws and the burden of exercising clemency, which is above the law, are properly attached to the "supreme executive power" in whom the people have reposed all of the unexpressed and otherwise undelegated powers necessary to accomplish the ends of government.

The exercise of this discretionary, exceptional and unreviewable jurisdiction undoubtedly presents grave difficulties. No function in a democratic government requires greater care, broader mental capacity or loftier morality. Under modern political conditions no official act is more likely to call forth criticism and charges of favoritism, caprice or corruption. The unhampered and uncontrollable nature of the power, its emanation direct from the people whose best general sentiment it should always reflect, the lack of formality in its procedure and its effects upon legislative intendments and judicial results make the lot of its depositary no enviable one. This is especially so in states having the "one-man power", which is now generally believed to be unwise. In the federal constitutional convention the question was debated and the clause as finally adopted was strongly upheld by Hamilton in the Federalist.[301] There has been little cause for complaint, probably because of the lack of general, direct and continuous contact between the executive and the citizens and the consequent feebleness of local influences. In the state, however, different results have followed and the "one-man" pardoning power has been the subject of much just criticism. Community sentiment, intimacy with local affairs, neighborhood knowledge of crimes committed, familiarity with criminal trials and constant approachability have made governors susceptible to deception, false sympathetic evidence and the obligations or feelings of friendliness founded upon political or personal considerations. Complaints were loud and many during the first half of the nineteenth century. Many remedies were suggested in the various constitutional conventions, resulting in some instances

[301]No. 74, Lodge ed., p.464.

by certain restrictions being placed upon the executive, most commonly by requiring him to act only upon advice of other officials. The first state constitutionally provide for a board of pardons by name was Minnesota, in 1857, although other states have designated similar functions to be exercised by certain officers without denomination as a body. It is now generally conceded that there should be some advisory body to hear and make recommendation to the governor before he acts on any application for clemency. This is not only advisable in relieving him of laborious and grave responsibilities, but exceedingly wise in providing regularity, publicity and careful consideration of the merits of every application.

Whether the power be vested in one or many, however, the governing principles, as well as the source and nature of data that should control, are matters of highest importance, quite frequently misconceived by the executive and generally not appreciated by the public. Caprice, rancor, or mere compassion obviously should be avoided in clemency. Francis Lieber has well said that it should "be wielded in the spirit of justice, and not according to individual bias, personal weakness, arbitrary view or interested consideration."[302] It would be wise for the depositary ever to remember that a supreme and plenary executive power of clemency is intended to supplement the inadequacies in and correct imperfections of ordinary governmental procedure so far as they affect individual liberty. On the other hand, he should firmly determine to exercise it only when in obedience to a rational interpretation of common public sentiment the case by reason of natural equity raises a presumption that it was intended by the people to be accepted out of the general terms of the punishing statute.

Under the former thought one who has been declared legally guilty should be pardoned if the broader inquest in clemency reveals his non-participation in the alleged crime. Under the latter rule, though the legal guilt be undeniable, where the circumstances would make it repugnant to natural equity and contrary to the common sentiment of the community for the law to take its course, relief should be granted. In either case the wisdom of the action taken must depend upon the character of the inquest, the nature and source of the data and the proper conception of the sacred duty imposed upon the depositary of the power. There is no doubt, however, that decision is capable of being rendered upon precise and unassailable grounds, for clemency if duly

[302] *Civil Liberty*, App. II, 435, ed. 1901.

considered is a definite jurisdiction with guiding rules tending to rational and just results.

One of the commonest errors is that executives are limited or bound by what has transpired while the judiciary had the case in charge. This would simply mean an additional court of review. There is no such intendment by the constitution. Every department of government is separate, and it is well settled that the executive is no more bound by a judicial finding in considering a pardon than the courts would be bound by an act of the legislature saying how a pending suit should be decided. James Wilson, one of the great thinkers of early days of the US, in one of his law lectures, referring to the three great powers of government being independent as well as distinct, said, "The independency of each power consists of this, that its proceedings, and the motives, views and principles which produce those proceedings, should be free from the remotest influence, direct or indirect, of either of the other two powers."[303] When the Massachusetts judges were asked by the governor what effect he should give to the recommendation of mercy added to the verdict convicting the notorious Jesse Pomeroy of murder, they specially decided that the recommendation was not binding on the court or the executive for the reason that the pardoning power is an independent function to be exercised upon a special consideration of the whole case *irrespective of any prior proceeding*.[304] The term "legal discretion", with its well-defined legal limitation, has no counterpart in "executive discretion", which is in nowise circumscribed save by reason and conscience. A governor represents the average honesty, intelligence and good judgement of the people and those are the guiding qualities of his discretion. If he commits blunders there is no appeal nor can he be held to any settled lines of reasoning in the exercise of his discretion. Only his corruption can bring impeachment. If he sees fit to call out the militia to quell disorder which indeed did not warrant such an expense, no man or court can overrule his action, review his conduct or compel him to give his reasons.[305] He exercised his "executive discretion". So it is in matters of pardon, where he acts alone; there are no rules binding upon him as to how he will consider the case, what information he will seek or consider, what weight he will give to a judicial decision, an affidavit, an oral, unsworn

[303]Works: Vol. I, 367, Andrews ed., 1896.
[304]*Opin.of the Judges*, 120 Mass., 600.
[305]*Hartranft*, App., 85 Pa., 433.

statement, or facts within his own knowledge; what circumstances he will consider important, what decision he will arrive at, what reasons he will give or whether he shall give any at all. A recent careful writer on constitutional law says that "if the constitution has vested a particular discretion in an executive officer, his interpretation of that discretion is conclusive."[306]

The case thus being open to examination *ab initio* it will be found subject to certain controlling principles which eliminate caprice and lead to a conclusion fortified by reason and data. At the out start every executive should be mindful of two presumptions, viz., that the statute invoked was intended to apply and that the judiciary acted properly and with correct results. All reasonable doubts must be resolved in favor of the law, its due course and the justice of its regular consequences.[307]

These presumptions remain until overcome by data weighed by the principles of clemency. Manifestly the first duty is to obtain full information from reliable sources. The natural course will be to first glean the facts developed during the trial and then to consider them in their relation to data pertaining to the witnesses, the public interest, the history of the offender and the offense. The method is immaterial so long as leading to trustworthy results. Examination of facts should in no wise be limited by standards or maxims of legal procedure for therein frequently only half the truth appears. It is impossible to indicate these matters more in details in an article of this nature, but may be said that there should be special attention paid to the prosecution, statute, the trial and its incidents, the condition of the public mind when the offense was committed and at the time of the trial, the conduct of public officers, the penalty imposed, the history of the culprit and the best interests of the community. All of this data should be considered relevant, subject only to the tests of reliability, comprehensiveness and correct interpretation.

The trial judge, until recent years, was the one official most frequently consulted in pardon matters. Executive made no study of clemency jurisdiction, did not appreciate its scope, and in their weakness sought to find support in the old tradition of judicial recommendation formerly usual when criminal appeals were not allowed. Under the "one-man power" it was not unnatural for such advice to be sought, but it

[306]Thomas Raeburn White, *Const. of Pa*., p.3.
[307]*Com. V. Moir*, 199 Pa. St., 534; *Likins' Pet*., 37 Super. Ct., 625.

was a rule of expediency rather than of reason. It, moreover, is an acknowledgement of incompetency. The record shows all the judges can or should know about the case and his mere opinion voices only the conclusion of the judicial department whose very imperfections and errors make a pardoning power necessary. The impropriety of even an appellate tribunal including the trial judge is well recognized, although the lines of authority and procedure are practically well defined. It is the more incongruous when applied to a jurisdiction governed by clement equity, state policy and public sentiment. The great Marshal said, "It is a constituent part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially."[308] His mental attitude and his training make a limited view almost inevitable. Lieber said, "The business of the judge, his duty and his habit of thinking, are strictly to apply the law, but in the case of pardon, the object is neither to make nor apply a law."[309]

Many efforts have been made in constitutional conventions to couple the judiciary with pardoning power and in some states in the USA it has been done. It is not generally considered expedient and many times the proposition has been rejected. In the Pennsylvania constitutional convention of 1873 in combatting a proposition to include judges of the trial court or the court of appeal in the board of pardons, the late Andrew G. Curtin, who had formerly been governor, said, "I would not vest the pardoning power in the courts; it is not a judicial proceeding. It ia a subject which appeals solely to the conscience of the executive and its exercise does not require a judicial inquiry and decision. When a judge has discharged his duty in sentencing a criminal, after conviction, his connection with the destiny of the criminal should terminate forever and he should not be recalled to sit in judgement upon his pardon."[310] In the same debate George W. Biddle, Esq., one of the great legal minds of that period also said, "When the judge has pronounced the ultimate judgement of the law, his function with the case is, or ought to be, ended forever. If there are good reasons for a modification of the judgement, they ought not to be addressed to him who is, or ought to be, as we say proverbially, blind."[311] Former Governor David B. Hill of New York

[308] *U.S. v. Wilson*, 7 Peters, 150.
[309] *Civil Liberty*, 446, ed. 1901.
[310] *II Pa. Const. Deb*., 1873, p. 335.
[311] *II Pa. Const. Deb*., 1873, p. 356.

said he considered the opinion of judges "by no means conclusive," and that "it is evident that a judge unconsciously is often influenced by the prejudiced atmosphere of a courtroom and the unreasonable clamor of a community."[312] To seek the opinion of the sentencing judge in his official capacity is unfair to him, a snare to his sincerity and too imperfect a source of data in determining a question of clemency. Judge might with as much reason ask the executive or legislators how to decide a certain case before them.

As stated above, in the United States, the pardon power for offences against the United States is granted to the President of the Unites States under Article II, Section 2 of the United States Constitution which states that the President "shall have power to grant retrieves and pardons for offences against the United States, except in cases of impeachment". The U.S. Supreme Court has interpreted this language to include the power to grant pardons, conditional pardons, commutations of sentence, conditional commutations of sentence, remissions of fines and forfeitures, respites, and amnesties.[313]

The pardon power of the President applies only to convictions under federal law. Additionally, the power extends to military court-martial cases as well as convictions in the Superior Court of the District of Columbia.Almost all pardon petitions are addressed to the President, who grants or denies the request. In some cases, the President will, of his own accord, issue a pardon.[314] Typically, applications for pardons are referred for review and non-binding recommendation by the Office of the Pardon Attorney, an official of the United States Department of Justice.

3.8.4 State Law on Pardon in the U.S. : Being the USA a federal state, we find pardon power to be exercised by the President if the offense committed has a federal concern; otherwise that authority has been conferred upon the governors. The governors of most U.S. States have the power to grant pardons or reprieves for offences under State criminal law. In other States, that power is committed to an

[312] *The Pardoning Power*, 154 North Am. Rev., 50.
[313] Ruckman, P.S., Jr. (1997). "Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)". Presidential Studies Quarterly, 27(2): pp. 251-271. JSTOR 27551729 (https://www.jstor.org/stable/27551729).
[314] "Trump issues pardon to 'Scooter' Libby, former chief of staff to Vice-President Cheney", The Washington Post, 13 April, 2018.

appointed agency or board or to a board and the governor in some hybrid arrangement (in some States the agency is merged with that of the parole board, as in the Oklahoma Pardon and Parole Board).[315]Nine States in the United States have boards of pardons and paroles that exclusively grant all state pardons. These States are: Alabama (Board of Pardons and Paroles), Connecticut (Board of Pardons and Paroles), Georgia (Board of Pardons and Paroles), Idaho (Commission of Pardons and Paroles), Minnesota (Board of Pardons), Nebraska (Board of Pardons), Nevada (Board of Pardon Commissioners), South Carolina (Board of Probation, Parole and Pardon), and Utah (Board of Pardons and Parole)

On at least three occasions, state governors – Toney Anaya of New Mexico in 1986,[316] George Ryan of Illinois in 2003,[317] and Martin O'Malley of Maryland in 2014[318] have commuted all death sentences in their respective States prior to leaving office.

3.8.5 Pardoning Power in USA in Nutshell : USA is a country which follows presidential system of government. It is the country which has written Constitution, the US Constitution of 1787. As there is President in the USA, the presidential power of pardon is part of the constitutional law of the USA, being explicitly provided in the US Constitution of 1787. The annals of the presidential pardon power in the USA however, show that the power did not come in easy way. During the drafting of the Us Constitution of 1787 at Pennsylvania in Philadelphia there was astringent debate on the extent of the presidential power of pardon.[319] But the Framers of the US Constitution of 1787 finally agreed to include the presidential pardon power in the Us Constitution of 1787. This was inserted in Article II (2) of the US Constitution of 1787 which provides that "the President shall have the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." By this provision, the President of USA can grant pardon, reprieve or commutation.

[315]State Clemency Guide.
[316]"Anaya Takes 5 Off Death Row", Los Angeles Times, 26 November, 1986.
[317]Marsh, Jason, "*A Change of Heart*", Greater Good, Berkeley University.
[318]"O'Malley commutes Maryland's last four death sentences", CNN., 31 December, 2014.
[319]The Records of the Federal Convention of 1787, edited by Max Farrand, Yale University Press, New Haven, Vol. II, (1966), p. 626.

The Presidential power of pardon in the USA is understood in the same way as it is understood in other countries, including developing countries and developed ones. For example, in the case of *United States v. Woodrow Wilson,*[320] Chief Justice Marshall defined the pardon to mean an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.

Thus, the Constitution of the United States under 'Article II, Section 2, Clause I' gives powers to the President with the capacity to give reprieves and pardons for offenses against the United States, aside from in instances of impeachment. It includes the ability to concede pardons, conditional pardons, commutations of sentence, conditional commutations of sentence, remissions of fines and forfeitures, respites and reprieve. The pardon intensity of the President stretches out just to offenses cognizable under Federal law. Be that as it may, the Governors of the States can allow pardons or reprieves for offenses under state criminal law. This force is available just if there should arise an occurrence of a violation of Federal law and pardon for the situation of violation of a State law that needs to originate from the Governor of the State concerned. The chief executive may utilize the pardon power to check the decision of the federal judiciary. All federal pardon petitions are routed to the President, who allows or denies the solicitation. Typically, applications for pardons allude for review and non-binding recommendations by the Office of the Pardon Attorney, an official of the United States Department of Justice. The President may still receive pardons by and by and may give them whenever. The President need not provide a purpose behind a pardon, and the Courts and the Congress have no legitimate authority to favour, disapprove, dismiss, or acknowledge a pardon. Civil liability can't be pardoned and hurt against another can still be considered mischief regardless of whether there is not, at this point any criminal liability. Scorn of court can't be pardoned, as they are offenses against the dignity of the Court, and not necessarily offenses against the law. It is available to the convict to decline to acknowledge a pardon on the ground that it is more disgraceful or cumbersome than the sentence. But, there is no such option where the sentence is remitted or driven to a lesser punishment, for, there is no right to incarceration' ensured by the Constitution.

[320]32 US (7 Pet.) 150, 160-61 (1833).

Under the US Constitution, just federal criminal convictions, for example, those adjudicated in the United States District Courts might be pardoned by the President. Besides, the President's pardon power reaches out to convictions adjudicated in the Superior Court of the District of Columbia and military court-martial proceedings. In any case, the President can't pardon a state criminal offense. Accordingly, if you are seeking clemency for a state criminal conviction, you ought not to finish and submit this petition. Instead, you should contact the Governor or other appropriate authorities of the State where you reside or where the conviction happened, (for example, the state leading body of pardons and paroles) to determine whether any relief is available to you under State law. If you have a federal conviction, information about the conviction might be obtained from the agent of the federal court where you were convicted.

Under the Department's guidelines governing petitions for executive forgiveness, an applicant must satisfy a minimum waiting period of five years before he gets eligible to apply for a presidential pardon of his federal conviction. The waiting period, which is designed to bear the cost of the petitioner a sensible period in which to show an ability to lead a responsible, productive, and law-abiding life, begins on the date of the petitioner's discharge from confinement. Alternatively, if the conviction brought about a sentence that did not include any type of confinement, including community or home confinement, the waiting period begins on the date of sentencing. Besides, the petitioner ought to have completely satisfied the punishment imposed, including all probation, parole, or supervised discharge before applying for forgiveness. Also, the waiting period begins upon discharge from confinement for your latest conviction, regardless of whether this is the offense for which pardon is looked for. You may ask for a waiver of this requirement. In any case, the waiver of any portion of the waiting period is seldom conceded and afterward just in the most exceptional circumstances. In request to demand a waiver, you should finish the pardon application frame and submit it with an introductory letter explaining why you believe the waiting period ought to be waived for your situation.

The individual should express the specific reason for which you are seeking pardon and, if applicable, join any significant narrative evidence that indicates how a pardon will assist you with accomplishing that reason, (for example, citations to

applicable provisions of state constitutions, resolutions, or regulations, or copies of letters from appropriate officials of administrative agencies, professional associations, licensing authorities, and so on.). Besides, you should remember that a presidential pardon is ordinarily a sign of forgiveness and is allowed in recognition of the applicant's acknowledgment of responsibility for the crime and established great lead for a significant period after conviction or discharge from confinement. A pardon is not a sign of vindication and doesn't suggest or establish innocence. Hence, while considering the merits of a pardon petition, pardon officials consider the petitioner's acknowledgment of responsibility, regret, and expiation for the offense.

The ability to concede pardons is vested in the President alone. No hearing is hung on the pardon application by either the Department of Justice or the White House. The convict or the petitioner will be notified in writing directed to the last location he provided during the pardon procedure when a final decision is made on his petition. There is no intrigue from the President's decision to deny a pardon demand. That Office of the Pardon Attorney doesn't disclose information regarding the nature or consequences of any investigation that may have been embraced in a particular case, or the specific point in the mercy procedure at which a particular petition is pending at a given time. As an issue of entrenched policy, the specific purposes behind the President's decision to allow or deny a petition, for the most part, are not disclosed by either the White House or the Department of Justice. In addition, reports reflecting deliberative communications pertaining to presidential decision-making, for example, the Department's recommendation to the President in a leniency matter, are confidential and not available under the Freedom of Information Act. If your petition is denied, you may submit another petition for consideration two years from the date of denial.

The regulations contained in this part are advisory only and for the internal guidance of the Department of Justice personnel. They create no enforceable rights in persons applying for executive clemency, nor do they restrict the authority granted to the President under Article II, Section 2 of the Constitution.

President Trump pardoned conservative writer Dinesh D’Souza, who’d pleaded guilty to violating federal campaign contribution limits. A week earlier, he’d

posthumously pardoned boxer Jack Johnson, whose 1913 conviction under the Mann Act has long been seen by many as an injustice. And, on Wednesday, after Kim Kardashian West advocated for the move, he commuted the sentence of Alice Johnson, who's been serving a life sentence for her role in a former Memphis cocaine trafficking operation.[321]

3.9 Pardon Power in Australia

The Australian Constitution of 1901 established a federal system of government, based on the British (Westminster) tradition of government. Powers are distributed between a national government (the Commonwealth) and the six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia). The Australian Capital Territory and Northern Territory have self-government arrangements.

It is not particularly wee known that under the 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, Australian head of state, on the recommendation of the attorney-general. The Governor-General has the power to pardon those convicted of federal crimes on the recommendation of the Prime Minister and Cabinet. The Governors of the States have the power to pardon crimes committed under the laws of their State on the recommendation of the State's Premier and Cabinet. This is called the exercise of the Royal Prerogative of Mercy.

Thus, in Australia, the traditional pardon power is referred to as the royal prerogative of mercy, an executive power that is vested in the Queen and may be exercised by the Governor-General.[322]The Governor-General may only exercise the Royal Prerogative of Mercy in relation to a federal offender convicted of a Commonwealth offence. The Royal Prerogative of Mercy can be exercised as regard to the grant of a free, absolute and unconditional pardon or a full pardon.

The prerogative of mercy is a broad discretionary power that may also be exercised by a state governor who is acting on the advice of the state executive council

[321]https://time.com/5304514/pardon-power-presidents-history/ retrieved on 12/6/2022.
[322]Commonwealth of Australia Constitution Act, Sec. 61.

and the state attorney general. Courts in Australia may also exercise their traditional power to exercise mercy when the circumstances of the defendant or offence warrant relief.

In addition to the prerogative of mercy, Australia has passed legislation that creates additional avenues to seek a pardon, exoneration, reduced sentence, or conditional release.

A grant of mercy generally only applies if the convicted person is 'morally and technically innocent of the offence' and there is no remaining avenue of appeal. There is a broad provision for exceptional circumstances. An application for mercy must be in writing and must provide detailed information on the case. Government advice states applicants should seek their own legal advice before lodging an application.

Under the prerogative in Australia, the Governor-General may act on the advice of the government to grant a free or absolute pardon, a conditional pardon or a remission of penalty, or to order a non-judicial inquiry into a conviction. States and territories have enacted similar legislation, allowing the attorney-general to refer a convicted federal offender's case to a state or territory appeal court.

A Royal pardon is rarely granted. In 2013, the Crown granted a posthumous Royal pardon to UK wartime code breaker Alan Turig, who was convicted over a homosexual relationship. The commonwealth parliamentary library reports that between 1990 and 2012, only four pardons were issued. A number of full and partial remissions of fines were granted, most commonly on the basis of financial hardship.[323]

In 2012, the Australian government rejected appeals for a pardon for 'Breaker' Morant and others who were executed in 1902 for killing civilians during the Boer War. The then attorney general Nicola Roxon said a pardon is only granted where the offender is both morally and technically innocent of the offence. She said Morant and others did kill civilians, regardless of whether they were following orders.[324]

The only instance where the prerogative of mercy was routinely exercised was in the commutation of the death penalty to life imprisonment for those sentenced to death before capital punishment was abolished in the 1970s. It is almost never

[323]Mondaq: https://www.mondaq.com^australia.
[324]*Ibid.*

exercised as doing so is considered to undermine the administration of justice. Certainly the issuing of pardons as done in the United States would be unthinkable in Australia.

3.10 Pardon Power in Canada

Canada is described as a "full democracy", with a tradition of liberalism,[325] and an egalitarian, moderate political ideology. The politics of Canada function within a framework of parliamentary democracy and a federal system of parliamentary government with strong democratic traditions. Canada is a constitutional monarchy, in which the monarch is head of state. In practice, the executive powers are directed by the Cabinet, a committee of ministers of the Crown responsible to the elected House of Commons of Canada and chosen and headed by the Prime Minister of Canada. The British Constitution and the American Constitution, which are quite different, are blended in Canada. Like the United States, Canada has a federal form of government. It was copied from the American example, with variations inspired by American experience and Canadian needs. The division of authority between the Canadian Parliament and the provincial legislatures is much the same as that between the US Congress and the state legislatures. But instead of leaving the provinces all the power that was not specifically conferred upon the Dominion, in accordance with the American principle, the Canadians adopted the opposite principle. They gave the residue of authority to the federal government. This seemed to be the great lesson taught by the American Civil war between the North and the South, during which the framers of the Canadian constitution did most of their work. Thus, the Canadian constitution bears the indelible stamp of the American Civil War. In practice, however, the provinces have gained in power through judicial interpretation of the constitution. Moreover, no province can legislate on banking or criminal law. These are subjects wholly within the federal field. The criminal law is, therefore, uniform throughout the country.

The U.S. duplicate system of courts, federal and state, was also rejected in Canada. There the same courts, with permanently appointed judges, administer both federal and provincial law.

[325] Anne Westhues; Brian Wharf (2017) *Canadian Social Policy: Issues and Perspectives,* Wilfrid Laurier Uni. Press, pp. 10-11. ISBN 978-1-55458-409-3.

Canada resembles the United States rather than Britain in having a written constitution. This is the British North America Act of 1867 and its amendments. At the same time, Canada has also an unwritten constitution, like the British, and this governs the operation of the written one. The most vital part of the Canadian system of government is wholly British and totally un-American. It is the fusion of the executive and the legislative branches of government in the cabinet, which is chosen from the leaders of the majority party in the Parliament at Ottawa. When the Canadians formed their federal union in 1867, they already had this British system in the provinces. They were so convinced by experience and observation that it was better than the American, with its separation of powers and its checks and balances.

By the letter of the British North America Act of 1867, the king rules Canada through the governor general, whom he appoints. In turn, the governor general supposedly rules the provinces through lieutenant governors, whom he appoints. But in reality, the Dominion government chooses the governor general and the lieutenant governors, who, like the king himself, are only figureheads. The real head of the federal government, legislative as well as executive, is the prime minister, in whom all power is concentrated and all responsibility focused.

Canada was once a British colony. Great Britain began acquiring territory in what is now Canada in the 1600s. In 1867, four British colonies (Quebec, Nova Scotia, Ontario, and New Brunswick) joined together as the "dominion of Canada" and became a self-governing state within the British Empire. So, Great Britain has been exercising an influence upon the Canadian state. The Royal Prerogative of Mercy is a monarch's prerogative, in theory and content, exercised in Canada by the Governor General or the Governor in Council. Clemency is granted in exceptional circumstances in deserving cases involving federal offences, where no other remedy exists in law to reduce severe negative effects of criminal sanctions. Clemency can be requested for numerous reasons, including employment, perceived inequity, medical conditions, immigration to Canada, compassion and financial hardship. The Governor General or the Governor in Council grants clemency upon the recommendation of a Minister of the Crown. In most cases, it is the Minister of Public Safety who makes the recommendation.

As already stated, the Royal Prerogative of Mercy originates in the ancient power vested in the British monarch who had the absolute right to exercise mercy on any subject. In Canada, similar powers of executive clemency have been given to the Governor General who, as the Queen's representative, may exercise the Royal Prerogative of Mercy. It is largely an unfettered discretionary power to apply exceptional remedies, under exceptional circumstances, to deserving cases.

Thus, the power to exercise the Royal Prerogative of Mercy for federal offences is vested in the Governor General of Canada by virtue of Letters Patent, constituting that office. In practice, the Governor General will 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 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.

Thus, in Canada it is found that Section 748 and 748.1 of the Criminal Code authorize the Governor in Council to grant free or conditional pardons, and to order the remission of pecuniary penalties, fines and forfeitures imposed under an Act of Parliament. The exercise of these powers is considered by the Federal Cabinet on the advice of the Minister of Public Safety and Emergency Preparedness Canada, or that of at least one other minister. In practice, requests for executive clemency are processed under the Letters Patent constituting the Office of the Governor General of Canada only when it is not legally possible to proceed under the Criminal Code. Therefore, with the exception of respites, relief from prohibitions and remissions of sentence, all positive recommendations are forwarded to the Federal Cabinet for a decision under the provisions of the Criminal Code, rather than to the Governor General of Canada.

It is to be stated here that the Parole Board of Canada (PBC) is the federal agency responsible for making pardon decisions under the *Criminal Records Act* (CRA). Under the *Criminal Records Act*, the Parole Board of Canada can issue, grant, deny and revoke pardons. In 2012, the Parliament of Canada passed the Safe Streets

and Communities Act,[326] which changed many of elements regarding the criminal justice system. The Act replaced the term 'pardon' with 'record suspension',[327]

A pardon keeps the police record of a conviction separate and apart from other criminal records, and gives law-abiding citizens an opportunity to reintegrate into Canadian society. The Royal Canadian Mounted Police (RCMP) removes all information about the conviction for which an individual received the pardon from the Canadian Police Information Centre (CPIC). Federal agencies cannot give out information about the conviction without approval from the Minister of Public Safety, Canada.

A pardon does not, however, erase the fact that an individual was convicted of a crime. The criminal record is not erased, but it is kept separate and apart from other (non-pardoned) criminal records. A pardon removes only disqualifications caused by a criminal conviction, such as the ability to contract with the federal government, or eligibility for Canadian citizenship. If an individual in receipt of a pardon is convicted of a new offence, the information may lead to a reactivation of the criminal record for which the pardon was received in CPIC.A pardon does not guarantee entry or visa privileges to another country. Before travelling to another country, individuals must still contact the authorities of the country in question to find out what the requirements are to enter that country.

Processing of pardons by the Parole Board of Canada generally takes six months for a summary offence and twelve months for an indictable offence. If the Parole Board proposes to deny the application, it can take 24 months to process.[328] Individuals can apply for a pardon if they were convicted as an adult of a criminal offence in Canada, or of an offence under a federal act or regulation of Canada, or if they were convicted of a crime in another country and were transferred to Canada under the *Transfer of Offenders Act* or *International Transfer of Offenders Act*. Non-

[326](https://laws-lois.justice.gc.ca/eng/Annual Statutes/2012-1/), S.C.2012 c.1.
[327] "Canada stiffens policy on sealing of criminal records- but it still looks pretty liberal from here" (http://ccresourcecenter.org/2014/11/23/canada-stiffens-policy-sealing-criminal-records-still-looks-pretty-liberal/).Collateral Consequences Resource Center.
[328]"Record Suspensions" (http://pbc-clcc.gc.ca/infocntr/factsh/pardon-eng.shtml#-16).Parole Board of Canada. Retrieved on 14/06/2023

Canadian citizens are not eligible for a Canadian pardon unless they were convicted of a crime in Canada.

To be eligible for a pardon or record suspension, individuals must have completed all of their sentences and a waiting period. Individuals are considered to have completed all of their sentences if they have:

1. paid all fines, surcharges, costs, restitution and compensation orders,
2. served all sentences of imprisonment, contingent or conditional sentences, including parole or statutory release,
3. completed their probation order.

Prior to 2012, following completion of all of their sentences, individuals must have completed a waiting period, as follows:

(a) Three years for summary convictions under the *Criminal Code* or other federal act or regulation, except sexual crimes against children or youngsters;

(b) Three years under the *National Defence Act*, if fined 2,000 dollars or less, detained or imprisoned six months or less, or subjected to various lesser punishments for a service offence;

(c) Five years for indictable convictions under the *Criminal Code* or other federal act or regulation and summary convictions of sexual crimes against children;

(d) Five years for all convictions by a Canadian offender transferred to Canada under the *Transfer of Offenders Act* or *International Transfer of Offenders Act*;

(e) Five years under the *National Defence Act*, if fined more than 2,000 dollars, detained or imprisoned more than six months, or dismissed from service;

(f) Ten years for indictable convictions for sexual crimes against children and criminals receiving more than two years of imprisonment time for

"serious personal injury offence" such as manslaughter or other designated offence under Section 752 of the Criminal Code.[329]

With effect from 13 March, 2012, the eligibility criteria and waiting periods changed:

1. Five years for summary convictions under the Criminal Code or other federal act or regulation, except sexual crimes against children;
2. Five years under the *National Defence Act*, if fined 2,000 dollars or less, detained or imprisoned six months or less, or subjected to various lesser punishments for a service offence;
3. Ten years for indictable convictions under the *Criminal Code* or other federal act or regulation and summary convictions of sexual crimes against children;
4. Ten years for all convictions by a Canadian offender transferred to Canada under the *Transfer of Offenders Act* or *International Transfer of Offenders Act;*
5. Ten years under the *National Defence Act*, if fined more than 2,000 dollars, detained or imprisoned more than six months, or dismissed from service;
6. "Not Eligible" for indictable convictions for sexual crimes against children (Schedule 1 Offence under CRA); and
7. "Not Eligible" for criminals with more than three offences prosecuted by indictment, each with a prison sentence of two or more years.[330]

Applicants for a record suspension must be able to show that they have completed their sentences in full and provide proof of payment.[331] Individuals can apply for a pardon by filling out the application forms available from the Parole Board and by paying a 631 dollars pardon application fee.

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[329]"Limiting Pardons for Serious Crimes" (http://web.archive.org/web/20130630003221.
[330]Record Suspensions" (http://www.canada.ca/en/parole-board/services/record-suspensions.html). Government of Canada.
[331]"Record Suspension Guide" (https://www.canada.ca/en/parole-board/services/record-suspensions/official-pbc-application-guide-and-forms.html). Parole Board of Canada.

Thus, in Canada, clemency is granted by the Governor-General of Canada or the Governor in Council (the federal cabinet) under the royal prerogative of mercy. Applications are also made to the National Parole Board, as in pardons, but clemency may involve the commutation of a sentence or the remission of all or part of the sentence, a respite from the sentence for a medical condition or a relief from a prohibition, e.g., to allow someone to drive who has been prohibited from driving.

3.10.1 Role of Parole Board in Canada : The role of Parole Board of Canada is very significant. The Parole Board of Canada is the Canadian government organization that is answerable for looking into and giving parole and criminal pardons in Canada. It works under the protection of Public Safety Canada. (PBC) is the government office answerable for settling on pardon choices under the Criminal Records Act (CRA). Under the CRA, the PBC can issue, award, deny, and disallow pardons. In 2012, the Parliament of Canada passed the Safe Streets and Communities Act, which changed a considerable lot of the components in regards to the criminal equity framework. The Act supplanted the expression "pardon" with "record suspension", and the pardon framework was comparatively changed. A pardon keeps the police record of a conviction discrete and separated from other criminal records, and permits decent citizens a chance to reintegrate into Canadian culture.

The RCMP expels all data about the conviction for which an individual got the pardon from the Canadian Police Information Center (CPIC). Government offices can't give out data about the conviction without endorsement from the Minister of Public Safety Canada. A pardon doesn't, in any case, delete the fact that an individual was indicted for an offence. The criminal record isn't deleted, yet it is kept isolated and separated from other (non-pardoned) criminal records. A pardon evacuates exclusions brought about by a criminal conviction, for example, the capacity to contract with the government, or qualification for Canadian citizenship. On the off chance that a person in receipt of a pardon is sentenced for another offense, the data may prompt a reactivation of the criminal record for which the pardon was gotten in CPIC. A pardon doesn't ensure section or visa benefits to another nation. Before heading out to another nation, people should in any case contact the concerned officials of the nation being referred to discover what the prerequisites are to enter that nation. Handling of pardons by the Parole Board of Canada, for the most part, takes a half year for a synopsis

offense and a year for an indictable offense. On the off chance that the Parole Board proposes to deny the application, it can take two years to process.

People can apply for a pardon in the event that they were indicted as a grown-up of a criminal offense in Canada, or of an offense under a government act or guideline of Canada, or on the off chance that they were sentenced for wrongdoing in another nation and were moved to Canada under the Transfer of Offenders Act or International Transfer of Offenders Act. Non-Canadian citizens are not qualified for a Canadian pardon except if they were indicted for wrongdoing in Canada. To be qualified for a pardon or record suspension, people more likely than not finished the entirety of their sentences and a holding up period.

3.11 Pardon Power in France

France, officially the French Republic is a transcontinental country predominantly located in Western Europe. France is a representative democracy organized as a unitary, semi-presidential republic with a head of government, the prime minister, appointed by the President who is the directly elected head of state. The French President performs all those functions, which are usually performed by a constitutional head of a State. Article 17, Fifth Republic Constitution (1958) of France states clearly that the President of the Republic has the right to grant individual pardons. He has the power to grant pardon, reprieve and amnesty to offenders. He is the protector of the independence of judicial authority, and is assisted by the Higher Council of Judiciary, which is presided over by him. Pardons and acts of clemency (graces) are granted by the President of France, who, ultimately, is the sole judge of the propriety of the measure. It is a prerogative of the President which is directly inherited from that of the Kings of France. The convicted person sends a request for pardon to the President of the Republic. The prosecutor of the court that pronounced the verdict reports on the case, and the case goes to the Ministry of Justice's directorate of criminal affairs and pardons for further consideration.

If granted, the decree of pardon is signed by the President, the Prime Minister, the Minister of Justice, and possibly other ministers involved in the consideration of the case. It is not published in the Journal Official.

The decree may spare the applicant from serving the balance of his or her sentence, or commute the sentence to a lesser one. It does not suppress the right for the victim of the crime to obtain compensation for the damages it suffered, and does not erase the condemnation from the criminal record.

When the death penalty was in force in France, all capital sentences resulted in a presidential review for a possible clemency. Executions were carried out if and only if the President rejected clemency, by signing a document on which it was written: "decides to let justice take its course."

The Parliament of France, on occasions, grants amnesty. This is a different concept and procedure from that described above, although the phrase 'presidential amnesty' (*amnistie presidentielle*) is sometimes pejoratively applied to some acts of parliament traditionally voted upon after a presidential election, granting amnesty for minor crimes. Thus, pardons and acts of clemency (graces) are conceded by the President of France, who, at last, is the sole appointed authority of the respectability of the measure. It is a right of the President which is legitimately acquired from that of the Kings of France. The sentenced person sends a request for exculpation to the President of the Republic. The prosecutor of the court that articulated the decision reports working on it and the case goes to the Ministry of Justice's directorate of criminal affairs and pardons for additional consideration.

Whenever in all actuality, the declaration of exoneration is signed by the President, the Prime Minister, the Minister of Justice, and possibly different ministers engaged with the consideration of the case. It is not published in the Journal Official is the administration paper of the French Republic. It publishes the major lawful official data from the national Government of France and the French Parliament.

The pronouncement may spare the candidate from serving the equalization of his or her sentence, or drive the sentence to a lesser one. It does not suppress the ideal for the casualty of the wrongdoing to acquire compensation for the damages it suffered and does not erase the judgment from the criminal record.

At the point when capital punishment was in power in France, every single capital sentence resulted in a presidential review for possible forgiveness. Executions

were done if and just if the President dismissed mercy, by signing an archive on which it was expressed: "decides to let justice follow all the way through".

Instances of pardon are also available in this country. French President Francois Hollande has pardoned a woman who was jailed for 10 years for killing her husband after he abused her for decades. While pardon her, the presidency said in a statement that “in the face of an exceptional human situation, the president wanted to make it possible for (Jacqueline) Sauvage to return to her family as soon as possible”. Sauvage was married for 47 years to Norbert Marot, a violent alcoholic who she said raped and beat her and her three daughters and also abused her son. On September 10, 2012, the day after her son hanged himself; Sauvage shot her husband three times in the back with a rifle. She was found guilty of murder and sentenced to 10 years in prison in October 2014, which was upheld on appeal in December 2015 as the state rejected her plea of self-defence.

In French law for an act to be considered self-defence it must be seen a proportional and in direct response to an act of aggression. Killing in response to repeated acts of violence suffered over decades, as in Sauvage’s case, did not meet this test. She was faulted for her passivity faced with the violence and incest carried out by her husband.

The rare pardon granted by Hollande amounts to a reduction of Sauvage’s sentence that allowed the 68- year old to leave prison after she had spent more than three years behind bars. The gesture came just two days after the President met for the first time with Sauvage’s three daughters and her lawyers. Sauvage’s case had become a cause celebre in France, with more than 400,000 people signing a petition demanding her release. [https://www.theguardian.com] When campaigning for the presidency in 2012, Hollande distanced himself from presidential pardons, describing them as belonging to “a different concept of power”. He had used the power only once before, when he freed convicted bank robber Philippe El Shennawy, who had spent 38 years behind bars, in 2014.

3.12 Pardon Power in Germany

Officially, the Federal Republic of Germany is a country in Central Europe. It is the second most populous country in Europe after Russia, and the most populous

member state of the European Union. Christianity is the dominant religion in Germany while Islam is the biggest minority religion. Today, Germany is still a superpower. It has a very strong economy and is able to compete with other countries. The country has a high life expectancy and is well educated. This makes Germany one of the most powerful countries in the world.

Similar to the United States, the right to grant pardon in Germany is divided between the federal and the state level. Federal jurisdiction in matters of criminal law is mostly restricted to appeals against decisions of state courts. Only 'Political' crimes like treason or terrorism are tried on behalf of the federal government by the highest state courts. Accordingly, the category of persons eligible for a federal pardon is rather narrow. The right to grant a federal pardon lies in the office of the President of Germany, but he or she can transfer this power to other persons, such as the chancellor or the minister of justice. The President enjoys a higher ranking at official functions than the Chancellor. The president's role is integrative and includes the control of function of upholding the law and the Constitution.

In early 2007, there was a widespread public discussion about the granting of pardons in Germany after convicted Red Army Faction terrorist Christian Klar, who was serving six consecutive sentences of life imprisonment, filed a petition for pardon. President Horst Kohler ultimately denied his request. Following a court decision, Klar was released on parole in December, 2008.[332]

For all other (and therefore the vast majority of) convicts, pardons are in the jurisdiction of the states. In some states it is granted by the respective cabinet, but in most states the state constitution vests the authority in the state prime minister. As on the federal level, the authority may be transferred. Amnesty can be granted only by federal law.

3.13 Pardon Power in Ireland

Ireland is a parliamentary democracy. The President of Ireland is the head of State of Ireland. The Office of President was established by the Constitution. He is

[332]"Vorzeitiges Haftende: Ex-RAF-Terrorist Christian Klar ist frei" .(https://www.spiegel.de/politik/deutschland/vorzeitiges-haftende-ex-raf-terrorist-christian-klar-ist-frei-a-597481.html). Der Spiegel (in German).

elected directly by the people and serves a seven year term in office. It is mostly ceremonial and elections are held every seven years, a person can be elected for up to two terms. The Irish Constitution in Article 13.6 states that the right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities. The power of clemency is thus nominally exercised by the President. However, the President of Ireland must act 'on the advice' of the Government (cabinet), so in practice the clemency decisions are made by the government of the day and the President has no discretion in the matter. The responsibility can also be delegated to the people or bodies other than the President.

Amnesty and immunity, on the other hand, are usually dealt with by an Act of the Oireachtas rather than by a general form of pardon or a slate of individual pardons.

There are two methods by which a pardon in Ireland may proceed: Method- I and Method- II. In the first Method, (it is better to call a procedure) aimed at miscarriages of justice, the Minister for Justice may recommend to the Government that they formally advice the President to grant a pardon, and any conditions along with it. The current procedure is specified by Section 7 of the Criminal Procedure Act, 1993, and provides the method by which a person convicted of an offence may apply for a pardon. Under this procedure, the person must: (a) have already been convicted; (b) have used up their appeals; and (c) allege a new fact (previously known and believed to be significant, but which he has a reasonable excuse for not having mentioned) or newly discovered fact (including a fact previously known which was not believed to be significant) showing a miscarriage of justice has taken place.

Then they can apply in writing to the Minister for Justice for a pardon. The minister may then 'make or cause to be made such inquiries as they consider necessary' and may refuse to grant the pardon on his or her own initiative, or if they think the person should be pardoned, bring such argument to the cabinet.

So far the Method- II is concerned, Section 6 of the Criminal Procedure Act allows a Minister for Justice to seek or receive a pardon request from someone whose case is not a 'miscarriage of justice', but has some other fault, such as an archaic law, a

law being misapplied by a rogue judge, a reduction in the harshness of a sentence or a substitution of a sentence, without having to go through the procedure above, gone through appeals, or presented new facts. It also allows the minister to waive the procedure in a case of miscarriage of justice if the specific case warrants it. It may also allow prospective pardons as it allows the minister to pardon someone who has not been convicted yet, which the other procedure requires.

For this purpose, the government itself may assemble a committee, called Committee of Inquiry, to study the case in more detail on their behalf. This may consist of anyone, and any number, but the chair must be: (i) a judge or former judge, or (ii) a barrister of at least 10 years standing, or (iii) a solicitor of at least 10 years standing.

This special committee may look to any material it sees fit to make its decision, even if it was not, or would not be, available to a jury or trial judge in a normal court. The government does not have to be bound by the committee recommendations.

For Pardons under military law, under 7(5) of the Act, the same powers of the Minister for Justice apply to the Minister for Defence in the case of military officers and enlisted convicted by courts martial.

The Minister for Justice or Defence may also, in their absolute discretion, pay compensation, determined by them alone, to any person given a pardon, if this compensation is applied for. If they think the compensation is too low they may challenge for a higher figure in the High Court.

There are instances of Presidential exercise of pardon power in Ireland. Since 1938, the power is used very infrequently compared to, for example, pardons in the United States.[333] In 1940, Thomas Quinn was granted pardon by Douglas Hyde, while another pardon was granted in 1943 to Walter Brady by the same President i.e. Douglas Hyde. Similarly, in 1992, Nicky Kelly was granted pardon by Mary Robinson and in 1999, William Geary was granted pardon by Mary McAleese.

In 2021, President Michael D. Higgins signed a Presidential pardon at an event in Aras an Uachtarain for Mr. John Twiss, who was executed in Cork Prison on 9

[333]Murdoch, Henry (2000): Murdoch's Dictionary of Irish Law (3rd ed.), p.566, ISBN 0-9514032-5-7.

February, 1895. In line with articles 13.6 and 13.9 of the Irish Constitution, the pardon has been granted following a recommendation by Government, which took account of a report by Dr. Niamh Howlin which found that the nature and extent of the evidence against Mr. Twiss could not safely support a guilty verdict. In this context, President Higgins said, "The case of John Twiss has been one of long standing concern for the people of Kerry, Cork and Limerick. Even before his execution, the Fermoy Town Commissioners wrote to the Lord Lieutenant asking him to exercise his Prerogative of Mercy in a petition accompanied with 40,000 signatures, a very substantial number to collect at that time in rural Ireland. Furthermore, the Governor of Cork Prison and the Prison Chaplain both stated their belief that Twiss was innocent while the Jury in the Coroner's Inquest stated that they believed in Mr. Twiss' innocence."

The President further commented, "While we at this remove cannot undo what happened, we do have the power to acknowledge that what happened to John Twiss was a great wrong. I am pleased to be able to formally grant a Presidential Pardon to him today, and to at least set the record straight. I hope that my doing so will bring a sense of closure to his family following almost 127 years. I commend them for their efforts. I would also like to commend the Michael O'Donohoe Memorial Project for their work to bring the case of John Twiss to public attention and their help in bringing the process of obtaining a pardon to fruition". This was the sixth pardon and at the same time the third posthumous pardon granted by the President Higgins. It was the second occasion on which a pardon was granted for a case in Ireland predating the establishment of the State, following the pardon which was awarded by President Higgins to Maolra Seoighe (Myles Joyce) in 2018.[334]

3.14 Pardon Power in Russia

The 1993 constitution declares Russia a democratic, federative, law-based state with a republican form of government. State power is divided among the legislative, executive, and judicial branches. Diversity of ideologies and religions is sanctioned, and a state or compulsory ideology may not be adopted. Russia or the Russian Federation is a transcontinental country spanning Eastern Europe and Northern Asia. Following the dissolution of the Soviet Union in 1991, Russia became an independent

[334] President.ie. https://president.ie Dec. 16, 2021 retrieved on 26/05/2023.

country, the newly independent Russian SFSR (Soviet Federative Socialist Republic) renamed itself the Russian Federation. In the aftermath of the constitutional crisis of 1993, a new constitution was adopted, and Russia has since been governed as a federal semi-presidential republic and the 1993 Russian Constitution remains in force today. The constitution establishes Russia as a semi-presidential system which separates the President of Russia from the Government of Russia which exercises executive power.[335]The Russian Federation consists of republics, krais, oblasts, cities of federal importance, an autonomous oblast and autonomous okrugs, all of which are equal subjects of the Russian Federation. According to the Constitution of Russia, the President of Russia is the head of state and of a multi-party system with executive power exercised by the government, headed by the Prime Minister, who is appointed by the President with the parliament's approval.

According to Article 50 of the Constitution of the Russian Federation, anyone convicted of a crime has a right to request a pardon. The President of the Russian Federation is granted the right of pardon by Article 89 of the Constitution of the Russian Federation. Under this Article, the President holds the exclusive authority to grant a pardon. The chain of pardon committees manage lists of people eligible for pardon and directs them to the President for signing.

In accordance with the law, the pardon of convicts on the verdict of the court is exercised by the head of State. This rule is fixed in the Constitution and the Code of Atrocities. Pardon, as an act of mercy, can be applicable to the following class of persons:

(1) by the convicted authorities of the Russian Federation and serving time in the territory of the country
(2) sentenced to punishment by courts of other sovereign states, but being behind prisons of Russia, provided that this rule is prescribed in an international treaty
(3) Citizens who have served their sentences and have an undefined previous conviction for the crime committed.

[335]I.E.Kozlova and O.E. Kutafin, *Konstitutsionnoe Pravo Rossii* (Constitutional Law of Russia), (4th ed., 2006) p.383.

When considering a petition for clemency of a person who committed a crime, the following points should be taken into account:

(a) The degree, nature, and gravity of the deed;

(b) The behaviour of the person during the period of serving the term (whether the convicted person worked, whether he did not evade participation in the creative activity, or whether he committed unlawful actions);

(c) The time that the detainee spent in the correctional centre (in light of the fact that the pardon doesn't have any significant bearing to those people who have not served half of the term of total punishment);

(d) Whether a new offence was committed by the accused during the period of the trial period (it is characteristic only with conditional conviction);

(e) The earlier application of an act of amnesty or pardon to the convicted person, as well as an early release;

(f) Compensation for damage caused by the atrocity;

(g) Information on the identity of the convict (if he has a family, children, also takes into account his age, the number of convictions).

This information is necessary to ensure that the head of state could make the right decision with respect to a certain person. All in all, the implementation of the pardon is one of its main functions, subordinated only to the president.

Pardon applies to the heads of State, and, accordingly, only they will decide on the application of the act of mercy to the guilty person. This is the law. Therefore, the identity of the convict, who asks the president for pardon, is subject to a detailed and comprehensive study. Nevertheless, according to the law, not all intruders can count on the charity of the head of state. These include the following categories of people:

(i) Committed a deliberate crime during the trial period;

(ii) Violators of the orders by those serving punishment (especially if a detainee has neglected the rules established in the correctional facility);

(iii) Released from the punishment in connection with amnesty, pardon or ahead of schedule;

(iv) Citizens who have already been replaced with a softer punishment.

It is to be noted here that Boris Yeltsin's Constitution of 1993 created a new institution for the administration of pardon policy within the executive: Presidential Commission on Pardon. Previously, the power to pardon was embedded in the legislature (Supreme Soviet). Yeltsin staffed his commission with well-known human rights activists, former prisoners, and literary scholars. While the composition of the commission was well publicized, its proceedings remained secret. Only in 2000 did the commission produce its first bulletin, describing procedures and personnel but noticeably failing to report decisions and results.[336]

While President Boris Yeltsin frequently used his power of pardon (1998 : 7,000 to 8,000 cases), his successor Vladimir Putin is much more hesitant; he granted five pardons in 2014 and two in 2015.

On January 24, 2002, Vladimir Putin's press office announced that the Russian President had "approved" a bold proposal to pardon all incarcerated mothers. The announcement generated, among other things, expectations of an immediate release of a large number of women from prison, as well as hopes for an end to a *de facto* moratorium on pardons.[337]

Russian President Vladimir Putin also pardoned two women who were sentenced to prison terms for sending text messages to Georgian acquaintances about the movement of Russian military equipment on the eve of a war in 2008. Two orders published by the Kremlin said Annik Kesyan and Marina Dzhandzhgava would not have to complete the rest of their sentence. It cited humanitarian principles for the decision. Kesyan and Dzhandzhgava were found guilty of treason for sending text messages about the movement of Russian military hardware near the border with Georgia's breakaway region of Abkhazia not long before a war broke out in 2008. Kesyan was sentenced to eight years in prison, while Dzhandzhgava was given a prison term of 12 years, according to Team 29, an association of lawyers based in St. Petersburg. Similarly, Putin also pardoned a third woman, Oksana Sevastidi, who was

[336]Federal Sentencing Reporter, Vol. 14, no. 2, September/ October, 2001.
[337]*Ibid.*

also convicted of treason for sending a text message to a Georgian acquaintance about a train carrying Russian military equipment.[338]

A pardon can be requested at any time. Although a one year waiting period is required between requests.The power to pardon, granted to the president by the constitution (American as well as Russian) is strangely anachronistic. It is an all- but-royal prerogative that places the democratically elected president above the law. Recent scandals notwithstanding, presidential clemency seems to play a much smaller role in the United States than in Russia, where the Pardons Commission and the president who signed pardons until recently administered justice where the judicial system failed to do so.

Throughout Russian history, the superior ruler, be it the Czar or the Secretary General of the Communist Party, enjoyed virtually unlimited power, while the institutions were traditionally weak. The Russian people have always appealed to the head of State as the source of absolute authority and truth and the ultimate defender against heartless bureaucracy or corrupt courts. This attitude is still alive. It's no wonder, since the institutions that have emerged over the decade of post-Communist development are still quite weak. The advent of Putin boosted the popularity of the President and the Presidency, but not respect for other government institutions.

At first President Putin did not question the pardoning practice established under his predecessor, Boris Yeltsin. He too signed all pardons submitted to him. By August 2000 some 12,000 pardons had been signed over a period of 12 months. But subsequently, Putin's advisers intend to reduce the operation of the Pardons Commission and change its status, so that it will be a bureaucratic institution, not a body made up of liberal writers and journalists. The government says it plans to reform the judicial system, but for the time being it remains as before – corrupt, inefficient and manipulated by political bosses. This makes the Pardons Commission an appropriate and indispensable body, even if it is not a very modern one.

Recently, President Putin endorsed his aides' effort by saying that he had his doubts whether the decisions of the Pardons Commission had been justified. This means that his KGB aides will most likely have their way. As a result, the President

[338]Putin pardons two women given prison terms for text messages , reuters.com.

will retain some of his monarchical function, but the victims of bad trials will lose their selfless defenders. And one more achievement of the Yeltsin era that served to soften the legacy of the Communist Police State will have proven itself sadly reversible.[339]

3.15 Pardon Power in China

China is one of the countries with longest histories in the world. The Chinese people of all ethnic groups jointly created its magnificent culture and have a proud revolutionary tradition.

After 1840, feudal China gradually became a semi-colonial, semi-feudal country. The Chinese people, wave upon wave, waged heroic struggles for national independence and liberation and for democracy and freedom.

In the 20th century, momentous historical changes took place in China. The revolution of 1911, led by Dr. Sun Yatsen abolished the feudal monarchy and gave birth to the Republic of China. However, the historic mission of the Chinese people to oppose imperialism and feudalism was not yet accomplished. In 1949, after engaging in protracted, arduous and tortuous struggles, armed and in other forms, the Chinese people of all ethnic groups led by the Communist Party of China with Chairman Mao Zedong as its leader finally overthrew the rule of imperialism, feudalism and bureaucrat-capitalism, won a great victory in the New Democratic Revolution, and founded the People's Republic of China. The Chinese people thus secured power and became masters of their own country. After the founding of the People's Republic of China, the country gradually achieved the transition from a new democratic society to a socialist society.

The Preamble of Constitution further says, "We the Chinese people of all ethnic groups will continue, under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the Theory of Three Represents, the Scientific Outlook on Development and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, to uphold the people's democratic dictatorship, stay on the socialist road, carry out reform and opening up, steadily improvement the socialist institutions, develop the socialist

[339]Masha Lipman, a Russian Journalist, writes a monthly column for the Washington Post: *Ibid.*

market economy and socialist democracy, improve socialist rule of law, apply the new development philosophy, and work hard in a spirit of self-reliance to modernize step by step the country's industry, agriculture, national defense, and science and technology and promote coordinated material, political, cultural- ethical, social and ecological advancement, in order to build China into a great modern socialist country that is prosperous, strong, democratic, culturally advanced, harmonious and beautiful, and realize the great rejuvenation of the Chinese nation.

The Constitution affirms, in legal form, the achievements of the struggles of the Chinese people of all ethnic groups and stipulates the fundamental system and the task of the state. It is the fundamental law of the state and has supreme legal force.

Article 1 of the Constitution also says that the People's Republic of China is a socialist state governed by a people's democratic dictatorship that is led by the working class and based on an alliance of workers and peasants. The socialist system is the fundamental system of the people's Republic of China. Leadership by the Communist Party is the defining feature of socialism with Chinese characteristics. Article 2 envisages that all power in the People's Republic of China belongs to the people. The organs through which the people exercise state power are the National People's Congress and the local people's congresses at all levels. The people shall, in accordance with the provisions of law, manage state affairs, economic and cultural undertakings, and social affairs through various channels and in various ways. Article 3 states that the state institutions of the People's Republic of China shall practice the principle of democratic centralism. The National People's Congress and the local people's congresses at all levels shall be created through democratic election and shall be responsible to the people and subject to their oversight. All administrative, supervisory, adjudicatory and procuratorial organs of the state shall be created by the people's congresses and shall be responsible to them and subject to their oversight. The division of functions and powers between the central and local state institutions shall honor the principle of giving full play to the initiative and motivation of local authorities under the unified leadership of the central authorities. Article 5 further states that the People's Republic of China shall practice law-based governance and build a socialist state under the rule of law. The state shall safeguard the unity and sanctity of the socialist legal system. No law, administrative regulation or local

regulation shall be in conflict with the Constitution. All state organs and armed forces, all political parties and social organizations, and all enterprises and public institutions must abide by the Constitution and law. Accountability must be enforced for all acts that violate the Constitution or laws. No organization or individual shall have any privilege beyond the Constitution or the law. Article 28 highlights on administration of the criminal justice system which also states that the state shall maintain public order, suppress treason and other criminal activities that jeopardize national security, punish criminal activities, including those that endanger public security or harm the socialist economy, and punish and reform criminals.[340]

According to Article 57, the National People's Congress of the People's Republic of China is the highest state organ of power. Its permanent organ is the National People's Congress Standing Committee. Article 58 says that the National People's Congress and the National People's Congress Standing Committee exercise the legislative power of the state. The National People's Congress shall exercise the functions and powers, amongst others, the amending the Constitution, and enacting and amending criminal, civil, state institutional and other basic laws also.[341] The National People's Congress Standing Committee shall exercise, amongst other, the functions and powers of interpreting the Constitution and overseeing its enforcement, enacting and amending laws other than those that should be enacted by the National People's Congress; and when the National People's Congress is out of session, partially supplementing and amending laws enacted by the National People's Congress, but without conflicting with the basic principles of those laws; and interpreting laws.

The President of the People's Republic of China is elected by the National People's Congress.[342] In People's Republic of China, the Supreme People's Court is the highest adjudicatory judicial organ which shall also oversee the adjudicatory work of local people's courts at all levels and of special people's courts; people's courts at higher levels shall oversee the adjudicatory work of those at lower levels.[343] The Supreme People's Court shall be responsible to the National People's Congress and the

[340]English.www.gov.cn.archive; http://english.www.gov.cn.archive.
[341] Article 62.
[342]Article 79.
[343]Article 132.

National People's Congress Standing Committee. Local people's courts at all levels shall be responsible to the state organs of power that created them. [Article 133] Another important aspect to consider is that under Article 135, the People's Republic of China shall also establish a Supreme People's Procuratorate, a legal oversight and the another highest organ of the state remaining responsible to the National People's Congress and the National People's Congress Standing Committee.[344]

In handling criminal cases, the people's courts, the people's procuratorates and public security organs should each be responsible for their respective tasks, work together with each other, and act as checks on each other to ensure the faithful and effective enforcement of the law.[345]

The President shall be the head of the State and shall represent the Republic of China in foreign relations. He shall, in accordance with law, exercise the power of granting amnesties, pardons, remission of sentences and restitution of civil rights. However, as per Article 80 of the Constitution, the President of the People's Republic of China is to act or discharge his powers in pursuance of the decisions of the National People's Congress and its Standing Committee.

The first Constitution of the People's Republic of China was declared in 1954. After two intervening versions enacted in 1975 and 1978, the current Constitution was declared in 1982.The Constitution of the People's Republic of China is the supreme law of the People's Republic of China. It was adopted by the 5th National People's Congress on December 4, 1982, with further revisions about every five years. It is the fourth Constitution in the country's history, superseding the 1954 Constitution, the 1975 Constitution, and the 1978 Constitution.[346]The year 1954 China Constitution stipulated amnesty and pardon, both of which were decided by the Standing Committee of the National People's Congress and issued by the President. The latter three constitutions of the years 1975, 1978 and 1982 all removed amnesty and only kept pardon. In China, the pardon was decided by the National Standing Committee of the People's Congress and issued by the President.

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[344] Article 138.
[345]Article 140.
[346]Diamant, Neil J., *Useful Bullshit: Constitutions in Chinese Politics and Society*, Cornell University Press (2022): https://en.m.wikipedia.org.

The order of special pardons for certain prisoners signed and issued by Chinese President Xi Jinping recently is a sign of the country's commitment to rule of law and rule by virtue. The latest move is another important implementation of the special pardon system stipulated in China's Constitution, and is of great political and legal significance. The decision of granting the special pardons had been adopted by the Standing Committee of the National People's Congress, China's top legislature.

The year 2019 marks the 70 th anniversary of the founding of the People's Republic of China (PRC). It is also a crucial year for the period in which the timeframes of the two centenary goals converge. At this important historic moment, granting special pardons to criminals demonstrates the efforts of the Communist Party of China to inherit and carry on the fine traditions of the Chinese civilization including cautious punishment and benevolence toward prisoners.

The move can also help promote the notion of law-based governance, create a social atmosphere of Constitution-based governance, advance China's rule of law, and promote social harmony and stability.

Among the nine categories of criminals granted special pardons, some have made contributions to national independence and the founding of New China. Granting pardons to them can highlight the theme of celebrating the PRC's 70^{th} founding anniversary. Some have contributed to consolidating state power, safeguarding state sovereignty, security and territorial integrity, enhancing composite national strength, defending the motherland and building socialist modernization. Criminals, who mainly fall into the nine categories; but are found to have committed embezzlement and bribe-taking, serious criminal crimes, crimes that endanger national security, terrorism, or in other specific situations, however, shall not be pardoned.

The decision has fully taken into account the situation in the fight against corruption in China that remains grim and the need to safeguard national security and people's sense of personal security.

To ensure the political, legal and social effects of the special pardons, they must be carried out in accordance with the law and in an active, prudent and orderly manner that honors fairness and justice.

Judicial administrative organs submit pardon cases to the courts for trial, while the procuratorial organs supervise the implementation of the special pardons. Each process should be handled in strict accordance with the Constitution and laws. In the meantime, it is necessary to strengthen ideological, moral and legal education for all prisoners, access the risk of those proposed to be pardoned, and strengthen education and management of those who are pardoned.

The latest special pardons embody the distinctive spirit of the rule of law and demonstrate China's judicial protection of human rights and underpin its image as an open, democratic, rule-of-law and culturally advanced country. If properly analyze the theory of pardon as practiced in the People's Republic of China, then it may easily be derived that the power to pardon by the Chinese president actually lies in the hands of the Chinese people, as the power to be exercised by the President is virtually exercised as decided by the Standing Committee of the National People's Congress whose members are elected by the people.

3.16 Pardon Power in Switzerland

Switzerland, officially the Swiss Confederation, is a landlocked country located at the confluence of Western, Central and Southern Europe.[347] It is bordered by Italy to the south, France to the West, Germany to the North and Austria and Liechtenstein to the East. Switzerland is one of the world's most developed countries.

The Federal Constitution adopted in 1848 is the legal foundation of Switzerland's federal state, where Cantons are federated states. A new Swiss Constitution was adopted in 1999 that did not introduce notable changes to the federal structure. Moreover, the newly revised Constitution (2000) of Switzerland directly describes it as the Swiss Federation. The Constitution also provides for Republicanism in the Cantons. Article 51 declares, "Every Canton shall adopt a democratic Constitution".

The Swiss Constitution is indeed unique in character. Its direct democracy devices are the envy of the democratic Constitutions of the world. Its plural executive combining in itself the advantages of Parliamentary and Presidential executives and

[347] [Berner, Elizabeth Kay; Berner, Robert A, *Global Environment: Water, Air, and Geochemical Cycles,* (2012) 2nd ed., Princeton University Press, ISBN 978-1-4008-4276-6, Retrieved 18 May, 2023].

avoiding their pitfalls is another laudable contribution to the mechanism of world governments.

An exclusive feature of the Swiss Constitution is that it provides for plural executive which consists of seven members elected by the Federal Assembly for four years. The Executive powers are in a group exercised by the Federal Council. The President is elected by the Federal Assembly for a period of one year only, and is simply "first among equals". He in no way enjoys a position superior to that of the rest of his colleagues.

In Switzerland, pardons may be granted by the Swiss Federal Assembly for crimes prosecuted by the federal authorities. This clearly indicates that the President alone can't exercise this power. For crimes under cantonal jurisdiction, cantonal law designates the authority competent to grant pardons, if any. In most cantons, the cantonal parliament may pardon felonies, and the cantonal government may pardon misdemeanors and minor infractions.

The provisions for pardons and amnesties have been made available in Title Eight of the Swiss Criminal Code. Art. 381 laws down that the right to grant a pardon in relation to convictions based on this Code or any other federal act is exercised: (a) by the Federal Assembly in cases in which the Criminal or Appeals Chamber of the Federal Criminal Court or an administrative authority of the Confederation has passed judgement; and (b) by the pardons authority of the Canton in cases in which a cantonal authority has passed judgement. Under Art. 382, the petition for a pardon may be filed by the offender, his legal representative or, with consent of the offender, by his defence agent, spouse or registered partner. In the case of political felonies and misdemeanors and in the case offences connected with political felonies or misdemeanors', the Federal Council or the cantonal government is also entitled to initiate the pardon procedure. The Pardons authority may stipulate that the petition for a pardon that has been refused may not be filed again before the expiry of a certain period. As regards to the effects, Art. 383 says that a pardon may wholly or partly remit all sentences imposed by legally binding judgement or commute the sentences to less severe forms of sentence. The pardon decree specifies the extent of the pardon. Art. 384 is concerned with Amnesties which says that the Federal Assembly may grant an

amnesty in criminal matters governed by this Code or any other federal act. An amnesty excludes the prosecution of specific offences or categories offender and grants the remission of related sentences.

3.17 Pardon power in Sri Lanka

Sri Lanka earlier known as Ceylon, benefited from the traditions of the rule of law and constitutional government that emerged during 150 years of British colonial rule. These traditions fostered the development of a political system characterized by broad popular participation in the political process, generally strict observance of legal guarantees of human and civil rights, and an orderly succession of elected governments.

Sri Lanka has its own political history. The British moved into Sri Lanka from India and defeated the Dutch in 1796 to bring it under British control. In the beginning, as the British had no permanent interests in the island, they administered the island from Madras. In 1802, Sri Lanka was made a crown colony, which meant that the island's affairs were administered by the Colonial Office in London, rather than by the East India Company that governed India at that time. The administration was carried on by the Governor who was appointed by the British Crown. Until 1972, Ceylon was a commonwealth realm with Queen Elizabeth II as the head of state and Queen of Ceylon.

Sri Lanka is a developing and Common Law Country. At present, is a Democratic Republic and a Unitary State which is governed by a semi-presidential system, with a mixture of a presidential system and a parliamentary system. It is a semi- Presidential representative democratic republic, whereby the President of Sri Lanka is both the head of state and head of government, and it relies on a multi-party system. Executive power is exercised by the President on the advice of the Prime Minister and Cabinet of Ministers.

The Constitution of Sri Lanka has been the Constitution of the island nation of Sri Lanka since its original promulgation by the National State Assembly on 7 September, 1978. It is Sri Lanka's second republic constitution and its third Constitution since the Country's independence as Ceylon in 1948. As of October 2020, it has been formally amended 20 times.

It is to be noted that the 1978 Constitution changed the country's formal name from the Republic of Sri Lanka to the Democratic Socialist Republic of Sri Lanka and established a presidential form of government similar to that operating in France under the Fifth Republic.

Sri Lanka's judiciary consists of a Supreme Court – the highest and final superior court of record, a Court of Appeal, High courts and a number of subordinate courts. The highly complex legal system reflects diverse cultural influences. Criminal law is based almost entirely on British law. Basic Civil law derives from Roman law and Dutch law.

Article 34(1) of the Sri Lankan Constitution empowers the president to pardon and offender convicted of any offence in any Sri Lankan court. In Sri Lanka, thus, the President can grant a pardon, respite or substitute a less severe form of punishment for any punishment imposed to any offender convicted of any offence in any court within the Republic of Sri Lanka. When an offender has been sentenced to death, the Constitutional process is as follows: (1) the president shall require the judge who tried the case to make a report; (2) it shall be forwarded to the Attorney-General for his advice; (3) thereafter, the report shall be sent to the Minister of Justice to forward to the president with his recommendation. The relevant clause is noted below:

"34. (1) The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka – (a) grant a pardon, either free or subject to lawful conditions; (b) grant any respite, either indefinite for such period as the President may think fit, of the execution of any sentence passed on such offender; (c) substitute a less severe form of punishment for any punishment imposed on such offender; or (d) remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence:

"Provided that where any offender shall have been condemned to suffer death by the sentence of any court, the President shall cause a report to be made to him by the Judge who tried the case and shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the

subject of Justice, who shall forward the report with his recommendation to the President".

The clause however does not extend to criminals serving other sentences, and in this regard it appears that the Executive President has an unfettered power to pardon criminals who have committed crimes for which they have not been served a death sentence. It is generally referred to as a Presidential pardon. Thus, the power to pardon is vested in the executive, arguably as a 'check' on the powers of the judiciary, as it provides a means of rectifying any miscarriage of justice.[348] However, leaving this executive power 'unchecked' could result in abuse.

In the past, several Sri Lankan presidents have used their power to grant controversial pardons in some high-profile cases. For instance, former President Maithripala Sirisena granted two such presidential pardons during his term in office. In May 2019, he pardoned secretary general of the militant Sinhala- Buddhist group Bodu Bala Sena, Venerable Galagoda Aththe Gnanasara Thera. The Thera was serving a six-year prison sentence for contempt of court imposed by the Court of Appeal in August 2018[349]. His subsequent appeals against the prison sentence filed in the Court of Appeal were dismissed. The second controversial pardon by President Sirisena was granted on 9 November 2019 to Don Shramantha Jude Anthony Jayamaha, who was sentenced to death in the Royal Park Murder case by the Court of Appeal in 2012. The Supreme Court in 2014 affirmed this sentence. The president's pardon was reportedly on the basis of requests made by the Buddhist clergy, and other parties, including the considering of reports prepared by the Prisons Department and several other state institutions.

Previous President had granted pardons to convicted criminals too. In 2019, Sunil Perera, better known as 'Gonawela Sunil' who was serving a sentence of rape, and who had close links with the United National Party (UNP) was granted a pardon by then President, J.R.Jayewardene. Similarly, President Ranasinghe Premadasa pardoned Manohari Daniels, who was convicted of aiding and abetting the Liberation Tigers of Tamil Eelam (LTTE) to carry out a bomb attack opposite Zahira College,

[348]William F. Duker, "The President's Power to Pardon: A Constitutional History" (1977)18 *William and Mary Law Review* 475, at p. 536.
[349] (*Galagodaaththe Gnanasara v. Hon. Attorney General*, CA (CC) Application No. 04/2016).

Maradana in 1987 that killed 40 persons. Daniels was pardoned at a time when the Premadasa government was having 'peace talks' with the LTTE, as a gesture of goodwill in what was a bid to ensure the talks succeeded.

There cannot be any doubt that the presidential pardons mentioned were nothing but politically motivated actions on the part of the executive and the political party he or she represents. The privilege of being pardoned would not be extended to others in the death row who do not belong to the elite club of persons who have in common the motto, "it is who you know and not what you know that matters".

The pardoning of Mary Juliet Monica Fernado, the wife of a former Minister of Parliament is another example of a controversial pardon. She was sentenced to death for a double murder in 2005. Subsequently, on International Women's Day in March 2009, former President Mahinda Rajapaksa granted her a presidential pardon. In addition to the above high –profile pardons, Sri Lankan presidents have routinely granted mass scale pardons to persons convicted of minor offences. These pardons are usually granted on special days, such as Independence day, Vesak day and Christmas.

On 26 March 2020, President Gotabaya Rajapaksa granted a presidential pardon to former Lance Corporal Sunil Ratnayake, a prisoner on death row for the murder of eight persons in Mirusuvil in 2000. Ratnayake was sentenced to death by a Trial-at-Bar bench of the Colombo High Court in June 2015. In the case of *Rathnayake Mudiyanselage Sunil Ratnayake v. Hon. Attorney General,*[350] a five-judge bench of the Supreme Court affirmed this sentence.

The controversy with presidential pardon has arisen again following President Gotabaya Rajapaksa's pardoning of former MP Duminda Silva who had been convicted for murder and sentenced to death by a High Court and the sentence unanimously ratified by the Supreme Court.

It is not clear whether the procedure followed by President Gotabaya Rajapaksa was consistent with the constitutional requirement. The same goes for President Sirisena in regard to the pardon granted to Anthony Jayamaha and whether it was in line with what is specified in the Constitution. Neither is it clear whether President

[350] SC TAB 01/2016, decided in April 2019.

Mahinda Rajapaksa adhered to the constitutional provision in pardoning Monica Fernando.

The cases discussed above indicate that in Sri Lanka, the granting of presidential pardons have been abused, as they seem to have undermined the role of the judiciary, rather than rectify miscarriages of justice. This is evidenced by the fact that several sentences in the above cases were affirmed by the Supreme Court, which is the 'highest and final superior court of record in the Republic', as highlighted in Article 118(c) of the Constitution. Therefore, presidential pardons should be subject to check and balances. Such check and balances are vital to uphold the separation of powers between the three branches of government – a doctrine incorporated in the Sri Lankan Constitution.

Some countries have empowered their judiciaries to review executive pardons. For example, in the United Kingdom, the courts have the jurisdiction to review the exercise of the Royal Prerogative of Mercy by the monarch (on advice of the justice secretary) 'in accord with accepted public law principles'. Thus, in the United Kingdom, the power to grant pardons does not go un-checked. Meanwhile in India, through the landmark case of *Epuru Sudhakar & Anor v. Government of Andhra Pradesh & Ors,* the Indian Supreme Court held that it has jurisdiction to judicially review the pardoning power of the president.

In Sri Lanka, except decisions to declare war, the official decisions of a president may be challenged by invoking the fundamental rights jurisdiction of the Supreme Court as per Article 35(1) of the Constituion. This mechanism was introduced through the Nineteenth Amendment to the Constitution. As such, a solution to 'check' controversial presidential pardons is available in Sri Lanka, thus, upholding the separation of powers. This remedy has been used to challenge the presidential pardons granted to Gnanasara Thera, Jayamaha, and Ratnayake.

The current practice of granting presidential pardons in Sri Lanka is deeply problematic. Presidential pardons in Sri Lanka seem to have conferred a constitutional privilege for some citizens to be more equal than others, even for those convicted of murder by the highest court in the country, the Supreme Court. Another feature associated with these pardons is that politicians from the major parties do not make

much noise over these compared to other comparatively less important issues for which they usually protest. However, the course of action provided through the Nineteenth Amendment for the Supreme Court to review pardons is a positive feature in Sri Lanka's constitutional framework. It can provide an avenue to maintain checks and balances on executive power, and prevent a culture of injustice, which undermines the rule of law.

3.18 Republic of South Africa

The Republic of South Africa is now a developing nation with a British colonial base before it has achieved the present status. It has a prolonging political past history. The South Africa Act, 1909, an Act of the Parliament of the United Kingdom, unified four British colonies – Cape Colony, Transvaal Colony, Orange River Colony and Natal Colony – into the Union of South Africa, a self-governing dominion. The Republic of South Africa Constitution Act, 1961 transformed the union into a republic, replacing the Queen with a State President, but otherwise leaving the system of government largely unchanged. By removing the last Commonwealth thresholds, however, the Act made the then-apartheid government completely sovereign. The Republic of South Africa Constitution Act, 1983 created a Tri-cameral Parliament with separate houses, representing Whites, Coloured and Indians; but without representation for Blacks. The figurehead State President and executive Prime Minister were merged into an executive State President, chosen by Parliament. This contradiction remains to date and is nearly unique to South Africa.

The Constitution of the Republic of South Africa, 1993 or Interim Constitution was introduced at the end of apartheid to govern the period of transition. It introduced, for the first time, the framework of a liberal democracy, universal adult suffrage and a bill of rights. At present, the Constitution of South Africa, popularly known as the "Constitution of the Republic of South Africa, 1996" is the supreme law of the Republic of South Africa, which provides the legal foundation for the existence of the republic. The Constitution defines South Africa as "one, sovereign, democratic State". Under the new Constitution, the Parliament is bicameral, and consists of the National Assembly (the lower house) and the National Council of Provinces (the upper house). The Constitution vests in the President the powers of the head of state and head of

government. In short, South Africa is a Parliamentary Republic, but unlike most such Republics, the President is both head of State and Head of government and depends for his tenure on the confidence of Parliament.

The first way in which amnesty might be granted is through the President's power to pardon offenders under section 84(2) (j) of the Constitution, which provides that 'the President is responsible for ….pardoning or reprieving offenders and remitting any fines, penalties or forfeitures'. Thus, under Section 84(2) (j) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), the President of the Republic of South Africa is responsible for pardoning or reprieving offenders. This power of the President is only exercised in highly exceptional cases.

To pardon a person is to forgive a person for his or her deeds. The pardon process is therefore not available to persons who maintain their innocence and is not an advanced form of appeal procedure. Pardon is only granted for minor offences after a period of ten years has elapsed since the relevant conviction. For many serious offences, for example, if the relevant court viewed the offence in such a serious light that direct imprisonment was imposed, pardon will not be granted even if more than ten years have elapsed since the conviction.

On its face, the power is broad. To pardon someone is to expunge a conviction - to treat a person convicted of a crime as if he had not committed it. To grant a reprieve is to delay or cancel a punishment for a crime. In America, reprieves are often granted to prevent the death penalty from being carried out. Finally, to remit a fine, penalty or forfeiture is to reduce or eliminate it.

The Section 84(2)(j) power can be used to pardon an individual,[351] or a group of people.[352] In the *Hugo* case, for example, President Mandela remitted the sentences of all mothers, with children under the age of 12, who were imprisoned for having committed minor offences. In *Albutt*[353]and *Chonco*,[354] President Mbeki pardoned certain people who would have been eligible for amnesty from the Truth and Reconciliation Commission, but who had failed to apply for it. No prisoner has a right

[351]*President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 para 29.
[352]Hugo *supra* n 1.
[353]*Albutt v. Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).
[354]*Minister for Justice and Constitutional Development v. Chonco* 2010 (4) SA 82 (CC).

to be pardoned.[355] Parliament cannot restrict the President's power through legislation,[356] and the President cannot restrict it himself by agreement.[357] Finally, pardoning might be something the President does on his own initiative (as in *Hugo*) or after receiving applications (as in *Albutt* and *Chonco*).

But while the power is broad, it is not unrestricted. The most significant restriction is that it must be exercised in a way that is consistent with the Constitution.[358] This means several things. First, he can't pardon in breach of the Bill of Rights. He is not allowed to pardon only white prisoners, for example, because that would be unfairly discriminatory in contravention of section 9 of the Constitution. Secondly, he must exercise the power in good faith. A pardon in exchange for a bribe would be an example of one made in bad faith. Thirdly, the power must be exercised rationally, in other words, it must be rationally related to a legitimate purpose. Finally, he must exercise the power personally. He cannot delegate it to a subordinate.

The question here is: Can the pardon power be used to provide amnesty for a hypothetical President? Possibly, but such a scheme will encounter significant legal obstacles.

The first option is for president's successor to promise that once she is President, she will pardon the President, who will, by then, have retired in return for the promise. This would resemble the pardon of US President Richard Nixon, who was pardoned by his successor, Gerald Ford, for 'for all offenses against the United States' which Nixon 'had committed or may have committed' during his presidency.[359] Critics claim that the pardon was granted in exchange for Nixon's resignation as part of a 'corruption bargain'. But there is a problem: such an agreement is not enforceable. As held by the Constitution Court in the SARFU case, the President cannot fetter his power to pardon through agreement. Thus, while the South African President's successor can promise that she will pardon, she cannot be held to this promise. This, of course, reduces its ability to serve as an incentive to retire.

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[355] *Hugo* supra n 1 para 29.
[356] *President of the Republic of South Africa v. South African Rugby Football Union 2000* (1) SA 1 (SARFU) para 155.
[357] *Ibid*., para 159.
[358] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 116.
[359] Proclamation4311 by Gerald R. Ford.

A second option is for the South African president to pardon himself. While this might seem ludicrous, the text of section 84(2) does not preclude it. It grants the President to power to pardon 'offenders' – a term that does not exclude the President. But there are other reasons that self-pardon might be unlawful. One might argue that it is in bad faith. It also arguably contravenes the rule that one should not be a judge in one's own case. It might also be irrational.

The second significant problem with pardoning the South African president is that it might unconstitutionally contravene section 34 of the Constitution, which is the right of access to courts. In the *AZAPO* case,[360] the Constitutional Court held that amnesty under the Truth and Reconciliation Commission 'effectively obliterates' the right of victims of apartheid political crimes to obtain redress before the courts. This might have unconstitutionally infringed section 22 of the Interim Constitution (the predecessor to section 33), were it not for the special circumstances surrounding the TRC. These were, first, that the Interim Constitution permitted TRC-style amnesty and secondly, that the South Africa's democratic transition might never have happened had amnesty not been on the table.

On this authority, a pardon for the South African President would limit (if not 'effectively obliterate') the Section 34 rights of victims of his crimes. This limitation is unconstitutional unless it can be justified in terms of section 36 of the Constitution – if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Section 84(2) (j) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") explicitly vests the power to pardon in the President and when exercised it sometimes unravels the outcome or result of a judicial process. Setting aside the decision of the judges made in terms of the law may be incompatible with the supremacy of the Constitution and with the independence of the judiciary. The issue is how the pardon power can be reconciled with the independence of the judiciary and related provisions. The pardon power is constrained by the broader objectives and visions of the Constitution. Given its impact on the judicial process, it must be exercised in a manner that advances the public interests of the beneficiary of the

[360] *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 672.

pardon. The exercise of the pardon power is not administrative action and therefore not susceptible to review under Section 33 of the Constitution and under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). However, it is subject to review under the principles of legality. In this regard, a jurisprudential development is required to make the issue more clear and precise. It would be imprudent given the pronounced shift that appears to have occurred in *Albutt v. Centre for the Study of Violence and Reconciliation,*[361] for presidential advisors to rely on the reasoning of the majority in *Masetlha v. President of the RSA*[362] that the duty to act procedurally fairly is not a requirement under legality. After reviewing the cases on legality, it is found that, in addition to incorporating a process so as not to irrationally exclude the victims, legality review requires the President to act lawfully, in a *bona fide* manner, and rationally. This would require justifying the decision to pardon. Rationality review under legality is a generic category which is capable of accommodating most, if not all, the grounds of review listed in PAJA. The new rule must be taken cognizance of in order not to create further unnecessary tension between the executive and the judiciary.

3.19 Pardon Power in Italy

Italy, a developed country, is officially known as the Italian Republic or the Republic of Italy is a country that consists of a peninsula delimited by the Alps and several islands surrounding it. A unitary parliamentary republic with Rome as its capital, is also considered part of Western Europe. It has been a unitary parliamentary republic since 2 June 1946, when the monarchy was abolished by a constitutional referendum. The President of Italy *(Presdente della Repubblica)* is Italy's head of state, and is elected for a single seven years mandate by the Parliament of Italy and some regional voters in joint session. Italy has a written democratic constitution, resulting from the work of a Constituent Assembly formed by the representatives of all the anti-fascist forces that contributed to the defeat of Nazi and Fascist forces during the Italian Civil War.[363]

[361] 2010 5 BCLR 391(CC).
[362] 2008 1BCLR 1(CC).
[363] Smyth, Howard McGaw Italy: From Fascism to the Republic (1943-1946) The Western Political Quarterly Vol. 1 No. 3, pp. 205-222, September, 1948.

The Constitution of 1948 is the main source. The judiciary of Italy is based on Roman law modified by the Napoleonic code and later statutes. The Supreme Court of Cassation is the highest court in Italy for both criminal and civil appeal cases. The Constitutional Court of Italy (*Corte Costituzionale*) rules on the conformity of laws with the constitution and is a post-World War II innovation.

In Italy, the President of the Republic may "grant pardons, or commute punishments" according to Article 87, para 11 of the Italian Constitution. It lays down that the President of the Republic may, through a presidential decree, grant pardons and commute punishments. It is a clemency provision dating back to ancient times and that wholly or partially extinguishes the punishment inflicted by an irrevocable sentence or transforms it into another type of penalty provided by law (for example a temporary detention instead of a life sentence or a fine instead of detention). The pardon also extinguishes ancillary punishments, if specifically provided for in the decree; instead, it does not extinguish the other penal effects of the sentence (Art. 174 of the Penal Code). The pardon may be subjected to the conditions laid down in Art. 681 of the Code of Criminal Procedure.

This means that the pardoning procedure is regulated by Art. 681 of the Code of Criminal Procedure. The pardon application must be addressed to the President of the Republic and submitted to the Ministry of Justice. It is signed by the convicted person, by the person's next of kin, his/her domestic partner, guardian or custodian, or by an attorney. If the convict is detained or interned, the application may also be directly filed with the Surveillance Magistrate (*Magistrato di sorveglianza*). The chairman of the Board of Corrections of the penitentiary may propose, as compensation for particularly noteworthy behaviour, to pardon the inmate who has distinguished himself for good conduct.

The Prosecutor General of the Court of Appeal and, if the convict is detained, at a person's home, remanded to community service, the Surveillance Magistrate, expresses his opinion on the pardon application or proposal. To this end, they collect any useful information relative to, inter alia, the legal status of the convict, the intervening pardon of the persons harmed by the offence, the personal information provided by the police, and the evaluation of the people in charge of the penitentiary

institutions. After receiving the opinions, the Minister transmits the pardon application or proposal, complete with an investigation report, to the President of the Republic, accompanied by his/her own 'opinion' in favour or against granting the reprieve. As established in Decision No. 200 of 2006 of the Constitutional Court, the President of the Republic takes the final decision. Art. 861 of the Code of Criminal Procedure also sets forth that pardon may be granted ex-officio, meaning thereby without the filing of an application or the submission of a proposal, but always after the conclusion of an investigation.

In case the President of the Republic grants the pardon, the competent public prosecutor will execute it by ordering the release of the convict, if the case so requires.

It appears from above that like other acts of the president, the pardon requires the countersignature of the competent government minister. The Constitutional Court of Italy has ruled that the Minister of Justice is obliged to sign acts of pardon.[364] The pardon may remove the punishment altogether or change its form. Unless the decree of pardon states otherwise, the pardon does not remove any incidental effects of a criminal conviction, such as a mention in a certificate of conduct (174 c.p.) or the loss of civil rights.

According to article 79 of the Italian Constitution the Parliament may grant amnesty[365] and pardon[366] by law deliberated a majority of two-thirds of the components. The last general pardon, discounting 3 years from sentences, was approved in 2006.

3.20 Pardon Power in Portugal

According to Article 1 of the Constitution of Portugal, Portugal shall be a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society. Article 2 says that the Portuguese Republic shall be a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and organization, respect for

[364]"Giudizio per Conflitto di Attribuzione Tra Poterio Dello Stato".(http://www.cortecostituzionale.it/actionSchedaPronucia.do?anno=2006&numero=200) [Judgement for Conflict of Attribution between the Power of the State]. Constitutional Court of Italy, 24 May 2006.
[365]Article 152 c.p.
[366]Article 174 c.p.

and the guarantee of the effective implementation of fundamental rights and freedoms, and the separation and interdependence of powers, all with a view to achieving economic, social and cultural democracy and deepening participatory democracy.

Currently, Portugal, being a semi-presidential system, the President holds no direct executive power, but is more than a merely ceremonial figure as is typically the case with parliamentary systems. The President of Portugal, officially known as the President of the Portuguese Republic is the head of State and highest office of Portugal. In Portugal, the Heads of State, Kings or Presidents, have always enjoyed the prerogative of grace, being able to grant pardons, commuting or extinguishing sentences in the context of requests for clemency.

According to the Portuguese Constitution, the President of the Portuguese Republic has the power to pardon and commute sentences, on the proposal of the Government of the Portuguese Republic. Article 134 para (f) of the Constitution of Portugal says that the President of the Republic shall be personally responsible for, after first consulting the Government, pardoning offences or commuting sentences. This is the exclusive and discretionary competence of the President and is not subject to any conditions beyond the prior hearing of the Government, generally represented by the Minister of Justice. Requests or proposals for pardons are instructed by the Criminal Execution Court by referral from the Ministry of Justice and subsequently submitted to the President for consideration. The pardon is granted by Presidential Decree, if the pardon is denied, the President decides by order. Traditionally pardons are granted during the Christmas period. The pardon can be revoked by the President of the Republic.

In 2019, the President granted two pardons.[367]The pardon, as an individual, shall not be confused with amnesty or generic forgiveness, both of a general and abstract nature. Amnesty has retroactive effects, affecting not only the penalty applied but the past criminal act itself, which is forgotten, considered as not practiced (retroactive abolition of crime). Generic forgiveness focuses only on the penalties

[367]https://www.dn.pt/poder/president-da-republica-concede-dois-indultos-por-razoes-humanitarias-11642068.html retrieved on 23/05/2022.

determined by the sentencing decision and for the future. It is the reserved competence of the Portuguese Parliament to approve generic amnesties and pardons.[368]

3.21 Pardon Power in Spain

Spain is classified as a democratic constitutional monarchy, which is also known as a parliamentary monarchy. The ruling monarch acts as the largely ceremonial head of state.[369] The *derecho de gracia* (right of grace) or *indulto* (pardon) is acknowledged by the Spanish Constitution of 1978 as a privilege of the King of Spain[370]. The Spanish Constitution defines it as a renunciation on the State's part of its own punitive power on behalf of an individual, founded on reasons of equity or public interest. The Constitution subjects royal pardons to the law and forbids general pardons, so they have to be granted individually. Theoretically, a royal pardon can be granted for a general offence or accessory offences alone; if it is granted for a general offence, the accessory ones it implies are also pardoned, with the exception of punishments involving political rights (i.e., removal of the right to run for a public office as a result of a sentence), which have to be explicitly mentioned in the pardon decree if they are going to be pardoned.

The procedure and requirements for the grant of the pardon are given by the Law of 18 June, 1870, modified by the Law 1/1988 of 14 January. The application for royal pardon has to be carried out by the convicted person himself, his relatives or any other person in his name. The convicting court will then issue a report of the case, which shall be considered along with the public comments of the Prosecutor and the victims of the crime if there were any. All of this is gathered by the Minister of Justice, who will present the pardon issue to the Cabinet of Ministers. If the Cabinet decides a pardon should be granted, then the Minister of Justice will recommend as such to the King. Pardons are issued by Royal Decree and have to be published in the *Boletin Oficial delEstado* (Public Journal).

Pardons are not commonly conceded in Spain, but for offenders convicted for minor crimes who are about to complete their sentence and have shown good

[368]Article 161para (f) of the Constitution of Portugal.
[369] [Spain's government and political system expatica.https://www.expatica.com; retrieved on 26/05/2023].
[370] article 62.i: "Functions of the King".

behaviour and repentance. Dating back to medieval times, several organizations and religious brotherhoods still hold the right of granting pardons as part of some privilege or other granted to them by the King of Spain. The scope of this privilege depends on the royal charter received by the organization when their right to concede pardons was granted, though it usually holds only for minor offences in very especial conditions; this right is implicitly acknowledged by the public offices nowadays, though it is not exercised but following the usual procedure for royal pardons. Traditionally, they will propose some petty criminal about to end his sentence for pardon being granted to him, and he or she will be released following the tradition to which the pardon holds, usually during the Holy Week. This type of pardons are distinguished from the usual ones in that they only release the prisoner from jail, halting the sentence, but do not pardon the offence itself.

3.22 Pardon Power in Greece

The roots of pardon and amnesty are found in ancient law. References to institutions somewhat resembling the modern appear in ancient Babylonian and Hebrew law. The first amnesty is generally attributed to Thrasybulus in ancient Greece (403 B.C.E.); but fifteen centuries earlier the Babylonian Kings, on accession to the throne, would declare a *Misharum,* involving a general discharge from legal bonds of both a civil and a penal character. Similar to this, an analogy may also be found in the biblical "jubilee laws". However, the Romans, on the other hand, developed a number of forms of clemency, and these influenced subsequent developments in European law.

The form of government of Greece is that of a parliamentary republic. All powers derive from the People and exist for the People and the Nation; they shall be exercised as specified by the Constitution. The Constitution of Greece grants the power of pardon to the President of the Republic[371] The Article 47 in the Greece Constitution of 1975 as amended in 2008 reads as follows:

1. The President of the Republic shall have the right, pursuant to a recommendation by the Minister of Justice and after consulting with a council composed in its majority of judges, to grant pardons, to

[371]Art. 47.

commute or reduce sentences pronounced by the courts, and to revoke all consequences at law of sentences pronounced and served.

2. The President of the Republic shall have the right to grant pardon to a Minister convicted as provided in article 86, only with the consent of Parliament.

3. Amnesty may be granted only for political crimes, by statute passed by the Plenum of the Parliament with a majority of three-fifths of the total number of members.

4. Amnesty for common crimes may not be granted even by law.

Thus, The President of Greece can pardon, commute or remit punishment imposed by any court, on the proposal of the Minister of Justice and after receiving the opinion (not the consent necessarily) of the Pardon Committee.

3.23 Pardon Power in Hong Kong

Under its constitutional document, the Basic Law, Hong Kong is an autonomous Special Administrative Region of the People's Republic of China, except in defence and foreign affairs. The Government of China is led by the Chief Executive, the head of the government. On 1 July 1997, sovereignty of Hong Kong was transferred to China (PRC), ending over one and a half centuries of British rule. Under British colonial rule, there was no democracy in Hong Kong. After resuming the exercise of sovereignty, the Chinese government implemented the basic policy of One Country, Two Systems and established democracy in the Hong Kong Special Administrative Region. Now, Hong Kong is one of two Special Administrative Regions of China (SAR) which enjoys a high degree of autonomy as a part of the People's Republic of China, which is guaranteed under Article 2 of Hong Kong Basic Law as ratified under the Sino-British Joint Declaration. Since the handover in 1997, the constitutional framework is provided by the Hong Kong Basic Law, which is a piece of National Law of the People's Republic of China and has, practically, constitutional status in Hong Kong.

Prior to the transfer of the sovereignty in 1997, the power of pardon was the royal prerogative of mercy of the monarch of the United Kingdom. This was used and

cited the most often in cases of convicts who had been given the death penalty: from 1965 to 1993 (when the death penalty was formally abolished) death sentences were automatically commuted to life imprisonment under the royal prerogative.

Since the transfer, the Chief Executive of Hong Kong now exercises the power to grant pardons and commute penalties under Section 12 of Article 48, Basic Law of Hong Kong. "The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions …. to pardon persons convicted of criminal offences or commute their penalties".

3.24 Pardon Power in Bangladesh

Bangladesh officially the People's Republic of Bangladesh is a country in South Asia. A developing country, which was once under the British colonial rule, has a parliamentary system of government with the President as the head of state, and the Prime Minister as the head of the government. The President is the constitutional head of the People's Republic of Bangladesh. Articles 48-54 of Part IV of the Bangladesh constitution state provisions related to the presidency. The President takes precedence over all other persons and exercises the powers and performs the duties conferred upon him by the Constitution and by any other law. Furthermore, all executive actions of the government are expressed to be taken in the name of the President. Though theoretically he is above all, but in reality he is a titular executive performing ceremonial functions only, and the real executive power of the State is exercised by the cabinet under the leadership of the prime minister. Except for appointing the prime minister in pursuance of the clause (3) of Article 56 of the Constitution, the President always acts in accordance with the advice of the Prime Minister.

The judicial power of the President in Bangladesh originates from Article 49 of the Constitution. Article 49 confers mercy power on the President in Bangladesh. It says that the President shall have to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. Apart from constitutional provisions, the government may suspend, remit or commute the sentence of a person under the Code of Criminal Procedure of 1898. [Sections 401

& 402 of the Code of Criminal Procedure, 1898] According to the Constitution,[372] the President is to exercise the prerogative power of mercy in consultation with or in accordance with the advice of the Prime Minister through the Ministry of Law and Parliamentary Affairs.[373] Now it is clear that the President is to act according to the wish of the government and he cannot apply his individual discretion. The President cannot act independently in exercising the prerogative power of mercy. The object of conferring this judicial power on the president is to correct possible judicial errors as no human system of judicial administration can be free from perfections.

3.25 Pardon Power in Pakistan

Pakistan, officially known as the Islamic Republic of Pakistan, is also a country in South Asia, and was formerly a part of the British Empire in India till its separation in 1947. The Federation of Pakistan has its own written constitution. As per Article 41 of the Constitution, there shall be a President of Pakistan who shall be the Head of State and shall represent the unity of the Republic. A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly. Article 45 of the Constitution of Pakistan assigns the President with power to grant pardon etc. The Article says that the President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

3.26 Comparative Analysis

A perusal of the comparative study of the above reveals that in the overwhelming majority of countries, clemency powers are vested in the head of states, be it the president or the monarch. The Cyprus constitution provides for a distribution of powers between President and Vice-President, reflecting the respective community affiliations of the holders of these offices while the King or Queen in Belgium, the

[372]Article 48(3): In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister; Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into any court.

[373]31 Rule 14 of the Rules of Business of 1996 provides that the Ministry of Law, Justice and Parliamentary Affairs shall be consulted before tendering advice on a mercy petition against an order of death sentence and pardon, reprieve, respite, remission, suspension or commutation of any sentence.

British Commonwealth, Denmark, Nepal, the Netherlands, and Norway; the Prince in Monaco and Liechtenstein; the Emperor in Japan; the Grand-Duke in Luxembourg; the Amir in Kuwait or the Yang di Pertuan Agong in Malaysia are empowered to exercise this power. The vesting of the clemency powers in the head of state is consistent with the popular view of the pardon as a discretionary power entrusted to the most elevated personage in the land. Indeed, in this respect there appears to be a degree of historical continuity with the powers of the formerly autocratic monarch having been transferred to his constitutional successor, who remains the ultimate font of mercy vis-à-vis his erring subjects. Superimposed on this image is an image which attributes the pardoning power to the executive arm of government, which retains the discretion to refrain in extreme cases from absolute enforcement of the laws of the land. This dual image depends upon an identity of functions of head of State and chief executive.

That the above over-simplistic picture is revealed by a study of the development of clemency powers over the past two centuries and by a close and comparative examination of different jurisdictions. The historical point may be made by reference to the constitutional histories of France and the United States. In post-revolutionary France, the acceptance of the need for a pardoning power did not entirely dispel reservations about the wisdom of concentrating the decision-making power solely in the hands of the head of state in his capacity as chief executive. The 1802 constitution provided for the establishment of an advisory council in which all three branches of government were represented. Similarly, the 1848 constitution provided for mandatory consultation with the *Conseil d' Etat*, and in serious cases (i.e., convictions in the High Court) the right to pardon was reserved to the National Assembly. Finally, under the constitution of the Fourth Republic, the power was vested in the President sitting in the High Council of the Judiciary, an indication that the power was not to be regarded as purely executive in nature.[374]

In the United States, the theory prevailed that the power to grant clemency, like all other powers, ultimately resided with the people, who were consequently able to delegate it to whichever body they chose.[375] The identity of the preferred body tended

[374]Leslie Sebba, The Pardoning Power—A World Survey, *Journal of Criminal Law and Criminology*, Vol. 68, issue 1 March, 1977, pp.111-112.
[375]THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, Vol. III: PARDON, pp.87-88 (1939).

to vary from era to era. During the pre-Independence period, there were three models for the institution of clemency: (a) vesting the power in the governor; (b) vesting the power in the governor acting only with the consent of the Executive Council; (c) vesting the power in the legislature. During the period 1790-1860, there was a revival in public trust in the executive, and twenty-one states adopted model (a), while four preferred model (b). since 1860, in keeping with the increasing professionalization of the pardoning power, the majority of state constitutions have provided for some sort of autonomous board of pardons having either formal decision-making power or at least an advisory role in this respect.

An analysis of the comparative provisions of respective constitutions confirms that attribution of the pardoning power to the head of state-cum-chief executive is not universal. Under some constitutions, the power is vested in a collective body rather than in an individual: the State Council in Bulgaria, the German Democratic Republic, Poland, Romania and South Korea; the Presidium of the legislative assembly in Albania, Mongolia and the Ukraine; the presidential Council in Dahomey and Hungary, the revolutionary Command Council in Libya. Most of these bodies, as their names sometimes indicate, perform tasks akin to those of a President. In the former U.S.S.R. the Praesidium of the Supreme Soviet "is the highest permanent functioning organ of the State…….. It performs all sorts of functions, and defies the theory of Separation of Powers……. It performs functions, executive in character, which in other countries are the prerogative of the Chief Executive, Head of the State, King, or President."[376]Similarly, the State Council in Poland fulfills the functions of a collective head of state.[377]

Under the new Swedish constitution, on the other hand, the pardoning power is vested in the government as such. In Sweden, the executive body does not play the additional role of head of state, a function still fulfilled by the monarchy, now apparently deprived of any substantial power.[378]The Instrument of Government of 1974 refers to the duties and the functions of the monarch, but does not specify what they are. The intention of depriving the monarchy of its powers, however, was

[376]S. Patel, World Constitutional Law and Practice, pp. 185-86 (1970)}.
[377]A. Peaslee, Constitutions of Nations, (3rd ed.), 1965.
[378]Leslie Sebba, *op.cit*. p.112.

evidenced by a provision specifying that the articles of the constitution relating to the monarchy would become effective only upon the death of the then-reigning monarch.

Finally, in a few countries, the power to pardon offenders is reserved exclusively to the legislature. It may be that in some jurisdictions vesting the pardoning power in the executive or other body does not deprive the legislature of an equivalent power.[379]This is the situation under the constitutions of Switzerland, Uruguay and for some purposes, Turkey. In Nicaragua, the power is vested primarily in the legislature, but supplementary powers are also granted to the President and the judiciary.

It is thus evident that clemency power is not universally regarded as the sole prerogative of the head of state. Indeed, the only clear feature emerging from an analysis of the constitutions is that in no case is this power vested primarily in a judicial authority, which only plays a secondary role in the clemency decision, nor does the model of the head of state acting within the framework of a judicial body. Under the constitution of France's Fifth Republic, the President no longer sits on the High Council of the Judiciary when it issues clemency decisions. He may, however, consult with the High Council, and it appears to be prevalent today.

Since the role of the head of state is at times ambiguous, the fact that the head of state may be the sole repository of the clemency power does not in itself unequivocally determine the constitutional nature of the power. In historic times, the sovereign ruler generally combined the functions of all three branches of government—executive, legislative and judicial—and even as these functions became differentiated, he continued to play a pivotal role in all three branches. Thus, the British Crown formally retains this threefold capacity today; and while recent tradition identifies the prerogative of mercy with the executive arm, the historical justification for this is not entirely clear. In an earlier day, this prerogative was linked with the Crown's control of criminal procedure[380] : the King was, in Hume's view, "the fountain of grace and mercy, as he is of justice."[381] There is at least some ground here

[379] Weihofen, *Legislative Pardons*, 27 CAL. L. REV. 371 (1939; Radin, *LegislativePardons: Another View*, 27 CAL. L. REV. 387 (1939).
[380]W. Holdsworth, *A History of English Law*, 415 (1938).
[381]Cited in 1 L. Radzinowicz, *A History of the Criminal Law*, 130, n.73 (1948).

for identifying the pardoning power with the judicial arm of government.[382] compared the Home Secretary's immunity in respect of the pardoning power with that of judges and advocates. Characterization of the source of the pardoning power as executive or otherwise (the 'organic' criterion) should, however, be differentiated from the characterization of the *exercise* of this power (the 'functional' criterion). Applying the functional criterion, many governmental acts are of a mixed character and cannot readily be denominated as either "legislative", "executive", or "judicial".[383]

Similarly, in the republics, the prevailing model under which the power to pardon is vested in the president does not obviate doubts as to the character of this power, [In France, the immunity of the exercise of the clemency powers from judicial review had always been attributed to its classification as an "act of state". In 1947, however, the *Conseil d' Etat* concluded that immunity from judicial review derived from the judicial character of the pardon.][384]because the role of president varies considerably from state to state. [Constitutions may be differentiated according to the degree to which the executive is subject to the control of the legislature, distinguishing the "presidential-executive" model from the "parliamentary-executive" model. L. Wolf-Phillips, Constitutions of Modern States, xix (1968). In states following the latter model, the head of state is less likely to have substantial political power] Thus, while the President of the United States serves simultaneously as head of state and as the sole chief-executive, the Presidents of the Federal German Republic and of Israel are for the most part symbolic figures, the effective political power being wielded by the Federal Chancellor and Prime Minister, respectively. The French presidency fulfills a role somewhere between these extremes, for although the office of Prime Minister also exists under the French constitution, substantial executive power is retained by the President.

This variance in the nature of the presidential role seems to add strength to the view that the dominant tradition is essentially one of vesting clemency powers in the head of state *as such*, and not specifically in his capacity as chief executive. Thus, the Communist states which entrust these powers to a presidential or state council, rather

[382] The English case of *Hanratty v. Lord Butler of Saffron Walden*, 1115 Sol. J. 386 (1971).
[383]KLINGHOFFER, ADMINISTRATIVE LAW (1957).
[384]J. Monteil, *La Grace En Droit FrancaisModerne*, 22 (1959).

than to the Council of Ministers, are substantially in keeping with this tradition. The main exceptions remain those few jurisdictions which seem reluctant to confide a power to interfere with the judicial process in any body other than the legislative assembly, which in most systems is regarded as the ultimate sovereign authority.

The analysis has been confined to a formal vesting of the clemency powers as reflected in the basic constitutional provisions. There are two reasons, however, why the designated body may not necessarily wield substantial power. First, the constitution may expressly provide that the power is to be exercised on the advice of some other body. Secondly, even without such express provision, the constitutional norms or practice of the individual country may require that the acts of the formal authority, especially those of a symbolic head of state, require the sanction of a more actively political figure.

3.27 Executive Bodies involved in the Clemency Decision

In most of the States in the present-day world, clemency decision is not only the decision by the executive heads of States, but such power is being exercised by the respective heads upon recommendations by some other executivebodies known by different names in different countries, may either be a Board of Pardon, like that of Canada, or Council of Ministers, as in practice in India, and so on. In medieval Europe, the power to grant pardon was held by various bodies, including the Roman Catholic Church and certain local rulers, but by the sixteenth century it usually was concentrated in the hands of the monarch.

In most jurisdictions, the clemency process involves more than a petition from the offender directly to the pardoning body, followed by the latter's decision. A more complex procedure is usually adopted, involving the examination of the petition and the issuing of an opinion on the part of some other body. The question arises as to the nature of such 'secondary' bodies and their power vis-à-vis the 'primary' decision-making body.

Under some systems, it is explicitly stated that the ultimate decision belongs to the primary body alone. For instance, the Zambian Constitution provides that the President acts "in his own deliberate judgement and shall not be obliged to follow the advice tendered by any other person or authority." Other systems, on the other hand,

specify that the primary pardoning authority is not entitled to exercise this function of his own accord, but is dependent on the initiative or recommendation of another body. This has been provided for by the constitutional or other statutory provisions relating to clemency. At the same time, no doubt, the constitutional provisions themselves frequently state that the constitutional powers will be exercised 'in accordance with the law'. Alternatively, the accepted constitutional practice of the state (whether on a written or conventional basis) may require that the power of the primary authority, especially where this authority is no more than a political figurehead, be exercised only in accordance with the wishes of the government or its appointee.

It is, indeed, most frequently the executive arm which is designated as the "recommending" body. This is the case under the constitutions of Austria, Greece, the Irish Republic, Japan, New Zealand, Rhodesia, Singapore, South Africa and Sri Lanka. In these countries, it seems clear that the "secondary" authority has been granted the effective decision-making power. In Great Britain, on the other hand, it is the constitutional convention which has transferred effective power from the Crown to the Home Secretary.

Under many constitutions, no such advisory role is explicitly attributed to the government or its representatives. The same result is achieved in practice, however, by the device of ministerial countersignature. These constitutions specify that decisions emanating from the primary authority require the countersignature of the prime minister, or the minister responsible for the matter to which the decision relates, or both. Such a requirement appears, *inter alia,* in the constitutions of Belgium, Burundi, Italy, Lebanon, Luxembourg, Mauritania, Spain and Turkey. It also appears in some other constitutions such as, Austria, Greece and South Africa, in which another governmental authority is designated as enjoying a "recommending" capacity, further emphasizing the role of this authority in the clemency process.

It is sometimes specified, and nearly always implied, that the absence of the required countersignature would render the clemency decision nugatory. For e.g., art. 75 of the Chilean constitution specify that all orders of the President of the Republic must be signed by the minister of the respective department, and "shall not be obeyed without this essential requirement." Further, since the effect of such countersignature is

to render the countersigning minister or ministers responsible for the decision, such responsibility is generally understood to be political, but under some systems may also connote *legal* responsibility.[385]This view is generally held by the governments or ministers concerned that even if no 'advisory' role is imputed to them by the constitutions, they are nevertheless entitled to an effective and perhaps decisive say in the pardoning decision.

Some constitutions, for e.g. Algeria, Zaire, follow the French model and bestow an advisory role on the High Council of the Judiciary. In Chad such a role is granted to the Supreme Court itself. In Vietnam, on the other hand, a special committee of National Assembly exists for this purpose. Some of the constitutions also provide for the establishment of an Advisory Committee on the Prerogative of Mercy (Kenya, Nigeria, Uganda and Zambia), a Pardon Board (Malaysia, Canada), a High Council of Pardons (Ivory Coast) or other consultative council (Greece). The body designated by the constitution for an advisory role may thus be associated with any of the three branches of government, or it may constitute an ad hoc combination.[386]

It should be again emphasized that the actual power of these 'secondary' bodies in the decision-making process may vary considerably. The role of the consultative council in Greece is clearly subsidiary to that of the Minister of Justice. Even though consultation with the council is mandatory, it should rather be classified as a 'tertiary' body. The formulation of the constitutional provisions may not be decisive in this respect.

It should also be pointed out that under most systems, there will exist some machinery for investigating the circumstances of the individual petitions. Such investigation may be required of a particular body, perhaps judicial, whose purpose is less to advise than to gather or sift the information on the basis of which a decision can subsequently be made. The role of these investigative bodies will rarely be mentioned in the constitutional provisions and their status may best be labeled 'tertiary'.

[385]J. Laferriere, *Le Contreseing Ministeriel*, in La Revue Generale D' Administration, 39 (1908).
[386]Leslie Sebba, *op.cit*. p. 115.

The typology of pardons differs widely, particularly between the common law and civil law systems, and also reflects the purposes and effects of the exercise of clemency. Common law systems use the pardon for a wide variety of purposes, such as rectifying miscarriages of justice and the rehabilitation of ex-offenders, whereas the civil law systems have developed alternative institutions for these purposes. However, common law systems are now moving in the same direction of specialization function. This is another result of a professionalized penal system, in which the pardon essentially fulfills a supplementary role. Even if the role of the pardon is merely residuary, nations seem to show little inclination to dispense with the institution altogether.

Two areas of application in particular attract the attention of drafters of constitutions such that special provisions are considered necessary: capital cases and political offences. The first has been undergoing a decline but, like the pardon itself, shows great reluctance to disappear entirely. Provisions under certain constitutions for mandatory consideration of clemency in all capital cases will therefore probably continue to be of significance. The importance of political offences, on the other hand, seems to be increasing. While the special provisions in this area mostly serve to limit the scope of the pardon, such restrictions are generally confined only to the matter of ministerial impeachment. Further, with the increasing politicization of 'common' crimes, it may be that the role of clemency will expand in this area.[387]

After an extensive study, it has been found that a power to pardon offenders existed in all the jurisdictions i.e. in different nations in the world with little variations in forms, types and the authority which still become evident from their respective constitutions. 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

[387]Sebba, op.cit. p 120.

entrusted under the previous constitution, has the power to "enact decrees……. And exercise such other functions and powers as are vested in it by the National People's Congress,"[388] which is "the highest organ of State Power under the leadership of the Communist Party of China."[389] Whether the pardoning power has been deliberately and finally omitted from the state fabric is thus as yet unclear.[390]

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[388]Constitution of the People's Democratic Republic of China, art. 18, (adopted 1954, repealed 1975).
[389]*Ibid*, art. 16.
[390]Leslie Sebba, The pardoning Power—A World Survey, *Journal of Criminal Law and Criminology*, Vol. 68, Issue 1March, 1977, p.84.