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Chapter 5

Pardoning Power and Judicial Review: A comparison

In this Chapter, an attempt has been made to critically present an analysis on judicial review on the exercise of pardoning power by the executive head of the state which mainly centers on few representative countries in the world, e.g. the United States of America, the UK, India, and few others. In doing so, the researcher gives more emphasis on the systems as found in America, England and India with some details incorporating incidental powers exercised by American President and historical process of growth taking place in the UK.

As has already been shown, the power of the head of State to suspend or commute individual sentences is (and has been for centuries) present in virtually all countries around the world. As more and more countries replaced their monarchs with non-hereditary presidents, the power to pardon, variously called “power of mercy” or “clemency power” remained one of the few royal prerogatives that survived and continues to be included even in modern constitutions (even the 2015 Nepali Constitution vests the president with the power to “grant pardons to persons convicted, and suspend, commute, or reduce any sentence” which is not discussed here). However, while monarchs faced little to no restrictions in using their power, most modern republics have instituted some restrictions on presidents’ use of their power.

In most of the countries including different European republics have constitutional regulations on the presidential pardon power. However, some countries vest presidents with a relatively unlimited pardon power; nevertheless, presidents may still be effectively bound by established practices and legal precedents or other sub-constitutional routines employed by administrative staff handling pardon requests. The Czech president can grant amnesties, i.e. pardons to groups of people (including for offences that have not been prosecuted yet. This is also not discussed here in details). Icelandic presidents present a similar exception as they can not only pardon individuals after sentencing, but also halt prosecution. Restrictions on pardon power vary greatly and present a far from uniform picture. In particular, there is no clear covariation with regime type, mode of presidential election or scope of other presidential power.

Presidents in Cyprus and Greece may only issue pardons on recommendation of other bodies, the Irish, Maltese and Portuguese president need to consult with the government, and the Finnish president requires a report from the Supreme Court. In contrast, only three countries exclude individuals from receiving pardons. While the Polish president cannot pardon those that that have been convicted by the Tribunal of State, presidents in Greece and Iceland require the consent of parliament to pardon ministers. Finally eight countries require a countersignature for presidential pardons either by the minister of justice (or another cabinet member responsible) or by the Prime Minister. Notably, in Czechia, Italy, Latvia and Slovakia that countersignature absolves the president of political responsibility which is then borne by the signing minister. These are all 22 European countries[458]

5.1 Pardoning Power and Judicial Review in USA

Years ago in 1610, Sir Edward Coke, Chief Justice of the Common Pleas declared in *Dr. Bonham's* case that "in many cases, the common law will control Acts of Parliament". This historic declaration gave rise to an everlasting debate regarding the extent of power between the Parliament and the Judicial organ and also played an important role in developing a check and balance concept which is known today as the *"Judicial Review"* system.

[458]https://presidential-power.net retrieved on 12/04/2023.

Judicial Review is a type of court proceeding in which a judge reviews the lawfulness of a decision or an action made by a public body based on consistency with the Constitution. It includes that jurisdiction of the court by which it can declare a law made by the legislative inconsistent with the Constitution or with the provisions of fundamental rights and therefore unconstitutional and void. The procedure and scope of Judicial Review differs from country to country and State to State, still its aim remains the same, that is, to protect the sanctity of the Constitution of the land.

The *Marbury v. Madison*[459] case was a landmark decision in the implementation of Judicial Review which laid the foundation of this concept in the United States. It dates back to November, 1800 when Thomas Jefferson was voted as the 3rd President of USA. But he would not assume office until March, 1801. This enabled President Adams to appoint new govt. officials before the new President take office. Jefferson was a Democrat- Republican but Adams was a Federalist. So the 'Lame Duck' congress took the opportunity to pass the Judiciary Act of 1801. These ensured additional federalists would be in powerful positions in the new govt. According to the plan Adams appointed 16 Federalist Circuit Judges and 42 Federalist Judges who were called as *'Midnight Judges'* (i.e. the last minute appointment). One of them was William Marbury who was named as Justice of Peace for the District of Columbia. When Thomas Jefferson started office, his Secretary of State, James Madison, did not deliver the official paper works to the 'Midnight Judges'. Thus, they including Marbury, were denied their new jobs. As a result, Marbury petitioned for a writ of Mandamus to force Madison to deliver the commission. Meanwhile, Chief Justice, John Marshall, denied the petition and refused to issue the writ of Mandamus, even though Section 13 of the Judiciary Act of 1789 gave the Supreme Court authority for such writs to be issued, as the Article 3 of the USA Constitution does not recognize the power to force actions of the govt. officials.

Therefore, the following questions arose: (1) whether or not the petitioner has a right to the commission he demands, (2) if he has a right, which is violated, do the laws of the country afford him a remedy, and (3) whether or not Section 13 of the Judiciary Act was in violation of the Constitution.

[459] 5 U.S. 137 (1803).

The Chief Justice found that the petitioners were entitled to their commissions, but the Constitution did not give power to the Supreme Court to issue writs of Mandamus even though Section 13 did. Thus, it was inconsistent with the Constitution, and therefore, invalid. As the Constitution is superior to any ordinary Act of the legislature, a Court may declare an Act of Congress void if it is inconsistent with it. The Constitution placed the entire confidence upon the supreme executive regarding delivering and withholding a commission as a political act for any misconduct, respecting which, the injured individual (i.e. Marbury) has no remedy.

This decision increased the Court's power by encouraging the judicial department to say what the law actually is. So, from this, a court may now declare an Act of the Congress or Parliament void if it found prove that the Act was inconsistent with the Constitution.

5.1.1 The American Law on Pardon: Judicial Interpretation : Because of the imprecise language of Article II, Section 2, one is forced to look to the courts to discover the meaning and operation of the clause. Although the Constitution confers the pardoning power on the President in general terms, the Judiciary has served as the supreme interpreter of the scope of the constitutional powers. After a pardon has been issued by the executive branch, the judicial branch formulates the clemency program, thereby determining the scope of the power. For example, President Lincoln sent a message to a judge in San Francisco on December 15, 1863, informing him that the amnesty oath, required by his proclamation, was "not for those who may be constrained to take it in order to escape actual imprisonment or punishment".[460] Lincoln later remarked that his offer of amnesty did "not extend to Prisoners of War, or to persons suffering punishment under the sentence of military courts, or on trial or under charges for military offenses".[461] A federal court, however, subsequently extended the proclamation "not only to those who joined the Rebellion in arms, but those who have been in any way implicated in it".[462] In *Re Greathhouse,* Greathouse initiated a Habeas Corpus proceeding, claiming that he was entitled to the benefits of the December 8, 1863 proclamation. In granting the application, District Judge

[460] 6 War of Rebellion: *A Compilation of the Official Records of the Union and Confederate Armies* 705 (2nd ser. F. Ainsworth & J. Kirkley ed. 1899).
[461] *Ibid* at 802.
[462] In Re Greathouse, 10 F. Cas. 1057, 1061(C.C.N.D. Cal. 1864) (No. 5, 741).

Hoffman observed that the court's "plain duty is to construe the proclamation like any other public act or law, and to apply to it the well-settled rules of interpretation, irrespective of any opinion, or even knowledge, of the private but unexpressed intention of its author".[463] Of course, the President had only to issue another proclamation to bring court interpretation in line with his intention. Nevertheless, the example illustrates the nature of courts' power in this area,since *Marbury v. Madison*.[464]

In *United States v. Wilson*,[465] Chief Justice Marshall defined the Power: "The Constitution gives to the President in general terms, "the power to grant reprieves and pardons for offenses against the United States."

Voicing a strong dissent to the use of English precedent, Justice McLean noted in *Ex parte Wells* that "the executive office in England and that of this country (the USA) is so widely different, that doubts may be entertained whether it would be safe for a republican chief magistrate, who is the creature of laws, to be influenced by the exercise of any leading power of the British sovereign."[466]McLean based his dissent on a decision the Court had rendered only five years earlier when Chief Justice Taney explained: "It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of government are brought into question. Our own constitution and form of government must be our only guide."[467]

Despite this opinion, the courts have looked to English jurisprudence for the meaning of a presidential power that corresponds to a power of the English Crown,

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[463] 10 F. Cas. At 1061.
[464]5 U.S. (1 Cranch) 137 (1803).
[465]32 U.S. (7 Pet.) 150 (1833).
[466]*Ibid*., at 318.
[467]*Fleming v. Page*, 50 U.S. (9 How.) 603, 618(1850).

because the framers were aware of the constitutional struggles in England at this time, constitutional history and English precedents are valuable for determining the meaning of the various clauses of the Constitution.[468] "The influence of these English-bred lawyers was most potent. The training which they received in the Inns, confined almost exclusively to the Common Law, based as it was on historical precedent and customary law, the habits which they formed there of solving all legal questions by the standards of English liberties and of rights of the English subject, proved of immense value to them when they became leaders of the American Revolution. The services rendered by the legal profession in the defense and maintenance of the people's rights and liberties, from the middle of the eighteenth century to the adoption of the Constitution, had been well recognized by the people in making a choice of their representatives; for of the fifty-six signers of the Declaration of Independence, twenty-five were lawyers; and of the fifty-five members of the Federal Constitutional Convention, thirty-one were lawyers, of whom four had studied in the Inner Temple and one at Oxford, under Blackstone….."[469]including the power to pardon. As Justice Wayne explained, "At the time of our separation from Great Britain, theyhad been exercised by the King, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the Crown."[470]Hence, when the words "to grant pardons" were used in the Constitution, they connoted the authority as exercised by the English Crown or by its representatives in the colonies.

Because of the emphasis Marshall placed upon *grace* and the private character of the presidential action in *Wilson*, mercy became, in strict legal theory, the reason for a pardon. The Court in 1915 formally adopted Marshall's definition.[471] In 1927, however, the Court set aside these elements and provided a more solid base for the power: "A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is

[468] B. Bailyn, *The Ideological Origins of the American Revolution,* 30-31 (1971); C. Warren, *A History of the American Bar*, 188 (1912).
[469]*Ibid.,* at 188, 211.
[470]*Ex parte Wells,* 59 U.S. (18 How.) 307, 311 (1855).
[471] *Burdick v. United States,*236 U.S. 79 (1915).

the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgement fixed."[472]

5.1.2 Incidental Powers exercised in USA : A definition of 'pardon' is incomplete without a consideration of the powers incidental to it. One such incidental power is the authority to issue amnesties by the US President. Prior to the Civil War, the power of the President to grant amnesties was unquestioned. The Civil War and Re-construction period provided the first controversial exercise of the Executive power to pardon in the United States. The bounds of the power were given extensive examination during this period; many constitutional queries surrounding the pardoning power were treated by the courts and tested by the Congress.

By 1790, death was the legitimate prescription for treason. The early Act was reinforced on July 17, 1862 by the "Confiscation Act", which provided that "every person who shall be adjudged guilty thereof, shall suffer death ……." It was obvious, however, that the treason statutes could not be enforced on the scale demanded by the Civil War. The pardoning power was a necessity in this season of insurrection and rebellion, as both the executive and legislative branches recognized. In 1863, Congress enacted a law providing that if a person were sentenced to both pecuniary and corporeal punishment, "the President shall have full discretionary power to pardon or remit, in whole or in part, either one of the two kinds of punishment, without in any manner impairing the legal validity of the other kind."[473]

Lincoln intended to use the power only if "the favourable fortunes of war should promise it some effectiveness in persuading waverers to resume their former loyalties".[474]Lincoln issued the first amnesty ten months after the Congressional sanction: Individual pardons were granted before December 8, 1863. On February 14, 1862, Secretary of War Stanton, directed by President Lincoln, issued the release of all political prisoners and other persons held in military custody "on their subscribing to a parole engaging themselves to render no aid or comfort to the enemies of the United States"[475]

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[472]*Biddle v. Perovich*, 274 U.S. 480, 486 (1927).
[473]William F. Duker, The President's Power to Pardon: A Constitutional History, *William & Mary Law Review,* Vol. 18 (1976-1977), Issue 3, 509, March 1977.
[474]E. Mc Kitrick, *Andrew Johnson And Reconstruction*, 143 (1960).
[475]*A Compilation of the Messages and Papers of the Presidents*, 1789-1895, 102-04 (J. Richardson ed. 1896).

"Whereas, in and by the Constitution of the United States, it is provided that the President "shall have power to grant reprieves and pardons………., except in cases of impeachment;" and

Whereas, a rebellion now exists whereby the loyal state governments of several states have for a long time been subverted, and many persons have committed, and are now guilty of treason against the United States; and

Whereas, with reference to said rebellion and treason, laws have been enacted by congress, declaring forfeitures and confiscations of property and liberation of slaves, all upon terms and conditions therein stated, and also declaring that the President was thereby authorized at any time thereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any state or part thereof, pardon and amnesty, with such exceptions and at such times and on such conditions as he may deem expedient for the public welfare; and

Whereas, the congressional declaration for limited and conditional pardon accords with well-established judicial exposition of the pardoning power; and

Whereas, with reference to the said rebellion, the President of the United States has issued several proclamations in regard to the liberation of slaves; and

Whereas, it is now desired by some persons heretofore engaged in the said rebellion to resume their allegiance to the United States, and to re-inaugurate loyal state governments within and for their respective states;

Therefore I, Abraham Lincoln, President of the United States, do proclaim, …… to all persons who have, directly or by implication, participated in the existing rebellion,…….that a full pardon is hereby granted to them and each of them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened, and upon the condition that every person shall take and subscribe an oath ………"[476]

The proclamation excluded six classes, and in March of 1864, Lincoln added a seventh class to those excepted.[477]Most members of Congress had little quarrel with

[476]Pres. Proc. No. 11 of Dec. 8, 1863, 13 Stat. 737.
[477]Pres. Proc. No. 14 of Mar. 26, 1864, 13 Stat. 74]The Proclamation of December 8, 1863 was limited to those who were yet at large and should come forward and take the oath.

this proclamation, for as Lincoln's private secretary, John Hay, observed, it was within the Constitution and the amnesty clause of the Act of July 17, 1862.[478]Lincoln's address, however, contained a clause that increasingly concerned the radicals: "Saying that on certain terms, certain classes will be pardoned, with rights restored, it is not said that other classes or other terms will never be added."[479]

There was good reason for many to expect Johnson to follow a hard line toward the South. In the early days of the rebellion he remarked: "Where I the President……I would do as Thomas Jefferson did, in 1806, with Aaron Burr: I would have them arrested; and, if convicted … by the Eternal God I would execute them".[480]In his brief inaugural address, Johnson warranted: "The only assurance that I can give of the future is reference to the past. The course which I have taken in the past in connection with the rebellion must be regarded as a guarantee of the future."[481]

A month and a half after taking the oath of office, Johnson issued his first amnesty. It was like the amnesty proclamation of his predecessor: "Whereas many persons who had so engaged in the said rebellion have, since the issuance of (President Lincoln's) proclamation, failed or neglected to take the benefits offered thereby; and whereas many persons who have been justly deprived of all claim to amnesty and pardon there under by reason of their participation, directly or implied, in said rebellion and continued hostility to the Constitution of the United States since the date of said proclamations now desire to apply for and obtain amnesty and pardon.

To the end, therefore, that authority of the Government of the United States may be restored and that peace, order, and freedom may be established, I, Andrew Johnson, President of the United States, do proclaim and declare that I hereby grant………amnesty and pardon………"[482]

Johnson's amnesty doubled the number of excepted classes, but the proclamation stipulated that special applications could be made to the President for pardons. Not only would a lenient policy allow many to go free whom the Northern Republicans felt should be punished, but it would permit former secessionists back into

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[478]Lincoln and the Civil War in the Diaries and Letters of John Hay, 131-32 (T. Dennett ed. 1939.
[479]Pres. Proc. No. 11 of Dec. 8, 1863, 13 Stat. 737.
[480]Cong. Globe, 36th Cong., 2d Sess. 1354 (1860).
[481]A Compilation of the Message and Papers of the President, 1789-1895,305 (J. Richardson ed. 1896).
[482]Pres. Proc. No. 37 of May 29, 1865, 13 Stat. 758.

the government. Between the introduction and adoption of the fourteenth amendment, there were other attempts by the radicals to curtail the scope of the presidential "general pardons."

Early in 1866, Congress began to question the nature of the presidential pardoning power. On June 18, 1866, the Joint Committee on Reconstruction issued a report on the effect of the President's clemency program.[483] The Committee concluded that the pardons and amnesties were undermining the authority and prestige of the federal government and producing an atmosphere of bitterness and defiance. On December 4, 1866, Senator Chandler introduced a bill to repeal section 13 of the Confiscation Act.[484] The purpose of the repeal, according to Senator Howard, was to prevent the President from restoring confiscated property to its former owners who participated in the rebellion. Senator Johnson and Fessenden argued that the repeal was at least superfluous and at most self-defeating, because if the President did not have the power to grant "general pardons" by the Constitution alone, he was specifically empowered to grant individual pardons. "It is alleged that hundreds of millions of dollars' worth of property confiscated under the law have under that section been restored by the President …….. It is alleged that pardons are for sale for money around the streets of this town by women of at least doubtful reputation ……….. If the President has powers under the Constitution, let him exercise them; but in God's name give him no greater power than he possesses under the Constitution, to exercise as they have been exercised for the last twelve months …………."[485]

When asked for the opinion of the Judiciary Committee on the nature of the presidential pardoning power, Senator Trumbull, chairman of the Committee, replied that the power of the executive branch to pardon and grant restoration of property would be as broad after passage of the repeal bill as before. He acknowledged that it was beyond the power of Congress to deprive the President of his prerogative and that

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[483]Joint Comm. Report on Reconstruction, 39th Cong., 1st Sess. 18 (1866).
[484]Cong. Globe, 39th Cong., 2d Sess. 8 (1866).
[485]Cong. Globe, 39th Cong., 2d Sess., 8-9 (1866):The following day, Chandler repeated his allegation: "It is a notorious fact, as notorious as the records of a court, that pardons have been for sale around this town, for sale by women and more than one ………. Any Senator, who desires to stop that disgraceful business, desires that the clause be instantly repealed."*Ibid*., at 14. To this Dixon replied that the bill certainly must go to the committee, for if such a charge be true, "I need not say, it renders [Johnson…….. liable to impeachment."*Ibid.,* at 15}.

pardons could be granted before as well as after conviction, and further, that they could be absolute or conditional. Nevertheless, he recommended repeal as an expression of the opinion of Congress and, more importantly, because he considered the "thirteenth section ……. Broader than the Constitution; it authorised the President …….to grant pardon and amnesty……… The President has already issued general proclamations of amnesty and pardon; there can be no occasion for the exercise of that power hereafter ……..''[486]

Senator Johnson dissented and insisted that the power of Article II, section 2 of the Constitution was "as comprehensive as the words can make it". He observed that the Constitution was silent with respect to the proper form of the presidential power:

"Whether he is to do it in each particular instance of a man who has committed an offense, or whether, where there is a class of offenders, he may do it in some form so as to include the entire class, the Constitution says nothing about. Where the power is conferred upon him absolutely, in general terms, it is for him to decide as to the manner in which he will execute it or as to the number of cases in which he will exercise it; as to the manner, whether he will execute it by granting it to each one a pardon for the alleged offense, or to those who may be included in it, whether he will grant a pardon to the whole collectively………..''[487]

The measure became law on January 21, 1867, without the signature of the President.[488] Nevertheless, Johnson was to announce three more amnesties.[489]

This Act was not the last attempt by the legislators to deny the President power to grant "general pardons". The next attack followed Johnson's Christmas Proclamation of 1868.[490] New life was given the argument by an end to hostilities. According to Senator Conkling:

"The argument is not that the President of the United States, as a Commander-in-Chief, or an any other capacity during a war, may make terms with public enemies or military offenders; but that in time of peace, as to any felony whatever, murder on

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[486]*Ibid*., at 144.
[487]*Ibid*. Senator Johnson continued his constitutional analysis in subsequent debates. *Ibid*., at 267-69.
[488]Act of Jan. 21, 1867, ch. 8, 14 Stat. 377.
[489]Pres. Proc. No. 3 of Sept. 7, 1867, 15 Stat. 699; Pres. Proc. No. 6 of July 4, 1868, 15 Stat. 702; Pres. Proc. No. 15 of Dec. 25, 1868, 15 Stat. 711.
[490]Pres. Proc. No. 15, Dec. 25, 1868, 15 Stat. 711.

the high seas, rifling the mails, or the other acts denounced as crimes in the national jurisprudence, he may interpose in no case in particular, but in all cases in general, without in any way individualizing them by a public act or edict, in effect by a public law of amnesty, and forego, and forever bar all prosecutions for past offenses."[491]

Senator Ferry claimed that no President before Johnson had undertaken to grant a general pardon without the prior sanction of Congress. Even Lincoln's pardons, observed the Senator, were "issued while a law stood upon your statute books expressly authorizing the President to make them."[492] Upon the repeal, that power, "so far as amnesty was concerned, exercised by the President, fell with the law, and Andrew Johnson alone among the Presidents of the United States has ever attempted to issue a proclamation of amnesty without previous sanction of Congress".[493]Senator Ferry's argument was inaccurate.

In 1795, Washington issued a Proclamation of Amnesty to the "Whiskey Rebels" without legislative sanction;[494]Adams proclaimed a general amnesty to Pennsylvania insurgents in 1800;[495] and in 1815 Madison granted a "general pardon" to the Barataria pirates.[496]And although Lincoln did have legislative approval for the proclamation of December 8, 1863,[497] his proclamation was worded to deny the need for legislative sanction.[498]Further, when the Supreme Court considered Lincoln's 1863 amnesty in *United States v. Padelford*,[499]the Court, too, seemed to imply that legislative sanction might have been superfluous:

"This proclamation, if it needed legislative sanction, was fully warranted by the Act of July 17, 1862…………That the President had power, if not otherwise yet with the sanction of Congress, to grant a general conditional pardon has never been seriously questioned."[500] The Attorney General sent President Johnson an opinion

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[491]Cong. Globe, 40th Cong., 3rd Sess. 169 (1869).
[492]Cong. Globe, 40th Cong., 3rd Sess. 439 (1869).
[493]*Ibid*.
[494]*A Compilation of the Messages and Papers of the Presidents*, 1789-1895, 181 (J. Richardson ed. 1896).
[495]*Ibid*., at 303-04.
[496]*Ibid.,* at 558-60.
[497] Pres. Proc. No. 11 of Dec. 8, 1863, 13 Stat. 737.
[498]*Ibid*.
[499]76 U.S. (9 Wall.) 531 (1870).
[500]*Ibid*., at 542(emphasis supplied).

stating that “the right and power of the President to pardon and to issue any proclamation of amnesty are derived from the clauses in the Constitution and the Act of Congress.[501] There is evidence, however, that Johnson himself felt that he was without power to grant amnesty without legislative sanction and would have vetoed the repeal bill as an unconstitutional infringement on the President’s pardon power had he been more certain of his power.[502]

Whether the Senate was serious or not, the Judicial Committee submitted a report[503]accompanied by the following resolution:

“*Resolved*, that in the opinion of the Senate the proclamation of the President of the United States of the 25th of December 1868, purporting to grant pardon and amnesty to all persons guilty of treason and acts of hostility to the United States during the late rebellion with restoration of rights, etc. was not authorized by the Constitution or Laws.”[504]

The Committee relied in part on English law, which seemed to deny the power to the Crown and grant it to the Parliament. An examination of the list of early English amnesties quickly reveals the error in that conclusion. Moreover, the absence of the word ‘amnesty’ from Article II, section 2 was convincing proof to some that the framers intended to withhold the power of amnesty from the executive office. To illustrate the conclusion, they noted the words of Chief Justice Marshal that a “pardon ……exempts the *individual* ………from punishment.”[505]

By arguing that the Parliament rather than the king of England had the power to grant amnesties, the Senate implied that they, rather than the President, possessed the power. It is easier to reason that the framers adopted the theory of pardon from the English executive’s authority and applied that theory to the President, and then it is to suggest that the theory followed for the legislative body. The power of the legislative body of England is neither limited by a written constitution nor held in check by a judicial reviewing power.[506] Moreover, the Constitution of the United States confers on

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[501] Act of July 17, 1862] …….11 op. Att’y Gen. 227 (1865).
[502]3 Attorney General’s Survey of Release Procedures 247 (1939).
[503]S. REP., No. 239, 40th Cong., 3d Sess. (1869).
[504]Cong. Globe, 40th Cong., 3d Sess. 1281 (1869).
[505]*United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1883) (emphasis supplied).
[506]S. De Smith, Constitutional and Administrative Law (1971).

the President the "executive Power" in undefined terms;[507]But the Congressional powers are carefully enumerated. Article I further provides that Congress is to exercise only those powers "herein granted".[508]

The Judicial Committee report was never considered by the Senate. Solicitor General William Howard Taft, when asked in 1892 for his official advice on the power of the President to grant amnesties, was of the opinion that the President obviously had such power, for if the President may grant pardons separately to 10,000 individuals, which no one doubts he may do, why can he not, by one general pardon or amnesty, grant such clemency to those offenders as a groups?[509]

It is most likely, however, that the framers considered the power to grant amnesties as incidental to the power to pardon. This theory is bolstered by Hamilton's justification for the existence of the power in the executive department: "In seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth …………"[510]

Furthermore, the Supreme Court specially upheld the President's power to grant amnesties without legislative consent in *Armstrong v. United States*.[511] By the Abandonment and Captured Property Act,[512] Congress provided for the restoration of property lost during the Civil war upon proof that the claimant had never given aid or comfort to the rebellion. After Armstrong fled south from the approaching Union army, her cotton was confiscated. She sought to recover the proceeds but the Court of Claims, holding that Armstrong's flight south evidenced aid to the rebellion, denied her claim. To the Supreme Court, however, Armstrong's move south was irrelevant; the court held that Lincoln's universal and unconditional amnesty[513] absolved Armstrong of any rebellious act and entitled her to recover the proceeds of her

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[507]U.S. Const. art II, $$ I, cl. I states: "The executive Power shall be vested in a President of the United States of America.

[508] U.S. Const. art I, $$ I states: "All legislative powers herein granted shall be vested in a Congress of the United States………".

[509]20 Op. ATT'Y GEN. 330 (1892).

[510]The Federalist No. 74, in The Federalist Papers 449 (1961) (A. Hamilton) emphasis supplied).

[511]80 U.S. (13 Wall.) 154, 156 (1871).

[512] Act of March 3, 1863, ch. 120, 12 Stat. 820.

[513]Pres. Proc. No. 15 of Dec. 25, 1868, 15 Stat. 711.

confiscated cotton.[514] Today the power of the executive to grant amnesties is established.

By reason similar to that which extended the power to pardon to cover amnesties (the greater includes the lesser),[515]the power to grant conditional pardons also is considered an incidental power. The power to grant conditional amnesties probably is also incidental power although it has never specifically been ruled on by the courts. However, courts have upheld claims that never would have been sustained without the operation of a conditional amnesty.[516]Indeed, it is unusual for an amnesty not to be granted conditionally.[517]

Although the Court qualified *Ex parte Wells*[518] in *Biddle v. Perovich*,[519] it did not overrule the holding of *Wells* on the basic issue: Can the President grant a conditional pardon? After receiving and accepting a conditional pardon, *Wells* challenged it by claiming that the Constitution empowered the President to issue only full pardons. *Wells* reasoned that attaching the condition was tantamount to legislating and was therefore a power reserved to a co-equal branch. The Supreme Court rejected the argument and held that the power to pardon on condition is incidental to the general pardoning power.

The power to pardon has been held to extend also to granting commutations[520]and remissions of fines and forfeitures imposed by the United States.[521] Commutation is the substitution of a lighter punishment for a heavier one. Although for a pardon to be effective it is usually must be accepted, commutation is effective without acceptance. In *Chapman v. Scott*,[522]the President granted a commutation to "time-served" to a convict so that he would be available for prosecution in a state court on a capital case. The convict refused the commutation and argued that it was not effective until accepted, but the court held that a commutation did not require acceptance: "Although

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[514]*UnitedStates v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1869) .
[515]*Semmes v. United States*, 91 U.S. 21 (1875); *Vitale v. Hunter,* 206 F. 2d 826 (10th Cir. 1953); *Kavalin v. White*, 44 F. 2d 49 (10th Cir. 1930); *In re Ruhl,* 20 F. Cas. 1335 (D. Nev. 1878) (no. 12, 124).
[516]*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).
[517]For a discussion of early English precedent, See 5 M. Bacon, *A New Abridgement of the Law*, 292-93.
[518]59 U.S. (18 How.) 307 (1855).
[519]274 U.S. 480 (1927).
[520]*Biddle v. Perovich*, 274 U.S. 480 (1927).
[521]*Osborn v. United States*, 91 U.S. 474 (1875); *The Laura,* 114 U.S. 411 (1885).
[522]10 F. 2d 156 (D. Conn. 1926).

power to commute is logically derivable from power to pardon,……., commutation is essentially different from pardon. Pardon exempts from punishment, bears no relation to term of punishment, and must be accepted, or it is nugatory. Commutation merely substitutes lighter for heavier punishment ………. It removes no stain, restores no civil privileges, and may be effected without the consent and against the will of the prisoner.[523]

5.1.3 Non-exclusivity of the Power in American Practice : The Supreme Court has held that the power to pardon is not exclusively vested in the President.[524] The Constitution specifically speaks of the power, however, in Article II only, and in fact, the framers even rejected legislative confirmation of the prerogative as it has been seen. Further, the Court ratified the exercise of the power by Congress despite statements in the previous opinions that "to the executive alone is intrusted the power of pardon"[525] and that the power is "not subject to legislative control.[526]

In *Brown v. Walker*[527] the Court Specifically affirmed the power of Congress to pass Acts of general pardon. Brown, the auditor for the Alleghany Valley Railroad Company, was subpoenaed to appear as a witness before a grand jury investing violations of the Inter-State Commerce Act. When asked if he knew whether or not Alleghany transported coal for the Union Coal Company at prices below established rates, Brown pleaded the Fifth Amendment guarantee against self-incrimination. The Court refused to allow Brown to fail to testify because an act of the Congress afforded him amnesty from prosecution. According to the Act: "No person shall be excused from attending and testifying or producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, ……..on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise

[523]*Ibid.,* at 160, quoting from In re Howard, 115 Kan. 323, 325, 222 P. 606, 608 (1924).
[524]*Brown v. Walker*, 161 U.S. 591 (1896); *The Laura*, 114 U.S. 411 (1885).
[525]*United States v. Klein*, 80 U.S. 128, 147 (1871).
[526]*Ex parte Garland,* 71 U.S. (9 Wall) 333, 380 (1866).
[527]161 U.S. 591 (1896).

before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding ………"[528]

The Supreme Court also observed that "if the witness has already received a pardon, he cannot longer set up his [fifth amendment] privilege, since he stands with respect to such an offense as if it had never been committed."[529] The Court held that although the Constitution vests the executive with the power to pardon, "this power has never been held to take from Congress the power to pass Acts of general amnesty."[530]

In a government of limited power under a Constitution that carefully defines the powers of Congress, advocates of exclusive executive pardoning power may have difficulty comprehending the Court's willingness to give the presumption of constitutionality to the Congressional power advocates and the burden of proof to the apologist for exclusive presidential power. This is even more difficult to understand in the light of *Ex parte Garland*,[531] in which the Supreme Court Stated: "The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment". The power thus conferred is unlimited, with the exception stated………. This power of the President is not subject to legislative control ………[and] cannot be fettered by any legislative restrictions.[532]

If the executive issued an amnesty accepting a group of offenders or attaching a condition to the general pardon and Congress thereafter issued a complete, full and unconditional amnesty, denying Congressional interference would be difficult.

In England, Parliament held the power concurrently with the king and a parliamentary pardon was often more beneficial than an executive charter alone.[Chief Justice Holt noted that the king's pardon was as effective as a Parliamentary pardon; both prevented all corruption of the blood. But Congress, unlike Parliament, is limited in its powers. The Court in *Brown* did not take note of the difference; in fact, it gave

[528] Act of Feb. 11, 1893, 27 Stat. 443-44.
[529] 161 U.S. at 599.
[530] *Ibid.,* at 601.
[531] 71 U.S. (9 Wall.) 333 (1866).
[532] *Ibid*., at 380, quoting U.S. Const. art. II, $$ 2 cl.1.

little support at all for its conclusion. It relied heavily on state court opinions and on the opinion of a former Court in *The Laura*.[533]

In *The Laura*, a revenue statute empowering the Secretary of the Treasury to remit or mitigate any fine or penalty relating to steam vessels or to discontinue any prosecution seeking to recover penalties was changed. It was argued that the presidential power to grant pardons included the power to remit fines and forfeitures imposed for the commission of offenses against, or for violation of the laws of the United States. Further, it was argued that such a power is vested exclusively in the President, and its exercise by any subordinate officer of the government is an encroachment upon the constitutional prerogative of the Chief Executive.[534]

Justice Harlan, speaking for the Court, agreed that the power to remit fines, penalties and forfeitures was incidental to the power of the President to pardon, but he did not find the power exclusively vested in the President. The opinion was based on previous practice and acquiescence in such practice for nearly a century: "The practice commenced very shortly after the adoption of the Constitution and was, perhaps, suggested by legislation in England, which, which without interfering with, abridging, or restricting the power of pardon belonging to the Crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country.[535]

However, it is dangerous jurisprudence for a court to rely upon past actions that may have been unconstitutional as authority. The doctrine of *Powell v. McCormack* "that an unconstitutional action has taken place before surely does not render that same action any less unconstitutional at a later date,"[536]cannot be overemphasized. Additionally, that the practice began shortly after the adoption of the Constitution does not strengthen the Court's argument. The 1797 Act was merely legislation enacted by the same generation divided over the vital issue of judicial review. Finally, that the Parliament vested the power in executive ministers is completely irrelevant because of the difference between the two systems.

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[533]114 U.S. 511 (1885).
[534]114 U.S. at 413.
[535]114 U.S. at 414. For the English legislation referred to by Justice Harlan, see 27 Geo. 3, c. 82 (1787); Geo. 3, c. 96 (1811); 54 Geo. 3, c. 171 (1814).
[536]395 U.S. 486, 546-47 (1969).

In addition to these examples of clemency power outside the executive office, the courts exercise power consanguineous to a power of pardoning. Although as a general principle the courts have no power to grant clemency,[537] they do have the power to commute sentences[538] and remit fines during the term in which the sentence or fine was rendered.

5.1.4 The Extent of Pardon Power in America : The extent of the presidential power needs a consideration here.It is submitted that the scope of the poweris broad enough to allow the executive to shield himself from the checking power of the other branches. More often impeachment was viewed as a check on the pardoning power. In 1867, Representative Ashley charged President Johnson with "high crimes and misdemeanours" for "usurpation of power and violation of law" by "corruptly using the pardoning power."[539] After investigation, the Committee on the Judiciary found no evidence of corrupt use of the power.[540]

Impeachment is usually no check at all on the powers of the President; it is a check on the individual President. If convicted, an impeached President is removed from office, but the powers of the executive branch are left undisturbed. Furthermore, the pardon remains effective despite removal of the President for issuing it. Once delivered, a pardon cannot be revoked.[541] When Oklahoma Governor Walton was impeached for abusing the pardoning power, the pardons remained in force despite the abundant evidence of abuse.[542]

It might be asked whether removal via impeachment is a desirable course of action against a President who issues a pardon because of incompetent advice or through his own misjudgement. A check on the power, then, is yet to be incorporated into the American Constitutional Scheme.

First, impeachments are specifically excluded from the scope of the power. As Chief Justice Story, commenting on the Constitution, concluded: "If the power of pardon extended to impeachments, ………..the latter might be wholly ineffective, as a

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[537]*Ex parte United States*, 242 U.S. 27 (1926).
[538]*UnitedStates v. Benz,* 282 U.S. 304 (1931).
[539]Cong. Globe, 39th Cong., 2d Sess. 320 (1867).
[540]H.R. Rep. No. 7, 40th Cong., 1st Sess. (1867).
[541][*In re DePuy*, 7 F. Cas. 506 (S.D.N.Y. 1869) (No. 3,814).
[542] 3 Attorney General's Survey of Release Procedures 150-52 (1939).

protection against political offenses. The Party accused might be acting under the authority of the President, or be one of his corrupt favorites".[543]The court has held that the exception in cases of impeachment strengthens the argument that the framers meant to include everything else.[544]

Secondly, the Constitution also limits the President's pardon power to offenses against the United States. This clause precludes the President from pardoning offenses against the individual states and from intervening in civil suits. The former limitation is based upon the American federal system; the latter upon accepted historical limitation. Even if a pardon were granted, it could not relieve an individual from prosecution by the affected party, or in the case of the death of a man, from revengeful kinsmen. This issue often arose in the United States in property confiscation cases decided after the Civil War.[545] Time is a third limitation on the power. Because the power to pardon is given only for "offenses against the United States", the crime must precede the pardon; it may not be anticipated. Otherwise, the power that allows presidential clemency for the consequences of a violation would be a power to dispense with the observance of the law. But, as the Court said in *Ex parte Garland*,[546] the pardoning power "may be exercised at any time after [the commission of the offenses], either before legal proceedings are taken, or during their pendency, or after conviction and judgement".[547]In this case, Judge Learned Hand remarked: "I have no doubt whatever that the President may pardon those who never have been convicted. The English precedents are especially pertinent."[548]

Whether contempt of court is a pardonable crime is an important issue in determining the scope of the power. In *Ex parte Grossman*[549] the Court considered only criminal contempt. Grossman violated an injunction entered on behalf of the United States and was arrested, found guilty of contempt of court, and sentenced to one year in jail and a fine of $1000. Thereafter, he was granted a pardon by President Coolidge. Grossman accepted the pardon, paid the fine, and was released. Six months

[543]I.J. Story, Commentaries on the Constitution of the United States, 172 (1851).
[544]*United States v. Thomasson*, 28 F. Cas. 82 (D. Ind. 1869) (No. 16,479).
[545] *Knote v. United States,*95 U.S. 149 (1877).
[546]71 U.S. (9 Wall.) 333 (1866).
[547]*Ibid*. at 380.;*United States v. Burdick*, 211 F. 492 (S.D.N.Y. 1914).
[548]*Ibid*., at 493.
[549]267 U.S. 87 (1925).

later, the District Court recommitted him to the House of Correction to serve his sentence notwithstanding the pardon.

On behalf of the lower court, special assistants to the Attorney General argued that the power to punish for contempt is inherent in, and essential to, the very existence of the judiciary. Were the President allowed to substitute his discretion for that of the court he would become the ultimate source of judicial authority. Such a holding, would be a distortion of the cardinal principle of American government that the executive, legislative, and judicial branches are independent and co-equal.[550]It is also suggested that contempt of court is not an offense "against the United States" and thus is not within the purview of the power of the President to pardon.[551]The Court, however,rejected this argument and adopted the plaintiff's contention that the power to pardon for contempt is inherent in the pardoning power. Attorney General Stone, as amicus curiae, argued that the history of the power to pardon for criminal contempt establishes that the grant of the pardoning power to the President by the Constitution "was intended to embrace criminal contempt in the phrase 'offenses against the United States'".[552]The President has power to grant a pardon to a prisoner undergoing punishment for contempt of court.The Court ordered Grossman released and held that the President's power extended to pardons of criminal contempt of court:"The King of England before our revolution, in the exercise of his prerogative, had always exercised the power to pardon contempt of court just as he did ordinary crimes and misdemeanours …………… In the mind of a common–law lawyer of the eighteenth century the word "pardon" included within its scope the ending by the king's grace of the punishment of such derelictions, whether it is imposed by the court without a jury or upon indictment, for both forms of trial for contempt were had."[553]

Moreover, the Court noted that criminal contempt of a federal court had been pardoned for eighty- five years,[554] decided forty years before *Grossman*. There the Court also noted in dictum that the pardoning power was unlimited "except in cases of

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[550]267 U.S. at 98.
[551]*Ibid.,* at 93-95.
[552]Ibid., at 102; 3 Op. ATT'Y GEN. 622 (1841).
[553] 267 U.S. at 110.
[554]267 U.S. at 118;*The Laura*, 114 U.S. 411 (1885).

impeachment and where fines are imposed by a co-ordinate department of the government for contempt of its authority……….”[555]

The Supreme Court thus ratified a power of the executive that had been and can be used to frustrate powers essential to the operation of the judiciary, power a lower court described earlier as "as inherent and indispensable as a judge."[556]The contempt power is essential to the preservation of order in judicial proceedings and to the enforcement of judgements, orders, and writs; consequently, it is essential to the due administration of justice. "A Court without the power effectually to protect himself against the assaults of the lawless, or to enforce its orders, judgements, or decrees against the recusant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it."[557] Yet the President has the unchecked power to frustrate this essential authority of the court. The argument is not that courts erred in their reading of jurisprudential history, but that the framers overlooked the need to hold the power to pardon in check. The holding of Grossman arms the President with a power that enables him to shield his subordinates against judicial interference.

America always has been vigilant in preserving her liberties. Speaking of the system of "mixed governments" in England, Bolingbroke observed: "It is by this mixture of ……….[power], blended together in one System, and by these three Estates balancing one another, that …….[the] free Constitution of Government hath been preserved so long inviolate …………"[558]The founding fathers were steeped in this type of literature. They were surrounded not only by the writing of Bolingbroke, but also by the works of such eminent writers as Cicero and Montesquieu. The early American constitutionalists were well aware that liberty was to be preserved only by maintaining institutional restraints and a just division of powers. The simplest government would not ensure the maximum freedom. But a government of law, guaranteeing optimum liberty, required numerous limitations and qualifications on the powers of government. The founders of the American government were no doubt the greatest innovators of the theory of "mixed governments", but in their desire to protect

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[555] *Ibid*., at 413.
[556] In *re Nevitt*, 117 F. 448, 455 (8th Cir. 1902).
[557] *Ibid*., at 455.
[558] N.Bolingbroke, *A Dissertation Upon Parties,* 158 (5th ed. London, 1739).

society from inflexible laws[559] and ironically enough, to establish a means of facilitating complete investigations,[560] they allowed one enumerated power to proceed unfettered.

The query naturally suggested by *Grossman* is whether a contempt of Congress constitutes a pardonable offense. Story suggests that it is necessary that the branches be independent and have the ability to discharge their duties: "If the executive should possess the power of pardoning any ………offender [who interrupts the affairs of Congress], ……….[the legislature] would be wholly dependent upon [the executive's] good will and pleasure for the exercise of their own powers."[561]But the argument based on the ground of separation of powers no longer seems feasible in the light of Grossman.[562] The power of the "Grand Inquest of the Nation" to compel testimony via a contempt citation is easily frustrated if the executive branch so pleases. The executive has issued pardons for Congressional contempt, e.g. the 1938 pardon by Franklin D. Roosevelt of Dr. Francis Townsend, leader of an old age pension group, who was found guilty of contempt for refusal to testify.

The power may be used in other ways to suppress a constitutional action by Congress. The most obvious exercise of the power to impede Congressional authority is the pardoning of all individuals convicted under a statute the President opposes. In a preliminary draft of his first address to Congress, Jefferson included a declaration that the Sedition Act was "a palpable and qualified contradiction to the Constitution" and announced that he intended, pursuant to the powers vested in him by Article II, Section 2, to pardon those convicted under the Act.[563]Inasmuch as the President is free to exercise the pardoning power for good reason, bad reason, or no reason at all, the clause was considered superfluous and was eliminated from Jefferson's final draft.[564] In sum, even if a presidential veto is overridden by two-third of Congress, the executive still possesses the dominating power[565]

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[559]4 Debates in the Several State Conventions on the Adoption of the Federal Constitution, 110-12 (J. Elliot ed. 1836).
[560]2 Records of the Federal Convention of 1787, 426 (M. Farrand ed. 1911).
[561]J. Story, *Commentaries on the Constitution of the United States*, 551-52 (1851).
[562] 267 U.S. at 119-20.
[563]E. Corwin, *ThePresident: Office and Power,* 350 n. 59 (4th ed. 1957).
[564]*Ibid*.
[565] Morris, *Some Phases of the Pardoning Power*, 12 A.B.A.J. 183, 184-86 (1926).

5.1.5 The Nixon Pardon and its Impact in the US Political History :

In an analysis of the President's power to pardon, it is difficult to overlook the most recent controversial exercise of the power in American history, although the exercise of the prerogative of mercy by Gerald Ford is much more significant in a political history of the United States than in a constitutional history.

With these words, the power of the presidency was displayed awesomely, "I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974".[566]

To many, the pardon of Richard Nixon seemed to be a great perversion of the power that violated the intention of the framers. During the formation conventions Iredell remarked that "pardon in a Republican government was not to protect felons with powerful friends, but to protect society from ineffective laws."[567]Wilson believed that the pardoning power should facilitate rather than circumvent a thorough investigation.[568]

Nixon had been forced from office by the threat of being the first President removed from the presidency by the Congress.[569] His resignation was followed thirty days later by a pardon from his chosen successor. To many the pardon smacked of a deal between Gerald Ford and Richard Nixon.[570] To dispel this apprehension, Ford volunteered to appear before the House Judiciary Committee's Subcommittee on Criminal Justice. Before the Committee Ford emphasized that there was no deal between the former President and himself. The pardon was granted, according to the President, to "change our national focus …….to shift our attention from the pursuit of

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[566]Pres. Proc. 4311, 39 Fed. Reg. 32601-02 (1974).
[567]4 Debates in the Several State Conventions on the Adoption of the Federal Constitution, 110-12(J. Elliot ed. 1836).
[568]2 Records of the Federal Convention of 1787, 426 (M. Farrand ed. 1911).
[569] Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. No. 1305, 93d Cong. 2d Sess. (1974).
[570]Stone, Pardons and Testimony, N.Y. Times, Oct. 9, 1974, at 43, col. 2.

a fallen President to the pursuit of the urgent needs of a rising nation."[571] Some members of the Committee, notably Elizabeth Holtzman, were unsatisfied with Ford's answers. One question asked by Representative Holtzman and unanswered by Ford sought an explanation for the President's failure to specify any of the crimes for which Nixon was pardoned.

Holtzman's query is not only an important political issue, but it raises an interesting legal problem: Is a pardon that does not specify an offense valid? The answer must begin with an explicit statement of the time-honoured canon of constitutional interpretation that words used in a Constitution or Charter carry with them the meaning of their origin, "Words of art bring their art with them. They bear the meaning of their habitat …….."[572] To the mind of the eighteenth century statesman, the word "pardon" conveyed the power exercised by the Crown in England. Of the thirty-one lawyer-delegates attending the Convention of 1787, five had received their legal education at the Middle Temple, four at the Inner Temple.[573] There can be little doubt that the others were at least familiar with the great works of the leading English writers. The courts have given great weight to that fact.

The Supreme Court never has been called upon to judge the validity of an open pardon like the Nixon pardon. If it must do so in the future and if it continues to view Article II, Section 2 in the light of the meaning the framers intended it to have, the evidence raises a reasonable doubt of the constitutionality of the Nixon pardon.

Under examination by the Subcommittee, Ford admitted that he had no knowledge of anything that "rises to the level ……… to prove even a probable criminal violation".[574] He had only the September 4th memorandum from Deputy Special Prosecutor Ruth to Special Prosecutor Jaworski listing ten "possibilities"[575] and had no knowledge "of any other potential or possible criminal charges".[576]

To guard against fraud on the part of persons seeking to secure a pardon, it was a general rule in England "that wherever it appeared by the recital of the pardon, that

[571] N.Y.Times, Oct. 18, 1974, at 18, col. 4.
[572] Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 537 (1947).
[573] R. Berger, *Impeachment: The Constitutional Problems,* 87 n. 160 (1973).
[574] N.Y.Times, Oct. 18, 1974, at 19, col. 2.
[575] *Ibid.*
[576] *Ibid*. at col. 5.

the king was misinformed, or not rightly apprised both of the heinousness of the crime, and also, how far the party stands convicted upon the record, the pardon [was] void ………"[577]The reasoning behind the rule was that the king was entrusted with the high prerogative upon a special confidence that he would spare only those whose cases "the Law itself may be presumed willing to have excepted out of its general Rules, which the Wit of Man cannot possibly make so perfect as to suit every particular Case………"[578]Of course, it could be argued that because Ford had available information on the ten "possibilities" at the time of the pardon, it is valid insofar as it applies to those ten areas.[579]At the time, however, these ten "possibilities" were even beyond proof by the Special Prosecutor's Office, although to President Ford, Nixon's acceptance was tantamount to an admission of guilt.[580] But only courts can pass judgement on the guilt or innocence of an individual; as long as the courts have not agreed on the meaning of acceptance, it is dangerous to maintain that acceptance implies guilt in every case.

The implication of acceptance is the second interesting constitutional issue raised by the pardon of President Nixon. As noted earlier, in *Ex parte Garland*,[581] the Supreme Court noted that a pardon "blots out of existence the guilt" and makes the offender "as innocent as if he had never committed the offense".[582]A half century after that decision, the Court said that acceptance of a pardon was an acknowledgement of one's guilt.[583]"A pardon proceeds not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon."[584]

The confusion continues to plague American law because the policy of granting pardons for a variety of reasons lingers. They are granted for both innocence and guilt.

5.1.6 Summary : As stated earlier, the power of pardoning offences against the United States, conferred by the Constitution upon the President, is practically unlimited, save in cases of impeachment. But the corresponding power of the

[577]M. Bacon, *A new Abridgement of the Law*, 290.
[578]W. Hawkins, *A Treatise of the Pleas of the Crown*, 382-83 (London, 1716).
[579]Macgill, *The Nixon Pardon: Limits on the Benign Prerogative*, 7 CONN.L. REV. 84-85 (1974).
[580]N.Y.Times, Octo. 18, 1974, at 20, col.5.
[581]71 U.S. 333 (1866).
[582]*Ibid.,* at 380.
[583]*Burdick v. United States*, 236 U.S. 79 (1915). See also *Carlesi v. New York*, 233 U.S. 51 (1914) and the opinion in *Roberts v. State*, 160 N.Y. 217 (1899).
[584]*Ibid*., at 221.

executive mercy bestowed upon the governors of the state sovereignties is substantially limited and restrained by the express words of their constitutional grants. For instance, it will be observed by comparing the provision of the Federal Constitution with the provision of the New York Constitution that the governor's power is limited or modified in four particular areasso far the exercise of this power is concerned:

1. The president can pardon for treason, the governor cannot.
2. The president can pardon at any time after the commission of the offense, the governor only after conviction.
3. Congress has no power to prescribe regulations as to the manner of applying for pardons; the state legislature has such power.
4. The president is not required to report to Congress any case wherein he has extended executive clemency; the governor is required to do so and give reasons for his actions.

The states themselves have withheld from their pardoning depositaries the power to pardon for the offense of treason, because the exercise thereof would not have been harmonious with the federal plan of government[585]In case of the impeachment of the governor, or his removal from office, or his absence from the state, the power to pardon generally devolves upon his direct representative, the lieutenant-governor[586]: in the absence of the governor, the lieutenant-governor is clothed with the power to grant a plenary pardon;[587] conditional pardon granted by the lieutenant-governor;[588] during the impeachment of the governor, the power to pardon devolves upon the lieutenant-governor. An apparent reason for this devolution of power lies in the fact that granting of pardons is a function of the state, and not merely the personal act of the governor.[589]Moreover, the principle is now firmly established in our jurisprudence that neither the state nor federal legislature can enact laws to restrict or encroach upon the executive's pardoning power, for his authority in relation thereto is supreme.[590] Right to practice law, after participation in the Civil War, restored by

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[585] Morris, some Phases of the Pardoning Power (1926) 12 A.B.A.J. 183, 187.
[586]New York Const. art.IV, $$ 6; Montgomery v. Cleveland, 134 Miss. 132, 98 So. 111 (1923).
[587]*Ex parte Cullens*, 11 Okla. Cr. R. 644, 150 Pac. 90 (1915).
[588]People *ex rel*. Robin v. Hayes, 163 App. Div. 725, 149 N.Y. Supp. 250 (3d Dep't 1914).
[589]*Montgomery v. Cleveland*, 134 Miss. 132, 98 So. 111 (1923).
[590]*Ex parte* Garland, 4 Wall 333 (U.S. 1866).

presidential pardon, despite attempted legislation to the contrary;[591]Texas statute allowing judges to suspend sentence indefinitely, held void as an invasion of the governor's pardoning prerogative. But it has sometimes been stated that according to the system of laws whence ours are derived, a pardon may proceed from either the executive or the legislative department, the authority of neither being exclusive.[592] While the power to pardon after conviction is vested in the governor, the exercise of the pardoning power before conviction by the legislature is not unconstitutional. Furthermore, the pardoning power is not so exclusive as to prevent other officers, acting under statute, from remitting forfeitures and penalties incurred from violations of laws of the United States.[593] Remission of forfeitures by the secretary of treasury and other officers has long since been upheld.But the power to reduce a sentence by judicial amendment is as much a judicial act as the imposition of the sentence in the first instance, and it is not a usurpation of the pardoning power of the chief executive.[594] Freedom from legislative and judicial control in this field, peculiarly executive in character, presents a concrete application of the doctrine of the separation of powers, inherent in a democratic form of government.

5.2 Pardon Power and Judicial Review in the UK

In the English tradition, the Royal Prerogative of Mercy is one of the historic royal prerogatives reserved to the British monarch, in which she 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; the RPM then being used to commute such a sentence to a less draconian form of punishment. Today, it can be used to change any sentence or penalty imposed upon a person. The justice secretary has responsibility for recommending the use of the Royal Prerogative of Mercy to Her Majesty, the Queen. The Defence Secretary is responsible for military cases. The royal prerogative of mercy is now exercised sparingly and only in cases of great exceptionality.

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[591]*Armstrong v. United States,* 13 Wall. 154 (U. S. 1871); *Snodgras v. State,* 67 Tex. Cr. R. 615, 150 S.W. 162 (1912).
[592]BISHOP, NEW CRIMINAL Law, (8th ed. 1892) 545; *State v. Nichols,* 26 Ark. 74 (1870).
[593]Pollock v. Bridgeport S.B. Co. (The Laura), 114 U.S. 411 (1885).
[594]Unites States v. Benz, 282 U.S. 304 (1930).

The most recent example of the Royal prerogative of Mercy, commonly referred to as a Queen's Pardon is the now well-known case of Alan Turing who was convicted on 31 March, 1952 of gross indecency with another man. Tragically, shortly after conviction this war hero, who cracked the German Enigma code thereby shortening the war by two years and saving countless lives, died. A verdict of suicide was recorded. When the Royal Prerogative of Mercy was thankfully, and at long last granted, a Ministry of Justice spokesman said, "Uniquely on this occasion a pardon has been issued without either requirement having been met, reflecting the exceptional nature of Alan Turing's achievements."

The royal prerogative covers those powers left over from when the monarch was directly involved in government-powers that now include making treaties, declaring war, deploying the armed forces, regulating the civil service, and granting pardons. These powers are exercised by government ministers or by the monarch, in almost all instances, under direction from ministers.

On the nature and scope of Royal Prerogative exercised by the executive in the UK, there are important cases decided by the English courts.The exercise of the power is reviewable by the Divisional Court by way of Judicial Review. In this context, the observation made in *R v Secretary of State for the Home Department*, *ex parte Bentley* which held is worth mentioning:

"*The court had jurisdiction to review the exercise of the royal prerogative of mercy by the Home Secretary in accord with accepted public law principles since the exercise of the prerogative was an important feature of the criminal justice system and a decision by the Home Secretary which was infected with legal errors ought not to be immune from legal challenge merely because it involved an element of policy or was made under the prerogative*."[595]

Historically, the principle of a pardon derives from the Act of Settlement 1700 which altered the law so that a pardon could not "stop an impeachment but there is to be nothing to prevent the king from pardoning after the impeached person has been convicted and sentenced."

[595](1993) 4 All ER 442

For a modern application of the law the important case is *R v Foster (Barry)*.[596] In *Foster* it was held that the effect of a free pardon was to remove from the subject of the pardon "all pains, penalties, and punishments whatsoever that from the said conviction may ensue" but not to eliminate the conviction itself.

Watkins, LJ pointed out that counsel:

"…has reminded us that constitutionally the Crown no longer has a prerogative of justice, but only a prerogative of mercy. It cannot, therefore … remove a conviction but only pardon its effects. The Court of Appeal (Criminal Division) is the only body which has statutory power to quash a conviction."[597]

This provides a clear indication to the fact that prerogative of justice and prerogative of mercy are quite different. The first comes within the domain of the courts while for the second, the British Monarchs are empowered by traditions. However, Royal Prerogative of Justice was abolished in the 17th Century. A pardon is thus a common law extra-judicial power which is exercised by the Crown under the Royal Prerogative of Mercy.

Again, the prerogative to grant a free pardon remains and is consolidated by the Criminal Appeal Act 1995, Section 16

"(1) Where the Secretary of State refers to the Commission any matter which arises in the consideration of whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to a conviction and on which he desires their assistance, the Commission shall –

(a) Consider the matter referred, and

(b) give to the Secretary of State a statement of their conclusions on it; and the Secretary of State shall, in considering whether so to recommend, treat the Commission's statement as conclusive of the matter referred.

(2) Where in any case the Commission is of the opinion that the Secretary of State should consider whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to the case they shall give him reasons for their opinion."

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[596](1985)QB 115; (1984)3 WLR 401.
[597] *Ibid. at p. 71.*

In the case of *Bentley,*[598] Watkins, L.J commented that the prerogative power is:

"A flexible power and its exercise can and should be adapted to meet the circumstances of the particular case the prerogative of mercy [can no longer be regarded as] no more than an arbitrary monarchical right of grace and favour. It is now a constitutional safeguard against mistakes."[599]

Thus, the power to pardon constitutes a broad and flexible constitutional safeguard against mistakes, encompassing Conditional as well as Free pardons.

The modern statement of the doctrine is found in Watkins, L.J judgment in the Court of Appeal in *Bentley* where he declared:

"We understand the strength of the argument that, despite the fact that a free pardon does not eliminate the conviction, a grant of a free pardon should be reserved for cases where it can be established that the convicted person was morally and technically innocent."[600]

The key test is thus whether the person is "morally and technically innocent" of the offence. A former Justice Secretary Kenneth Clarke has previously stated that the subject of the pardon must not be "tainted with unclean hands".

That test, however, is not definitive and it is important to counterbalance all prevailing and relevant factors. Former Home Secretary, Herbert Gladstone, classically advised the House of Commons in 1907:

"It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy. Numerous considerations – the motive, the degree of premeditation or deliberation, the amount of provocation, and the state of mind ... character and antecedents ... and many other [factors] have to be taken into account in every case."

It seems that these "numerous considerations" – and rightly so - have taken place in the case of *Turing* and perhaps explain the Ministry of Justice spokesman's comments.

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[598](1994) QB 349.
[599]*Ibid. at p.365.*
[600]*1994 QB 349 at 364E.*

In *Sarah's* Case,[601] also *R v A* (2012)[602] the grant of a Free Pardon was refused by the Ministry of Justice because the Court was unequivocal in its view that *Sarah* was guilty of the offence with which she was charged, and therefore that the conviction was safe. This is despite the DPP stating at the time that "this was not a case where justice was done or seen to be done"[603]

In addition, the CPS accepts that *Sarah* – a victim of rape who retracted a true complaint - would not now be prosecuted for the perverting the course of justice. Importantly, the prosecution took a neutral stance in the Court of Appeal and did not seek to support the safety of the conviction. An application to have the case heard before the UK Supreme Court was blocked by the Court of Appeal. *Sarah's* Case is now lodged before the European Court of Human Rights.

At present, the monarch exercises the power on the advice of the departmental minister, the Home Secretary. The Home Secretary's decision can in some situations be challenged by judicial review. In *R v. Secretary of State for the Home Department ex-parte Bentley*, the Court held that the formulation of policy for the grant of a free pardon was not justifiable, but a failure to recognize that the prerogative of mercy was capable of being exercised in many different circumstances and over a wide range was.

Thus, all in all, it may be concluded that in the U.K. judicial review of the power of pardon is extremely restricted in scope. However, the British constitutional structure recognizes the supremacy of parliament and provides an altogether narrower scope for judicial review than the Indian Constitution which tends towards separation of powers. Thus, British precedent in this area has limited application to the India

5.3 Pardoning Power and Judicial Review in India

That the President of India derives its power to grant a pardon, from Article 72(1) of the Constitution of India, 1950, the cases under which the President has the power to grant pardon are as follows:[604]

-Where the punishment or sentence is by a Court Martial.

[601] as it is referred to in the media; also *R v A* (2012).
[602] *EWCA Crim 434; [2012] 2 Cr. App R. 8.*
[603] The Guardian, Thursday 16th December 2010.
[604] The Constitution of India, 1950.

-Where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends.

-Where the sentence is a sentence of death.

Article 72(1) further enumerates that, nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend; remit or commute a sentence passes by a Court Martial.

That the said Article further enumerates the Clemency powers of the President, which means that the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.

It has already been stated earlier that the pardoning power of the President of India is wider than the pardoning power of the governors of the states and it differs in the following two ways:

(1) The President can grant pardon in all cases where the sentence given is sentence of death, but pardoning power of the governor does not extend to death sentence cases;

(2) The power of the President to grant pardon extends in cases where the punishment or sentence is by a Court Martial, but Article 161 does not provide any such power to the governor.

5.3.1 Exercise of Pardon powers : The exercise of pardon powers by the President of India has been made limited by the constitutional provision itself conferring this power read with Article 74 of Indian Constitution which states that (1) there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice; Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration; (2) the question whether any, and if so what, advice was tendered by Ministers to the President shall not be enquired into in any court. In deciding mercy petitions, the recommendation of the Ministry of Home Affairs is viewed as the opinion of the Council of Ministers. The

President (and also the governors of States) cannot overrule the Home Ministry's advice. Thus,

(a) This power of pardon shall be exercised by the President on the advice of Council of Ministers;

(b) The Constitution does not provide for any mechanism to question the legality of decisions of President or governors exercising mercy jurisdiction.

5.3.2 Can Governor Pardon Death Row Convicts? : In an important case, the Supreme Court held that the Governor of a State can pardon prisoners; including death row ones, even before they have served a minimum 14 years of prison sentence. In fact, the Governor's power to pardon overrides a provision in the Code of Criminal Procedure – Section 433A, which mandates that a prisoner's sentence can be remitted only after 14 tears of jail, a Bench of Justices Hemant Gupta and A. S. Bopanna observed in a judgement. "Section 433-A of the Code cannot and does not in any way affect the constitutional power conferred on the President or Governor to grant pardon under Article 72 or 161 of the Constitution …. If the prisoner has not undergone 14 years or more of actual imprisonment, the Governor has a power to grant pardon. Such power is in exercise of the power of the sovereign, though the Governor is bound to act on the aid and advice of the State Government", the Court observed. In fact, the Court noted that the sovereign power of a Governor to pardon a prisoner under Article 161 is actually exercised by the State Government and not the Governor on his own. "The advice of the appropriate government binds the Head of the State", Justice Gupta observed in the judgement which referred to the Supreme Court's Constitution Bench judgement in the Rajiv Gandhi assassination case on the power of remission. In the case of *A.G. Perarivalan v. State, Through Superintendent of Police CBI/SIT/MMDA, Chennai, Tamil Nadu and Anr.* (2022) the Supreme Court further held that the Governor has no right to send a mercy plea to the President of India for consideration. The pardoning power in such cases vests with the Governor and he can exercise such power only with the aid and advice of the state executive.

In the case of State *of Haryana & Ors. V. Raj Kumar @ Bittu*, the Supreme Court of India in 2021 also held that the Governor can exercise the pardoning power in

case of death row convicts as well and can grant pardon to a person including the death row convicts, even before they complete 14 years of imprisonment. Earlier, this power concerning death row convicts was with the President only.

5.3.3 Indian Case Laws on Judicial Review : As has already been mentioned above that Article 72 empowers the President to grant pardon, reprieve, respite or remission of punishment, or to suspend, remit or commute the sentence of any person. Over the years, the president's pardoning power has become diluted when the Hon'ble Supreme Court of India conclusively established that the power of pardon is subject to judicial scrutiny. The SC in *Epuru Sudhakar* Case has given a small window for judicial review of the pardon powers of President and governors for the purpose of ruling out any arbitrariness.

In *Maru Ram v. Union of India*,[605]the court observed that in any case the power under Article 72 is exercised on irrational, irrelevant, discriminatory or *mala fide* consideration; the Court could examine the case and intervene if necessary. There may be grounds, such as; political vendetta or party favouritism which may make the actual exercise of the constitutional power vulnerable, only in these rare cases the Court will examine the exercise.

In *Kehar Singh v. Union of India*,[606]the Court considered the nature of the President's power under Article 72 while dealing with a petition challenging the President's rejection of a mercy petition by Indira Gandhi's assassin, Kehar Singh. The court held that the President can scrutinise the evidence on record of the criminal case and come to a different conclusion. It further held that *"the Court provided that the pardoning power can be subject to a review where an executive decision grounds such as discrimination on the basis of religion, caste, colour or political loyalty"*. Moreover the President's power is a matter of discretion and it cannot be claimed as a fundamental right. However, unlike *Maru Ram*, the court refrained from laying guidelines stating it seems that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision and existing case law and specific case law need not be spelled out.

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[605]*AIR 1980 SC 2147.*
[606]*AIR 1989 SC 653.*

The Supreme Court of India examined the pardoning power of the President of India under different cases like *Kehar Singh's* Case and *Maru Ram's* Case, and laid down the following principles:

1. The convict seeking this relief has no right to insist on an oral hearing;
2. No guidelines need to be laid down by the Supreme Court for the exercise of the power;
3. This power is to be exercised by the President on the advice of the Central Government;
4. The President can go into the merits of the case and take a different view;
5. Exercise of this power by the President is not open to judicial review, except to the limited extent as indicated in *Maru Ram's* case;
6. The President is not bound to give reasons for his order;
7. The President can afford relief not only from a sentence that he regards as unduly harsh, but also from an evident mistake;
8. Where the earlier petition for mercy has been rejected by the President, a stay cannot be obtained by filing another petition.

   The Apex Court can interfere only where the President decision is wholly irrelevant to the object of Article 74 or is irrational, arbitrary, discriminatory or *mala fide.* Hence, the power exercised under Article 74 or 161 of the Constitution can be subjected to limited judicial review. This power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigate the sentence of punishment, awarded and which do not, in any way wipe out the conviction.

   However, the delay in deciding the mercy petitions under Articles 72 and 161 has come under heavy criticism by the Supreme Court. The Apex Court while taking note of the contemporary jurisprudential development with regard to delay in the execution of death sentence commuted the death sentence into life imprisonment.

In *V. Vaitheeswaran v. State of Tamil Nadu*,[607]it was held by a bench of two judges that two years delay in execution of the sentence after the judgment of the trial

[607](1983) 2 SCR 348.

court would entitle the condemned prisoner to ask for a commutation of his sentence of death to imprisonment for life.

In *Sher Singh v. the State of Punjab*,[608] a three Judges' Bench held that delay alone is not good enough for commutation and two year's rule could not be laid down in the cases of delay and that the Court in the context of the nature of the offence and delay, could consider the question of commutation of a death sentence. This judgement, hence, overruled the *Vaitheeswaran* judgement.

In *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*,[609] the Supreme Court observed that where the condemned man had suffered more than two years and nine months and was repenting and there was nothing adverse against him in the jail records, this period of two years and nine months with the sentence of death heavily weighing on his mind, would entitle him for commutation of the sentence of death into imprisonment for life.

That in *Smt. Triveniben V State of Gujarat*,[610] there was a delay in the execution of death sentence awarded against the appellant. The appellant contended that owing to this delay, the death sentence should be commuted to life imprisonment. The Honorable Supreme Court of India dealt with some important issues concerned and finally reduced the sentence from the death penalty to life imprisonment. The explanation was given to the term 'delay' and the aspects relating to it are noteworthy. It was held by the Hon'ble Supreme Court an undue long delay in execution of the sentence would entitle the convict to approach the Supreme Court under Article 32. The Hon'ble Supreme Court observed that In such a case, the court would only have the jurisdiction to examine the nature of the delay caused and the circumstances ensued after the sentence was finally confirmed by the judicial process and would have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. Further, it was observed that the delay which could be considered while considering the question of commutation of the death sentence into life imprisonment could only be from the date of the pronouncement of the judgement of the Apex Court. Further, the judicial process is considered to have ended only when

[608](1983) 2 SCR.
[609](1986) 2 SCR 8.
[610]AIR 1989 SC 142.

the apex court has passed a judgement. Hence, the only delay which would be material for consideration will be the delay in disposal of mercy petitions or delays occurring at the instance of the executive. When petitions under Articles 71 or 161 are received by the authorities concerned, it is expected that these shall be disposed of expeditiously. A judgement of the court awarding death sentence is not open to challenge under Article 14 or 21. Moreover, the question of improvement in the conduct of the prisoner after the final verdict can also not be contended and the sentence cannot be altered on that ground too.That accordingly the petition was was partly allowed by the Hon'ble Supreme Court and the sentence of death awarded to the convict is commuted to life imprisonment.[611]

The Supreme Court in the 1997 case of *Mansukhlal Vithaldas Chauhan v. State of Gujarat*[612]said that the *'Court does not sit as a court of appeal but merely reviews how the decision was made particularly as the Court does not have the expertise to correct the administrative actions.'*

Furthermore, in *Ranga Billa* case[613]the Supreme Court observed that *'the term "pardon" itself signifies that it is entirely a discretionary remedy and grant or rejection of it need not be reasoned.'*

Further in the case of *Shatrughan Chauhan & Anr. Versus Union of India & Ors*[614] the apex court held that *'the death sentence of a condemned prisoner can be commuted to life imprisonment on two grounds "inordinate, undue and unexplained" delay in disposal of their mercy pleas and "non-consideration of their mental illness".'* It has been noted that there is no definite time limit or rule to exercise this power of the President.'

In *Epuru Sudhakar and Another v. Govt. of A.P. and Others*,[615] that the Hon'ble Supreme Court of India in Para 34 enumerated grounds for challenging the rejection of mercy petition in a review petition it was held as under:-

[611]https://lawbriefs.in/smt-triveniben-v-the-state-of-gujarat1989-death-sentence-can-be-reduced-to-life-imprisonment-on-grounds-of-material-delay/ retrieved on 13/03/2023.
[612]*(1997)7 SCC622.*
[613]*Kuljeet Singh @ Ranga v. Union of India & Anr, 1981 AIR 157.*
[614]*(2014)3 SCC 1.*
[615](2006) 8 SCC 161.

"34. The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness."[616]

In this case, Pasayat, J. also emphasized that for effective exercise of judicial review reasons for the exercise of power under these Articles must also be provided. Besides, he held that pardon obtained on the basis of manifest mistake or fraud can also be rescinded or cancelled.

In *Jagdish vs. State of Madhya Pradesh*[617], the Court held that the power of the President and Governor to grant pardon etc. under Articles 72 and 161, though couched in imperative terms has nevertheless to be exercised on the advice of the executive authority. In this background, it is the government which in effect exercises that power.

In *Banikanta Das and other vs. State of Assam and Others*,[618] The Court held that the reason for the commutation of a sentence must be given by the Governor. In this case, the Court set aside the impugned order of commutation of death sentence to life imprisonment and directed the reconsideration of the application filed by accused for commutation of sentence.

In the impugned order no reason was indicated as to why the Governor decided to commute the death sentence to that of life imprisonment, when the accused was guilty of heinous abominable crime. Accused had murdered brutally four persons of a family.

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[616] https://main.sci.gov.in/supremecourt/2020/3334/3334_2020_5_301_20151_Judgement_29-Jan-2020.pdf. Retrieved on 05/02/2023.

[617] (2009) 9SCC 495.

[618] (2009) 15 SCC 206.

In *Mukesh Kumar vs. Union of India and Ors*.[619]Mukesh Kumar, who was one of the convicts in the '*Nirbhaya* case' filed the writ petition challenging the rejection of his mercy petition by the President of India and seeking commutation of his death sentence inter alia on the following grounds:-

1. *Solitary confinement of the petitioner for more than one and half years due to which the petitioner has developed severe psychiatric ailments;*
2. *Non-consideration of relevant circumstances like prisoners' suffering in the prison and consideration of extraneous and irrelevant circumstances; and*
3. *The petitioner narrated about the alleged sufferings and that he was beaten up in the prison and sexually harassed as well.*
4. *He also alleged that his brother Ram Singh was murdered though his death was projected as "suicide" and that due to the death of his brother, the petitioner was living in "perpetual fear".*

Reasons propounded by the Hon'ble Supreme Court to justify dismissal of the petition:

1. As contended by the learned Solicitor General, delay in disposal of mercy petition may be a ground calling for judicial review of the order passed under Article 72/161 of the Constitution. But the quick consideration of the mercy petition and swift rejection of the same cannot be a ground for judicial review of the order passed under Article 72/161 of the Constitution. Nor does it suggest that there was pre-determined mind and non-application of mind as referred in the *Maru Ram v Union of India* case

2. The alleged sufferings in the prison cannot be a ground for judicial review of the executive order passed under Article 72 of the Constitution rejecting the petitioner's mercy petition. s per the settled legal position held in *Narayan Dutt and others v. State of Punjab and another*,[620]*Epuru Sudhakar and Another v. Govt. of A.P. and Others*[621] and *Shatrughan Chauhan*, the exercise of power under Article 72/161

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[619] Supreme Court of India [Writ Petition (Criminal) D. No. 3334 of 2020.
[620] (2011) 4 SCC 353.
[621] *Ibid.*

of the Constitution is subject to challenge only on the grounds indicated thereon.

3. The contention of the petitioner that he has been kept in solitary confinement in violation of the principles of *Sunil Batra v. Delhi Administration and Others*[622] cannot be countenanced. This cannot, therefore, be a ground for review of the order rejecting the petitioner's mercy petition as he was kept in the single room comes out and mixes up with the other inmates in the prison on daily basis like other prisoners as per rules

In *Akshay Kumar Singh Vs. Union of India & Ors*[623]that Akshay Kumar being another accused in the *Nirbhaya* Case, also filed the writ petition before the Supreme Court of India challenging the rejection of his mercy petition by the President of India, that the said Petitioner raised various grounds namely:

1. *There was miscarriage of justice in rejection of the mercy petition.*
2. *The petitioner was kept in solitary confinement in violation of Sunil Batra vs. Delhi Administration & Ors. reported in (1978) 4 SCC 494*
3. *The petitioner has been tortured in the prison for which the petitioner has been given treatment; the petitioner had also referred to the nature of treatment and the medication given to him*
4. *The persons in position have given interviews to the media and press and according to the petitioner the rejection of the mercy petition is influenced by such views. The petitioner had, inter alia, also raised other grounds.*
5. *The divorce petition was also filed by the wife of the petitioner which can also be regarded as a ground of mercy*

Reasons of the Hon'ble Supreme Court to justify dismissal of the petition

1. Alleged torture of the petitioner in the prison, as we have held in earlier Writ Petition (criminal) Diary No. 3334 of 2020, the alleged torture in

[622](1978) 4 SCC 494.
[623]Supreme Court of India [Writ Petition (Crl.) No. 121 of 2020 arising out of W.P. (Crl.) Diary No(s). 10508 of 2020.

the prison cannot be a ground for review of the order of rejection of the Mercy Petition by the President of India

2. The grounds raised by the petitioner that the Press interviews given by the persons in a position of authority reported in the newspapers have influenced the decision of the President of India in rejection of the mercy petition is concerned when the decision has been taken by the highest constitutional authority like the President of India it cannot be said that the President of India was influenced by such interviews reported in the newspapers.

3. The divorce petition said to have been filed by the wife of the petitioner and the petitions filed by the petitioner before the Lieutenant Governor and Chief Minister of Delhi under Sections 432 and 433 Cr.P.C. cannot be a ground for the exercise of judicial review of the order of the President of India rejecting the Mercy Petition as grounds for the exercise of review power is only on the grounds indicated in *Epuru Sudhakar and Another v. Govt. of A.P. and Others*[624]judgment.

In *Pawan Kumar Gupta vs. State of NCT of Delhi,*[625] that the petitioner herein being another convict in *Nirbhaya* case filed this writ petition, wherein the following grounds were raised as under:

1. *There was a miscarriage of justice in rejection of the mercy petition;*
2. *The petitioner's date of birth is 08.10.1996 and on the date of the incident that is 16.12.2012, he was only aged 16 years and that he was a juvenile and his claim of juvenility has not been finally determined;*
3. *The petitioner has been tortured in the prison and had sustained head injuries for which he has not been given proper treatment.*
4. *The learned counsel for the petitioner also raised the contention that the petitioner might not have shared common intention along with the other co-accused and therefore the petitioner cannot be imposed with the grave capital punishment with other co convicts.*

[624]*Ibid.*
[625] Supreme Court of India [Writ Petition (Criminal) No. 122 of 2020 arising out of Diary No. 10611 of 2020.

Reasons of the Supreme Court to justify dismissal of the petition

1. In this writ petition, the writ petitioner has again raised the plea of juvenility by contending that his date of birth is 08.10.1996 and that he was a juvenile on the date of the incident on 16.12.2012. The petitioner relies upon the School Certificate issued by the School, namely, Gayatri Bal Sanskar Shala, Narayanpur, District Ambedkar Nagar but the Court rejected it and did not find any merit in the contentions raised by the petitioner.

2. The contention of the petitioner is that due to torture in the prison the petitioner had sustained head injuries and that he was sutured with more than 10 sutures and proper treatment was not given to the petitioner. As pointed out earlier, the exercise of judicial review of the order of rejection of the mercy petition by His Excellency the President of India is subject to challenge only on the grounds indicated in Epuru Sudhkar (Supra) and Shatrughan Chauhan (supra) and other decisions.

3. The contention of the petitioner is that due to torture in the prison the petitioner had sustained head injuries and that he was sutured with more than 10 sutures and proper treatment was not given to the petitioner. The exercise of judicial review of the order of rejection of the mercy petition by the President of India is subject to challenge only on the grounds indicated in *Epuru Sudhakar and Another v. Govt. of A.P. and Others*[626]and proper treatment was also given to the petitioner as said by the learned Solicitor General.

4. The contention of the learned counsel that the petitioner might not have shared the common intention along with other co-accused. These contentions have already been mentioned and the petitioner has been found guilty and convicted by Trial and High Court and this contention cannot be entertained as a ground for judicial review of the order of rejection passed by His Excellency the President of India.

[626]*Ibid.*

In *Vinay Sharma vs. Union of India and Ors*.,[627]the petitioner has filed the writ petition challenging the rejection of his mercy petition by the President of India and seeking commutation of his death sentence *inter alia* on the grounds:

1. *Non-furnishing of relevant materials under RTI Act;*
2. *Non-consideration of relevant material*
3. *Torture*
4. *Mental illness*
5. *Consideration of irrelevant material by the respondent authorities;*
6. *illegal solitary confinement*

Judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness.

Other contentions:

1. Learned counsel appearing on behalf of petitioner Vinay Sharma challenged the rejection of his mercy petition by the President of India contending that the Lieutenant Governor and Home Minister, NCT of Delhi have not signed the recommendation for rejection of the petitioner's mercy plea. It was submitted that the relevant materials like the case records, correct medical status report of the petitioner, Social Investigation Report and the nominal roll of the petitioner were not placed before the President of India and the concerned authorities and these documents were kept out of consideration and only irrelevant materials were placed before the President of India which according to the learned counsel, vitiates the order of rejection of mercy petition.

[627]Supreme Court of India [Writ Petition (Crl.) No. 65 of 2020.

2. Petitioner Vinay Sharma was only 19 years old and is not a habitual offender and hails from the lower class of society and these aspects could have been considered only by a thorough Social Investigation Report which was not placed before the President of India.

3. The petitioner has been on psychological medication and diagnosed with the adjustment disorder and the petitioner should have been provided with proper care and treatment for mental illness and based on the medical records. The learned counsel claimed that the prisoners with medical illness and mental illness cannot be executed in terms of the UN General Assembly Resolutions as referred to in *Shatrughan Chauhan and Another v. Union of India and Others*.[628]

Reasons of the Supreme Court to justify dismissal of the petition

1. The learned counsel learned that the relevant file has not been signed by the Minister (Home), NCT of Delhi, and the Lieutenant Governor, Delhi. Upon perusal of the file relating to the mercy petition of the petitioner, it is seen that the Minister (Home), NCT of Delhi, and Lieutenant Governor, Delhi has perused the relevant file and have signed the note to reject the mercy petition. The Court does not find any merit in the contention that there was non-application of mind on the part of the Minister (Home), NCT of Delhi, and Lieutenant Governor, Delhi.

2. The alleged suffering of the petitioner in the prison cannot be a ground for judicial review of the executive order passed under Article 72 of the Constitution of India rejecting petitioner's mercy petition. As per the settled legal position in *Narayan Dutt and Othersvs. the State of Punjab and Another*[629] and *Epuru Sudhakar*, the exercise of power under Articles 72 and 161 of the Constitution of India is subject to challenge only on the grounds indicated thereon.

3. Social Investigation Report containing the economic conditions of the family of the petitioner was enclosed as enclosures. While forwarding

[628] *Ibid.*
[629] (2011) 4 SCC 353.

the mercy petition dated 30.01.2020, the said Social Investigation Report dated 30.11.2019 containing the family background of the petitioner and economic status of the family and other details were again forwarded. There is no merit in the contention that the Social Investigation Report was not placed before the President for consideration and the relevant materials were kept out of consideration of the President

4. It is stated that the single room where the petitioner was placed had iron bars open to the air and the same cannot be equated with solitary confinement as the petitioner was permitted to come out and mingle with other inmates at regular intervals on daily basis like other prisoners.

5. Learned counsel appearing for the petitioner argued that the petitioner was illegally segregated and put in solitary confinement. It has been submitted that such placement of the petitioner in a single room was for a limited duration and intermittent period either for security reasons or other reasons in the interest of convict. It is clear from the affidavit filed by the Director-General (Prisons) that the petitioner was not kept in solitary confinement; rather he was kept in protective custody which was for the benefit of the petitioner and also for ensuring the security. Considering the averments in the affidavit filed by the Director-General (Prisons), the contention of the petitioner that he has been kept in solitary confinement in violation of the principles of *Sunil Batra* does not merit acceptance and this cannot be a ground for review of the order rejecting the mercy petition of the petitioner.

The 12-year old son of Shabnam, a death row convict from Uttar Pradesh's Amroha, appealed to President, Ram Nath Kovind to "forgive" his mother. Shabnam has exhausted most of her legal remedies, and if executed, will be the first woman in independent India to be hanged for a crime.[630]

[630] Only one jail in India, the one in Mathura, has the provisions for hanging a woman convict.

In fact, the truth is that no time limit is prescribed to the President or the Governor for disposal of the mercy petition. Therefore, the government is required to work in a more systematised manner to repose the confidence in the institution of democracy and as such the Supreme Court suggested the government to render its advice to the President within a reasonable time so that the President is in a position to arrive at a decision at the earliest.

5.4 Judicial Review in Germany

The German head of state is the federal President. As in Germany's parliamentary system of government, the federal Chancellor runs the government and day-to-day politics, while the role of the federal President is mostly ceremonial. In modern Germany, a secular state with a republican form of government, there is still the institution of pardon, known in the pre-Christian era. Under the current Constitution of Germany, pardon is carried out by the President of Germany; the decision is not subject to judicial review. According to Article 60(2) of the Basic Law, the Federal President exercises the power of pardon. This means that he has the authority to revoke or commute penal or disciplinary sentences in individual cases.

Under Article 102 of the German Constitution, Capital punishment is abolished. This may, perhaps, the reason why the necessity of judicial review is not felt to be exercised by the German Federal Court as in most of criminal cases convicted are supposed to be awarded punishment as per law and as per fair trial procedure followed for conviction. An act may be punished only if it was defined by a law as criminal offence before the act was committed. [Article 103]

The relationship of mercy and justice has been controversial for centuries. Opinions differ in literature and court practice, up to the Federal Constitutional Court of Germany. A retrospective of the historical development of the practice of pardon, the analysis of the goals and consequences of this measure convincingly prove the need of the possibility of judicial review of clemency decisions enshrined in the legislation. This is the only effective way to prevent arbitrariness, abuse of power and violation of human rights. The modern legal state should not allow the negative experience of past dictatorships and monarchies.

5.5 Judicial Review in Switzerland

Judiciary occupies a secondary position in Switzerland. The Swiss judiciary plays a less vital role than the judiciary in United States of America or India. The Swiss Federal Tribunal has only limited judicial review. It can declare only a cantonal law unconstitutional. The Swiss Constitution makes it specifically clear that "the court shall apply laws voted by the Federal Assembly". In other words, it does not exercise judicial review of the laws passed by the central government. The election of judges by the Federal Assembly further establishes the inferior position in fact denigration of judiciary in Switzerland.

5.6 Judicial Review in Russia and China

Both Russia and China are communist countries and have much in common; though these countries have some minor differences between the two. In the Constitutions of both the countries, there are expressed provisions relating to pardon powers of the Presidents. As already stated, an absolute power of pardon is given to the Russian President through the Article 84 of the Constitution of Russian Federation. The Constitution also provides for a system of governance in which the Russian President, being the head of state and Chief Executive, has been assigned a large number of real powers and functions.

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.

It is to be mentioned here that in Russia the Constitutional Court has only the power of judicial review, which enables it to rule on the constitutionality of laws. But it is not evidently clear as regard to the judicial review of pardon power exercised by the Russian President.

In China, executive pardons work differently and are granted much less often. Since the ruling Communist Party took power in 1949, the government has only issued

special pardons, which can cover multiple people, in nine of the past 70 years, two of which took place in the past five years. There were no pardons issued between 1975 and 2015.[631] The judicial review of governmental actions is often used as a bellwether of the government's attitude towards the rule of law in China.[632] The Chinese courts do not have the power of constitutional judicial review, but have limited powers of judicial review of specific administrative actions. The logic of restrictions on the scope of judicial review in this country is best explained in reverse order. There is an obvious explanation why Chinese courts may not be permitted to 'strike down' problematic agency rules. This has to do with the idea that civil law judiciaries, on which the Chinese judiciary is modeled, are generally expected to apply the law, not to make law. Relatedly, decisions by civil law courts generally do not have precedential value, because they do not create norms of general application.

So far the pardon power of the President is concerned, pardons are decided by the National Standing Committee of the People's Congress in China, and only issued by the Chinese President. This implies that the decision is purely the ruling communist party's decision politically decided and materialized. Therefore, in China, there is no scope of judicial review on executive decision specially on pardon power exercised by the President upon recommendation of the National Standing Committee of the People's Congress in China, once decided is taken to be final one.

5.7 Judicial Review in Bangladesh

The term "Judicial Review" may be included impliedly within a Constitution. The typical example of such Constitution is the Constitution of the People's Republic of Bangladesh. Here this term has not been mentioned even for once. But the Articles 7(2), 26, 44(1) and 102 of the Bangladesh Constitution indirectly support the Judicial Review system. A recent example of the exercise of this review power would be the High Court's decision to scrap the 16th amendment of the Constitution that empowered the Parliament [by articles 96(2) and 96(3)] to impeach Supreme Court judges for incapacity or misconduct. The Court declared the amendment illegal and unconstitutional and against the principle of separation of powers and the

[631] South China Morning Post. https://www.scmp.com.article.us retrieved on 14/07/2023.
[632] Liebman *et al.* 92017); Cui and Wang (2017).

independence of the judiciary. This decision was also upheld by the Appellate Division.

In *Kudrat-e-Elahi v. Bangladesh*,[633] Mustafa Kamal J held that even Constitutional Amendments fall within the definition of'any other law' referred to in Article 7(2) of the Constitution(para 84) thus is subject to judicial review. Although, according to the law minister the High Court did not have the jurisdiction to deliver this verdict and for that the Government have decided to challenge the HC decision at the Appellate Division of Supreme Court. As the object of Judicial Review is to ensure that the authority does not abuse its power and being the guardian of the Constitution of the land, it is now up to the Appellate Division to decide this case and declare its final judgement which will bound to be followed in all the spheres of administration.

Bangladesh has also obtained the same view to that of the *Mar bury v. Madison*[634] case, which was a landmark decision in the implementation of Judicial Review which laid the foundation of this concept in the United States. As stated before, the articles 7(2), 26, 44(1) and 102 of the Bangladesh Constitution indirectly support it. Article 7(2) established supremacy of the Constitution by saying if any other law is inconsistent with this Constitution that law shall, to the extent of the inconsistency, be void. Article 26 and 44 denotes that laws inconsistent with fundamental rights will be void. However, this does not apply to any amendment of the Constitution made under article 142. While judicial review power is vested in the High Court Division under article 102(1) which is one of the basic structures of the Constitution and it cannot be taken away. Whereas judicial review power under article 102(2) is not fundamental or guaranteed, it is only available if no other equally efficacious remedy is available.

Again there exists article 47 according to which no law shall be deemed to be void on the ground of inconsistency with the Constitution if Parliament expressly declares that such provisions have been made to give effect to any of the fundamental principles of state policy. This article is a clear contradiction to the above articles. Hence, this is a hindrance to the Judicial Review system of Bangladesh as many inconsistent and harmful Acts can be passed through it.

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[633]44DLR (AD) 319.
[634]5 U.S. 137 (1803).

The present legal system is very rigid and complicated. There remains the hunger of gaining more and more powers which will surely disrupt the structure of the Government if left untreated and unchecked. Judicial Review system tries to maintain and develop the structure by implementing some checks and balances which can surely protect a nation from imminent disruption.

From some recent issues, it appears that there is misuse of mercy power in Bangladesh. Former Jubo League leader Aslam Fakir was sentenced to death for killing Manikhaha Union Parishad Chairman AKM Saheb Ali on September 25, 2003. On November 2012 he got released under prerogative mercy of the President. Again in 2015, he was arrested in connection with another murder case.

The culture of pardoning initially started in different way as by promulgating the Indemnity Ordinance, 1976 by President Khondaker Mostaq Ahmed which was ratified by the Parliament in 1979 and that draconian law prohibited any investigation and prosecution of the murder of Sheikh Mujib, the national leader and 14 members of his family.

In Bangladesh, it is not settled, whether the exercise of prerogative power by the President is subject to judicial review or not. Recently a Division Bench of High Court Division held that in exercising the power of mercy the President misused it.[635] Citing examples of various cases, the Bench said the court had the jurisdiction to examine whether the President had misused his constitutional power.

In Bangladesh Constitution from the preamble to the end, the constitutionalists kept the theme of democracy in every segment of their work. The President of a State must not be politically biased if democracy signifies the government for the people. While an elected government moves prejudicially to save the obliged people by rendering mercy, it will be terminated into political autocracy. Rationally, it is 'Being for and about people's welfare, democratic sovereignty generally downplays revolution and violence as a primary means to quash despotic policies, structures and behaviours'.[636] The second and third paragraph of the preamble of Bangladesh Constitution emphasizes on 'democracy' as the fundamental principle of state policy

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[635] *Sarwar Kamal v. State*, 64 DLR (2012) 331.

[636] W.S. Matthew (2007) *Democratic Sovereignty: Authority, legitimacy,and state in a globalizing age*, 1st ed. UCL Press, Oxon, UK, p.19.

and 'democratic process' as a means to realize the aims of the state respectively. Article 7 states that the people of the republic keep all the powers.[637] As a part of the Constitution, this provision should prevail upon any authority. O, all authorities have been originated from the citizens who have conferred the authorities on the different organs of the state commonly known as the government.[638]

Unfair prerogative of mercy by the President is hampering the standards of rule of law. Bangladesh Constitution accommodates rule of law by inserting government to run in accordance with law,[639] equality for all citizens,[640] treatment according to law,[641] ensuring independence of judiciary,[642] access to justice, [643]protection against arbitrary exercise of discretionary power, Arbitrary or capricious exercise of discretion[644] and non-application of mind[645]and so on. Bangladesh vows the execution of 'due process of law' as a state of typical democracy and social equality. Uncontrolled and unaccountable prerogative mercy let to infer 'the rule of man' instead of 'the rule of law'. … The criminals will be provoked by the precedence of the arbitrary exercise of pardoning and will think that not the judiciary rather the President is the last shelter of them. In such a way, the administration of justice of the state will be collapsed down losing its institutional independence. The President should act as a man of prudence and always keep in mind that his power for recovering justice, not to create any issue of injustice.

5.8 Judicial Review in Pakistan

Article 45 of the third and current 1973 Constitution of the Islamic Republic of Pakistan gives the President to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. This power is strictly a constitutional power and does not derive from the Pakistan Penal Code or Criminal Procedure Code. However, whether this power conforms to the

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[637] "All powers in the republic belong to the people, and their exercise on behalf of the people shall be affected only under, and by the authority of, this Constitution".
[638]*Shoib v. Government of Bangladesh,* (37 DLR 318)
[639] Article 7.
[640] Article 27, "all are equal before law and all are entitled to the equal protection of law".
[641] Article 31
[642] Articles 94, 96and 147.
[643] Articles 44 and 102.
[644]*PresidingOfficer v. Sadaruddin,* 19 DLR (SC 516)
[645]*Lutfu Mia v.Bangladesh* (1981) BLD (AD) 105

norms and principles of Islamic law and can indeed be exercised to commute punishments mandated in Islamic law has been a subject of ongoing debate and contention. This is an important question of constitutional significance since Pakistan's Constitution mandates in its preamble that sovereignty belongs to God alone, and that the authority exercised by the people of Pakistan is a sacred trust and must fall within the limits prescribed by Him. It also states that Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teaching and requirements of Islam as set out in the Holy Quran and Sunnah. While many preambles serve as a kind of opening mission statement for constitutions around the world, in Pakistan it not only serves this purpose, but also forms a substantive part of the Constitution.

Article 227 of the Constitution mandates that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, and no law shall be enacted which is repugnant to such Injunctions. Article 203D of the Constitution provides the Federal Shariat Court with power to examine and decide the question of whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet. The trouble, however, is that the jurisdiction of the Federal Shariat Court is narrow and limited. Indeed, the Constitution itself is outside of the jurisdiction of its powers of review alongside other important areas of law. The matter also remains unsettled in the secular courts. The question of whether Article 45 follows legal norms of the sharia has been the subject of ongoing debate and division. The critical point of division relates to Hudood and Qisas cases.

In 1988, the President of Pakistan commuted all death sentences awarded by the military and other courts to life imprisonment. The full bench of the Lahore High Court investigated the issue regarding whether the President could in fact exercise such powers and declared that "The President of Pakistan had no such power to commute the death sentences awarded in matters of Hudood, Qisas and Diyat. In this view of the matter, the power of pardon in such cases only vests with the heirs of the deceased, therefore, the cases in which death sentences had been awarded, the President had no power to commute, remit or pardon such sentences. However, the cases would be on different footing, if a person had been punished by way of Tazir as in such cases, the

Head of the State has the power to pardon the offender and that too in public interest. The decision was challenged and the Supreme Court reversed the judgement of the High Court stating, "if the High Court considered that the existing provision of Article 45 of the Constitution contravened the Injunctions of Islam in some respects it should have brought the transgression to the notice of the Parliament which alone was competent to amend the Constitution, and could initiate remedial legislation to bring the impugned provision in conformity with the Injunctions of Islam". In other words, the Supreme Court referred the matter to Parliament meaning that the prerogative of determining whether article 45 conforms to Islamic norms lies pre-eminently with the legislature.

The Chief of the Jamaat-i-Islami and senator Sirajul Haq argued that Article 45 violates the mandate of Article 227(1). On 20 January, 2020, he had moved The Constitution (Amendment) Bill, 2020, in the Senate recommending amendment to the President's power to grant pardon in sentences awarded in Hudood or Qisas cases. It was argued that Article 45 does not conform to the dictates of the sharia in which the commands with respect to the punishments given under Hudood and Qisas are clear and non-negotiable. Under the Islamic law of Diyat and Qisas, it is explained that the legal heirs of the deceased have the sole right to pardon the convicted person. The Constitution (Amendment) Bill, 2020 was referred to the Standing Committee on Law and Justice for consideration and report. In order to investigate the matter, the Committee drew upon the expertise and advise of the Council of Islamic Ideology, a constitutional body that advises the legislature whether or not a certain law is repugnant to Islam, namely whether it violates Injunctions from the Quran and Sunna. The Chairman of the Council, Dr. Qibla Ayaz affirmed Haq's contention explaining that in all cases of *Hudood*or *Qisas,* the President could not pardon because these principles have been unequivocally settled in the Quran. This is in line with the Council's earlier findings with regard to Article 45.

In its annual report for 2012-2013, the Council had previously concluded that Article 45 in its current form was un-Islamic. Other Islamic legal experts called by the Committee reinforced the same position that the Presidential power to pardon cannot be exercised in *Hudood* or *Qisas* cases as that would violate Islamic injunctions. The Bill, however, did receive resistance. Senator Mustafa Khokar argued that even if

absolute Presidential powers of pardon were not appropriate, a situation could arise when such a power could be useful. The Ministry of Law and Justice also opposed the Bill arguing that both the scope of *Hudood* laws and Article 45 have multiple aspects which the proposed amendment elides. Nevertheless, the Bill was put to a vote and passed with a majority. The Committee recommended that the Bill be passed.

The Constitution's declaration that the authority to govern is conditional on conformity to divine limits poses fundamental tensions for democratic governance in Pakistan. If divine sovereignty trumps democratic consensus in matters of law-making and law reform but requires the democratic process itself to ensure that this constitutional commitment is upheld without structural checks (such as courts) poses an interesting paradox. It also demonstrates Pakistan's deep constitutional ambivalence towards Islam. Passing the Bill and consequently upholding divine sovereignty and bringing Article 45 within the limits prescribed by God requires parliament to set partisan differences aside and remain firm on its political commitment to Islam.[646]

5.9 Summing Up

Thus, it has been found that in all most all the countries, there is constitutional provision empowering the President of respective country with pardon power, the power delegated to the executive, the elected representative of the people, or the hereditary monarch as part of the conventional and prolonging practices which continued till date subject to the modifications made in the process and system. It is found to be desirable to exist and favoured it to be continued for maintaining properly check and balance amidst the functions discharged by the tree important organs of the State, even where the doctrine of separation of power is not exclusively followed or is being followed in like that of the United States of America. This emphasises on restricting this power while being used by the President as no power is absolutely used and hence the role of Judiciary as an independent organ is expected to be existed for the purpose of making judicial review upon the presidential pardon order if exercised *malafide* or without compliance of certain process or norms already established. In the U.S.A., U.K., India, and some other countries as discussed herein, judicial review is allowed and has been made or considered to be a basic structure of the Constitution

[646]Imran Ahmed, Presidential Pardon and the Limits Prescribed by God: A Bill to Amend Article 45 in Pakistan (9 November, 2020).

particularly in India, whose examples are cited as reference in the context of exercise of this power by the President in Bangladesh and Pakistan or some other Islamic countries to follow Indian precedents, though some of these countries strictly adhere to Islamic law based on the Quran. For these countries, this is still a debatable subject, and final directions are still awaited

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