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Review Article

Judicial Review and Pardoning Power of President: An Analysis

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Abstract

In common parlance, to pardon means to forgive a person of his offence. The term 'pardon' has been defined as an act of grace, proceeding from the power entrusted with the execution of the law, which exempts the individual on whom it is bestowed upon, from the punishment the law inflicts for a crime he has committed. It affects both the punishment prescribed for the offence and the guilt of the offender. In other words, grant of pardon wipes off the guilt of accused and brings him to the original position of innocence as if he had never committed the offence for which he was charged. Under Indian law, the President of India and the Governors of States have been given the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence. In law, pardon is an exemption from punishment for a criminal conviction granted by the grace of the executive of the government. A general pardon, to a class of persons guilty of the same offence, is an amnesty. A pardon terminates criminal liability, including any restriction that results from a criminal conviction though the person is not exonerated from the civil liability that a crime may have incurred. A pardon is thus to be distinguished from alleviation of punishment, such as commutation of sentence, reprieve and parole which does not nullify the conviction and all effects. Justice Holmes of US Supreme Court has said that pardon as of today is not an act of grace but is a constitutional scheme which when granted is determination of the ultimate authority that the public welfare will be served by inflicting less than what the judgment fixed. Montesquieu believed in significance of clemency in the monarchical system.

Keywords: Pardon; Act of Grace; Execution; Offender; Offence; Remit; Reprieve; Respites; Remission; Conviction; Parole.

Introduction

Mercy is God's grace, a gift to the mankind which gives all an equal chance to mend ways and to correct a deviant behaviour. This might be why every civilized State has a provision to pardon offenders in their criminal justice system to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some functionary of the government, a country would be most imperfect and deficient in its political morality [1]. Pardons, reprieves and remissions are manifestation of the exercise of prerogative power of executive. These are

not act of grace. They are part of constitutional scheme. When a pardon is granted, it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment has fixed.

The object of the pardoning power is to correct possible judicial errors, for no human system of judicial administration can be free from imperfection. It is an attribute of the sovereignty, wherever the sovereignty may lie in the body of politic, to relieve a convict from a sentence which is mistaken, harsh, or disproportionate to the crime. Before the Constitution came into force, the law of pardon in India was the same as in England since the sovereign of England was the sovereign of India. From Government of India Act, 1935 onwards, the law of pardon was contained in Section 295 of the Government of India Act which did not limit the power of the Sovereign. The result was up to the coming into force of the Constitution, the 'exercise of the King's prerogative was plenary, unfettered and exercisable as hitherto.

Pardoning power of President is provided in "Article 72" of the Indian Constitution. This Article empowers the President to grant pardons, reprieves, respites or remissions of punishment in all cases where the punishment is for an offense against any law to which the executive power of the union extends. The same is also available against sentences of courts-martial and sentences of death. A parallel power is given to the Governor of a state under Article 161. A pardon may be absolute or conditional. It may be exercised at any time either before legal proceedings are taken or during their pendency or after conviction. The rejection of one clemency petition does not exhaust the pardoning power of the President [2].

The executive power of pardon differs from the power of court to suspend a sentence or to grant pardon to accomplice under section 306 of Cr. P.C.; for, the exercise of the judicial power is governed by the judicial considerations, while pardon is granted on consideration of policy, other than that of innocence. In exercising of the power of pardon, the executive does not alter the sentence but abridges its enforcement and, in doing so, practically destroys the effect of the judicial punishment, without this affirming the judicial verdict [3].

Capital Punishment is to be very sparingly applied with special reasons in cases of brutal murder and gravest offences against the state. About retention or abolition of capital punishment, debates are raging the world over amongst social activists, legal reformers, judges, jurists, lawyers and administrators. Criminologists and penologists are engaged in intensive study and research to know the answer to some perennially perplexing questions on Capital Punishment.

A. Whether capital punishment serves the objectives of Punishment?

B. Whether complete elimination of criminals through capital punishment will eliminate crime from the society?

C. Whether complete elimination of crime from society is at all possible or imaginable?

Human beings are neither angel capable of doing only good nor are they demons determined to destroy each other even at the cost of self destruction. Taking human nature as it is, complete elimination of crime from society is not only impossible but also unimaginable. Criminologists and penologists are concerned about and working on reduction of crime rate in the society. Criminals are very much part of our society and we have to reform and correct them and make them sober citizens. Social attitude also needs to change towards the deviants so that they do enjoy some rights as normal citizens though within certain circumscribed limits or under reasonable restrictions.

But we also have to think from victims' point of view. If victims realize that the state is reluctant to punish the offenders in the name of reform and correction, they may take the Law in their own hands and they themselves may try to punish their offenders and that will lead to anarchy. Therefore, to avoid this situation, there is a great need for prescribed and proportional punishment following Bentham's theory of penal objectives that pain of offender should be higher than pleasure he enjoys by commission of the crime. But this "higher" must have proportionality and uniformity too; for example, for theft, trespass, extortion and so forth, capital punishment is not reasonable and even life imprisonment is disproportionate and unreasonable.

International Scenario

United Nations

Capital punishment is one of the most debated issues around the world. The UN General Assembly recognized that in case of capital punishment there is a need for high standard of fair trial to be followed by every country. Procedures to be followed must be just, fair and reasonable. For example the UN Economic and Social Council (ECOSOC) in resolution No. 15 of 1996 (23 July 1996) encouraged member countries to abolish death sentence and

recommended that those countries who retain it must ensure defendants a speedy and fair trial.

- Article 5 of the Universal Declaration of Human Rights 1948 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- Article 7 of the International Covenant on Civil and Political Rights (ICCPR) 1966 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

By several resolutions the United Nations suggested protection of human rights of the persons facing capital punishment which were again approved by Economic and Social Council in resolution No. 50 of 1984 (26th May, 1984). These may be summarized as follows:

i. Countries which have not yet abolished capital punishment may impose it only for the most serious crimes;

ii. Capital punishment may be imposed only in case of serious offences according to established law for the time being in force. There must not be any retrospective effect of the punishment;

iii. Young person's at the time of commission of crime, whose age was below16 years, should not be awarded death penalty;

iv. Death penalty must not be imposed upon pregnant women or on new mothers or insane persons;

v. Capital punishment must be imposed after following fair procedure according to Article 14 of the ICCPR and when guilt is clearly proved leaving no room for reasonable doubt or alternative explanation of the fact;

vi. Any person sentenced to capital punishment shall have right to appeal to the higher court and steps should be taken to ensure him right to appeal;

vii. Any one sentenced to capital punishment should be given the right to seek pardon or commutation of sentence;

viii. When appeal, pardon or commutation of sentence proceeding is pending, capital punishment shall not be executed;

ix. Execution of capital punishment must be by way of minimum possible suffering.

The European Union

During 19th century due to work of Prof. Beccaria and other criminologists, political and economic changes as well as due to initiatives of Central and Eastern Europe, the European countries almost became capital punishment-free area and recognized death penalty as cruel and inhuman, which imposes psychological terror and gives scope for disproportional punishment. The 6th protocol to the European convention on Human Rights 1982 provides for the complete abolition of death sentence in peacetime by all members. The Assembly of the Council of Europe in the year 1994 with further protocol to the European convention on Human Rights recommended for the complete abolition of death penalty even in war time and under the Military Laws.

On 3rd May 2002 the 13th protocol to the European convention for the protection of Human Rights and Fundamental Freedoms was open for signature of member states which provides for the total abolition of death penalty in all circumstances. Most of the countries in the European Union have abolished death sentence. Capital Punishment has been recognized as cruel, degrading and inhuman punishment which infringes upon the basic human rights of the accused as expressed in article 3 of the European Convention on Human Rights [4]. Article 3 of the UDHR also provides for right to life, liberty and security of human beings.

Following the resolutions of the European Union and the United Nations, several countries abolished death penalty completely. For example, Germany is a death penalty-free zone. However, China imposed maximum death penalty. Saudi Arabia, Iran, Iraq, the United States of America (USA) is also in the first row so far the application of capital punishment is concerned. In England it was abolished by the Murder (Abolition of Death Penalty) Act, 1965 though at the end of 18th century about 200 offences were punishable by death. In Warwickshire (England) a person was prosecuted on the charge of murder.[5] A little girl was under the care and custody of her uncle due to death of her multi-millionaire father. Accordingly she was about to inherit her father's property when she would become 16 years of age .The uncle was affectionate to her about her food, shelter, education and other reasonable necessities. When she was about nine years of age, one night the neighbours heard her cry which was quite unnatural saying "oh good uncle, please don't kill me" and so forth. Just after this incident she disappeared and could not be traced. The police were informed about the matter. The uncle was suspected of committing murder of his niece and disposing of her body as in her absence he was her father's heir apparent and would inherit his huge estate. He was arrested immediately though was released on bail on condition to produce the girl soon before the court. He could not produce the girl and he was sentenced

to capital punishment. But after several years of the execution of death sentence, the girl returned to Warwickshire. She said that due to fear of punishment for her mischief, she had escaped to the neighbouring town for those years. Death sentence once enforced is irreversible and irrevocable and the life which is lost cannot be brought back and the injustice done is irreparable.

Indian Scenario

The Indian Penal Code, 1860 (IPC) is the Public Law and substantive Criminal Law which defines crimes and prescribes punishments. Section 53 of the IPC provides for death sentence and imprisonment for life as alternative punishments.

In Mithu v. State of Panjab [6] the apex court declared that section 303 is unconstitutional because it is not in tune with articles 14 and 21 of the constitution. In India, non-governmental organizations as well as general people are fighting against inhuman, degrading and cruel punishment and protection of human rights. Nevertheless capital punishment still remains in force. Although judiciary has evolved the principle of "rarest of rare cases" and has indicated that it is with special reasons that death penalty must be imposed in cases of exceptional and aggravating circumstances where offences are very grave in nature, the application of the principle itself, as evident from a plethora of cases, is violative of Constitutional provisions.

Constitutional and Statuary Provisions

Article 21 of the constitution guarantees the right to life and personal liberty to all which includes right to live with human dignity. No person shall be deprived of his right except according to the procedure established by law. Therefore, the state may take away or abridge even right to life in the name of Law and public order following the procedure established by Law. But this procedure must be "due process" as held in *Maneka Gandhi v. Union of India [7]*.

The procedure which takes away the sacrosanct life of a human being must be just, fair and reasonable. So, fair trial following principles of natural justice and procedural Laws are of utmost importance when capital punishment is on the statute book. Therefore, our constitutional principle is in tune with procedural requirements of Natural Law which constitute the inner morality of Law which may be stated as follows:

i. Death sentence is to be used very sparingly only in special cases.
ii. Death sentence is treated as an exceptional punishment to be imposed with special reasons.
iii. The accused has a right of hearing.
iv. There should be individualization of sentence considering individual circumstances.
v. Death sentence must be confirmed by the High Court with proper application of mind.
vi. There is right to appeal to the Supreme Court under Article136 of the Constitution and under section 379 of the Cr.P.C. The Supreme Court should examine the matter to its own satisfaction.
vii. The accused can pray for pardon, commutation etc. of sentence under sections 433 and 434 of the Cr.P.C. and under articles 72 and 161 to the President or the Governors.
viii. Articles 72 and 161 contain discretionary power of the President and the Governor beyond judicial power to interfere on merits of the matter; though judiciary has limited power to review the matter to ensure that all relevant documents and materials are placed before the President or the Governor. However, the essence of the power of the Governor should be based on rule of Law and rational considerations and not on race, religion, caste or political affiliations.
ix. The accused has a right to speedy and fair trial under Articles 21 and 22 of the Constitution.
ix. The accused under Article 21 and 22 has right not to be tortured.
x. The accused has freedom of speech and expression within jail custody under Articles 21 and 19 of the Constitution.
xi. The accused has right to be represented by duly qualified and appointed legal practitioners.

Judicial Approach towards the Pardoning Power

In Jagmohan Singh v. State of U.P [8]. it was argued that capital punishment for murder violates Articles 21 and 14 of the Constitution. The counsel for the appellant contended that when there are discretionary power conferred on the judiciary to impose life imprisonment or death sentence, imposing death sentence is violative of Article 14 of the Constitution if in two similar cases one gets death sentence and the other life imprisonment. On this point the Supreme Court held that there is no merit in the argument. If the Law has given to the judiciary wide discretionary power in the matter of sentence

to be passed, it will be difficult to expect that there would be uniform application of Law and perfectly consistent decisions because facts and circumstances of one case cannot be the same as that of the other and thus these will remain sufficient ground for scale of values of judges and their attitude and perception to play a role. It was also contended that death penalty violates not only Article 14 but also Articles 19 and 21 of the Constitution. Here procedure is not clear because after the accused is found guilty, there is no other procedure established by law to determine whether death sentence or other less punishment is appropriate in that particular case.

But this contention was rejected by the Supreme Court and the Court held "in important cases like murder the court always gives a chance to the accused to address the court on the question of death penalty". The Court also held "deprivation of life is constitutionally permissible provided it is done according to procedure established by Law. The death sentence *per se* is not unreasonable or not against public interest. The policy of the Law in giving a very wide discretion in the matter of punishment to the Judges has its origin in the impossibility of laying down standards. Any attempt to lay down standards as to why in one case there should be more punishment and in the other less punishment would be an impossible task. What is true with regard to punishment imposed for other offences of the Code is equally true in the case of murder punishable under section 302 I.P.C. No formula is possible that would provide a reasonable criterion for infinite variety of circumstances that may affect the gravity of the crime of murder. The impossibility of laying down standards is at the very core of the criminal law as 'administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment"

One of the earliest case of significance where a clemency petition was brought under judicial review was *G. Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh and Ors [9]*, the Court rejected the claim, observing that with respect to actions of the President, the Court "*makes an almost extreme presumption in favour of bona fide exercise*" and that the petitioners had shown no reason for the court to consider the rejection of their application "*as motivated by malignity or degraded by abuse of power*." Even while rejecting the writ petition, the Court however sounded a note of caution and stated that the Court would intervene where there was "absolute, arbitrary, law-unto-themselves malafide execution of public power". These parameters for judicial review were reiterated again in *Maru Ram v. Union of India and others [10]* where the Constitutional Bench further asserted that the Courts would intervene in cases where *political vendetta or party favouritism was evident or where capricious and irrelevant criteria like religion, caste and race* had affected the decision-making process.

In *Rajendra Prasad v. State of U.P. [11]* V. R. Krishna Iyer, J. observed that;

"....the humanistic imperative of the Indian Constitution, as paramount to the punitive strategy of the Penal Code, has hardly been explored by the courts in this field of 'life or death' at the hands of the Law. The main focus of our Judgement is on this poignant gap in human rights Jurisprudence within the limits of the Penal Code, impregnated by the Constitution.....in the Post-Constitutional period section 302, IPC and section 354(3) of the Code of Criminal Procedure have to be read in the human rights of Parts III and IV, further illuminated by the Preamble to the Constitution."

The Court held that it is constitutionally permissible to swing a criminal out of corporal existence only if the security of state and society, public order and the interests of the general public compel that course as provided in Article 19 (2) to (6). Social justice has to be read with reasonableness under a Article 19 and non-arbitrariness under Article 14. V. R. Krishna Iyer, J. also observed that such extraordinary grounds alone constitutionally qualify as special reasons as to leave no option to the court but to execute the offender if the state and society are to survive and progress. He was in favour of abolition of death penalty in general and retention of it only for White Collar Crimes.

In *Bachan Singh v. State of Punjab [12]* the Supreme Court by 4:1 majority has overruled its earlier Judgment pronounced in Rajendra Prasad's case and held that death sentence under section 302 IPC does not violate Article 21. The International Covenant on Civil and Political Rights, to which India has become a party in the year 1979, does not abolish imposition of death penalty wholly. But it must be reasonably imposed and not arbitrary; it should be imposed in most serious crimes. In this case the Court held that "Judges should not be blood thirsty. A real and abiding concern for the dignity of human life postulates resistance to taking a life through laws' instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

In *T.V.Vatheeswaran v. State of Tamil Nadu [13]* the issue was whether delay in execution of death sentence violates Art 21 of the Constitution and whether on that ground death sentence may be

replaced by life imprisonment. A Division Bench consisting of Chinnappa Reddy and R B. Misra JJ. held that prolonged delay in execution of death penalty is unjust, unfair, unreasonable and inhuman; which also deprives him of basic rights of human being, guaranteed under Article 21 of the Constitution i.e., right to life and personal liberty. Justice Reddy and Justice Mishra Observed thus,

"Making all reasonable allowance for the time necessary for appeal and consideration of reprive, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 of the Constitution and demand quashing of the sentence of death."

Therefore, 'due process' i.e. just, fair and reasonable process as held in *Maneka Gandhi v. Union of India [14]* does not end with only reasonable pronouncement of death sentence rather it extends till the proper and due execution of sentence. There was two years delay in execution of death sentence. The court reiterated that speedy trial is an integral part of Part III of our Constitution and it is included under Article 21 and there was prolonged detention before execution of death sentence and the accused was waiting every moment for due execution of death sentence. Every moment he was terrorized. Therefore, it must be treated as violation of the Constitutional mandate.

In *Noel Riley v. A.G. of Jamaica [15]* the Privy Council held that prolonged delay in execution of death sentence due to external factors is inhuman and degrading. But from which date the period will be counted and whether a period like two years is the yardstick? It is not clear even from the decisions of different benches of the Supreme Court. In *Ediga Anamma v. State of A.P. [16]* V.R. Krishna Iyer and R.S. Sarkaria, JJ: substituted capital punishment by imprisonment for life not only for twelve years delay of hanging but also on personal grounds such as youth, imbalance, sex and expulsion from her conjugal relation.

In *Sher Singh v. State of Punjab*, [17] (Y. V. Chandrachud C.J.; V.D. Tulzapurkar and A. Varadrajan, J.J.), Chief Justice disaffirmed the decision in Vatheeswaran where the court had held that two years delay in execution of death sentence would be replaced by life imprisonment as binding rule and rejected the plea for replacement of death sentence by life imprisonment. When delay in execution is in issue, the court must find out reasons for delay. Therefore two judges' decision was overruled by three judges' bench. The court held that prolonged delay in the execution of a death sentence is an important consideration to determine whether the sentence should be allowed to be executed.

As the doctrine of rarest of rare cases evolved in *Bachan Singh v. State of Punjab [18]*, the Supreme Court tried to formulate specific criteria to determine scope of 'rarest of rare' in *Macchi Singh v. State of Punjab [19]*. The court opined that while one is killed by another, the society may not feel bound by this doctrine. It has to realize that every person must live with safety. Rarest of rare doctrine has to be determined according to following factors:

- If Motive for the Commission of Murder shows depravity and meanness.
- Anti-social or socially abhorrent nature of the Crime.
- Magnitude of the Crime.
- Personality of Victim of the murder that is, Child, helpless Woman, public figure and so forth.

The Supreme Court held in *Attorney General of India v. Lachmi Devi [20]* that the mode of carrying out death penalty by public hanging is barbaric and violative of Art.21 and that there must be procedural fairness till last breath of life as held in *Triveniben v. State of Gujarat [21]*.

In *Madhu Mehta v. Union of India [22]* the mercy petition of the accused was pending before the President of India for about nine years. This matter was brought to the notice of the court by the petitioner. The court directed to commute death sentence to imprisonment for life because there were no reasons to justify prolonged delay and speedy trial was said to be included in article 21 of the Constitution. There was nine years' delay in execution of death sentence. Sabyosachi Mukharji J. and B.C. Roy J. approved and relied on Triveniben and again held; *".....undue long delay in execution of the sentence of death would entitle the condemned person to approach this court or to approach under Article 32 of the constitution, but this court would only examine the nature of delay caused and circumstances.... No fixed period of delay can be considered to be decisive. It has been emphasized that Article 21 is relevant here. Speedy trial in criminal cases though may not be fundamental right is implicit in the broad sweep and context of Article 21. Speedy trial is part of one's basic fundamental right i.e., right to life and liberty. This principle is no less important for disposal of mercy petitions. It has been universally recognized that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture....."*

In the case of *Epuru Sudhakar and anr v. Government of Andhra Pradesh [23]*, the court laid clear grounds on which the pardoning power may be challenged.

It was held that with clear separation of powers emphasized in the Constitution of India regarding pardons, the scope for judicial review of executive action is limited. Where constitutional powers of clemency are involved, the extent of judicial review is limited further to extreme cases. The Supreme Court referred to the large number of petitions challenging the grant of pardon or remission to prisoners; there are no cases in which the Supreme Court has quashed the decision of the President or Governor granting clemency.

The impact of the above is highlighted provisions and case study, which has argued that the Indian Constitution has expressly and impliedly, provided for a restricted and controlled power of Pardon to the President. Thus, the power cannot be exercised before conviction of the person. It cannot be used to pardon acts in contempt of court. It does not blot out the guilt, or the factum of conviction of the offender. Neither can the power be deemed to include the power to declare a General Amnesty. However, within the limited sweep of this power, the President should be left with maximum discretion to grant or refuse pardon, and judicial review should be limited to clear cases of mala fide, non-application of mind and the like. Such a conclusion is a mere reinforcement of the principles of Separation of Powers and Supremacy of the Constitution, based on which the Power is argued to be restricted in the first place.

Executive pardon since the ages has undergone massive change and so has unbridled executive power. It only well for a democratic nation that the ambit of a free and fair judiciary claims victory over a politically motivated executive. However, propagating absolute denial of clemency to the executive will not lend itself to better circumstances as an already overburdened judiciary tries to deal with the immense backlog of disputes. An executive seeking to reach a just end for the accused without any other considerations and a strict and ever watchful judiciary, looking over the exercise of such vast amplitude of power can guarantee a balanced and legitimate use of this

Conclusion

Regarding the judicial review debate, pardoning power should not be absolute as well as Judiciary should not interfere too much in exercise of this power. As judicial review is a basic structure of our Constitution, pardoning power should be subjected to limited judicial review. If this power is exercised properly and not misused by executive, it will certainly prove useful to remove the flaws of the judiciary. The pardoning power of Executive is very significant as it corrects the errors of judiciary. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The process of granting pardon is simpler but because of the lethargy of the government and political considerations, disposal of mercy petitions is delayed. Therefore, there is an urgent need to make amendment in law of pardoning to make sure that clemency petitions are disposed quickly. There should be a fixed time limit for deciding on clemency pleas. The biggest question that arises in the minds of people is whether the President's position while granting pardon especially in the cases of capital punishment is same as that of God? Is he keeping all the moral and humanitarian grounds in his mind? If yes, then there is no need for the judicial review of his power as his act is absolute and final and no other person can judge his acts.

Thus, the power of President while granting pardon or remitting the punishment or commuting is absolute which is one of the examples of existence of flexibility in the Indian Constitution keeping in tune with the changes of the society from laissez faire to Welfare State. A miscarriage of justice by the courts has to be rectified by a non-judicial body because firstly, argument might not be legally valid but the rejection of the same might lead to injustice, secondly, the vesting of the power to pardon with executive makes the process of dispensing justice more rigorous. Punishment would require the consent of the head of state, which reaffirms that an innocent should not be punished. Thirdly, since the executive does not have a duty to interpret the law, it shall prevent wherever strict interpretation of the law is leading to the same. In the researcher's view the Supreme Court has been correct in not framing guidelines for the exercise of mercy jurisdiction. If so happens, the exercise of the executive will become similar to judicial functions. Where an interpretation of the guidelines to be done, it will be required with respect to every factual situation. An application for pardon before conviction should not be allowed because: firstly, they do not affect the purpose of mercy jurisdiction and secondly, through procedural fairness the scope of a bias is reduced.

There should be a time frame within which the executive should be asked to decide over cases in order to prevent undue trauma to the application and his family members and back logging of cases. An amendment should be brought about in the constitution at the earliest barring the executive from pardoning its own members. Since, that is likely to create a bias, abusive of power and effectively make

one a judge in his own cause. The biggest question which could be laid down against the conception of Judicial Review of the power is that, a person pleads for mercy when all the doors of judiciary closes for him, in that case if president grants pardon on some moral and humanitarian ground whether in that case if judicial review is done then how come a judiciary would close its eyes from the previous judgments which it has given right from the lower courts against the pleader. It is more or less clear that it would revoke the pardon and would revert back to its final decision.

The pardon power is necessary to allow for justice and mercy, restore nationality, solve crime, and promote foreign policy. Placing the pardon power solely with the President allows for efficient, accountable, and energetic issuance of pardons; however, it also allows for improper cover-up and self-interested pardons. The checks of impeachment, political fallout, and scarred reputation are not sufficient to completely eliminate improper pardons, but no current state constitutional provision or proposed constitutional amendment prevents improper pardons without unnecessarily stifling legitimate pardons.

A more narrowly-tailored Pardon Clause would be impractical-imagine courts trying to interpret a Pardon Clause that allowed for pardons "except in cases of impeachment, cover-up, or self-interest." Perhaps the best solution is to leave the Pardon Clause the way it is, relying on the political and constitutional check already present. To prevent such sort of lawful practices judiciary transgressed its boundary many times. It is not good sign at least for the executive because its action are challenged and quashed in few cases in spite of being correct and constitutional and in consonance to the Article 72 and 161 of the Constitution.

It is patent court has averted the plausible abuse and misuse of this constitutional power. But there are also possible misuse of judicial review and court should exercise restraint while exercising its power of judicial review otherwise it will led to undue fighting between judiciary and executive wing of the constitution. Court should refrain to encroach on the power of the President and the Governor. It should not always come forward to examine the legality of pardon granted by the executive in its exercise of power, because the power of president and governor is very high, reputed and at the same time very wide and unfettered. The purpose of Articles 72 and 161 is to provide a human touch to the judicial process, which is tied down with technicalities. If this human touch is to be subject to the orders of the prosecutor, the very purpose of mercy provisions is defeated.

The impact of penal reform is sometimes reflected in the appointment of special advisory pardon boards or in the reliance on prior investigations by criminal justice personnel. The main exceptions to the general pattern are:

a. The nations which vest the pardoning power in the legislature alone, a system which appears inconsistent with the flexibility normally attributed to the clemency power, and
b. The recent Chinese constitution which omit shall reference to clemency.

The typology of pardons differs widely, particularly between the common law and civil law systems, and also reflects the purposes and effects of the exercise of clemency.

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

Two areas of application in particular attract the attention of drafters of constitutions such that special provisions are considered necessary capital cases and political offences. The first has been undergoing a decline but, like the pardon itself, shows great reluctance to disappear entirely. Provisions under certain constitutions for mandatory consideration of clemency in all capital cases will therefore probably continue to be of significance.

The importance of political offences, on the other hand, seems to be increasing. While the special provisions in this area mostly serve to limit the scope of the pardon, such restrictions are generally confined only to the matter of ministerial impeachment.

Further, with the increasing politicization of "common" crimes, it may be that the role of clemency will expand in this area. Apparent or formal similarities between systems might conceal practical differences which would only emerge on closer scrutiny of the systems concerned, while apparent differences might disappear. Where pardons are used as a tool in the reformation of the offender and this is their most common function today an evaluation of their effectiveness for this purpose would not be amiss.

References

1. American jurisprudence, 2d, 5 as cited in written submissions of Soli Sorabjee as Amicus Curie in the case of Epuru Sudhakar and Anr vs. Government of Andhra Pradesh, AIR (2006) SC 33.
2. www.legalservicesindia.com , Assessed on dated 10.05.2017, time 5:17 P.M.
3. http://www.lawteacher.net/administrative-law/essays/power-to-pardon-an-analysis-law-essays.php accessed on dated, 28-11-2017, 11:59 AM.
4. 13th protocol to the European convention for the protection of Human Rights and Fundamental Freedoms.
5. A. Felicitla, Human Rights and Capital Punishment, in Human Rights and the Law: National and Global Perspectives, (Snow white) 1997, 207.
6. (1983) 2 SCC 277.
7. AIR 1978 SC 597.
8. AIR 1973 SC 947, 1973 Cr. L.J. 330, 1973 SCC 162.
9. (1976) 2 SCR 73.
10. (1981) 1 SCC 107.
11. AIR 1979 SC 916.
12. AIR 1980 SC 898, (1980) 2 SCC 684, 715, Para 88.
13. (1983) 2 SCC 68.
14. AIR 1978 SC 597.
15. (1982) 3 WLR 557.
16. (1974) 4 SCC 443.
17. (1983) 2 SCC 344.
18. AIR 1980 SC 898.
19. AIR 1983 SC 957.
20. AIR 1986 SC 467.
21. AIR 1989 SC 142.
22. (1989) 4 SCC 62.
23. AIR 2006 SC 3385.