

# Constitutional Aspect of Clemency Power in USA and India: An Overview



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## Abstract

Clemency is an elegance of god which not only provides equal opportunity to heal but also rectifies a deviant behaviour of the convicted person. However, In the contemporary, democratic word this humanitarian power not only act as grace but it is a part of the constitutional scheme and of constitutional responsibility of utmost significance. The present paper aims to explore the comparative nature, scope, effect, and framing of the constitutional provision of clemency in the USA and India as such for the better understanding of the subject area.

**Keywords:** Clemency, Nature, Scope, Effect, the Framing of Pardoning Power.

## Introduction

Clemency is a divine grace to the humanity which allows equal opportunity to reform and to rectify an aberrant behaviour. It is considered to be an essential function of a sovereign's executive. in the majority of the Constitutions, written or unwritten, parliamentary or presidential, unitary or federal there is a legal procedure and rules for granting pardon to offenders. In the United States of America, the constitutional framers considered pardon not merely an act of grace but a constitutional scheme. Similarly, in India, this power is a part of the constitutional scheme along with a constitutional responsibility of significance. Even today pardons have been granted for an ample number of reasons such as to undo or to absolve a person from a conviction for which he has been wrongfully convicted of a crime. However, in the modern era, the pardoning power acts as a significant component of criminal justice administration.

## Review of Literature

H.M. Seervai, *Constitutional Law of India*, N.M. Tripathi Pvt. Ltd, Bombay (1984) in his erudite and monumental work explained the position, nature, and effect of the pardoning power in English and American law comparatively with Constitutional law of India. Besides this, his work is a critical evaluation of the study of comparative constitutional law.

Parul Kumar, *The Executive Power to Pardon: Dilemmas of the Constitutional Discourse*, 2 *NUJS Law Review* 9 (2009) traces the boundaries of the power stipulated under the Indian Constitution as well as the jurisprudential development by the Supreme Court of India. Her work also makes an inquiry into the rationale underlying the power of pardon and other emerging issues relating to it in an analytical manner.

Andrew Novak, "Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States," 49 *U. Mich. J. Law Reform* 817 (2016) makes a comparative analysis of the study of common law countries' Constitutional clemency mechanism. He also examines the implementation of laws and reporting of clemency cases and the impact on the criminals and the community at large.

Jeffrey Crouch, *The Presidential Pardon Power* (University Press of Kansas, 2009) in his comprehensive work considered the framers' vision of how clemency would fit into the separation of powers as an 'act of grace' or a check on injustice. In his analytical work, he also traced out the struggle for supremacy between the United States President and the Congress to own the pardoning power.

A historical account of the Pardoning power in England and its colonies is presented by Willard Harrison Humbert, *The Pardoning Power of President*, American Council on Public Affairs, 1941) presented a discussion of the power in the Constitutional Convention and in the rectifying conventions of the States. While considering the pardoning process and its administrative aspect he made careful and exhaustive

research by using tables and charts in his work to accurately record the available data.

Shiva Rao, Framing of India's Constitution, Select Documents (Universal Law Publishing Co. Pvt. Ltd, 2004) in his comprehensive work includes all the select documents, memorandum of the drafting committee and another important discussion on the framing of the Constitution of India.

#### **Aims of the Study**

1. To trace out the comparative nature of the clemency power of the President
2. To explore the scope of the clemency power
3. To analyze the effect of the exercise of the clemency power
4. To examine the framing of pardoning power in the Constitution of USA and India

#### **Methodology**

The present study is based on doctrinal research method which is based on some theories or some basis legal proposition. The basic aim of such research is to discover, explain, describe, analyze and present in a systematic form the provisions, concepts, and principles or the working of certain laws or legal institutions/authorities. The researcher has select largely India and referred the position of the USA for the better understanding of the study. In this study, primary and secondary sources are analyzed. Primary sources such as constitutional provisions, judicial pronouncements, foreign statutes etc have been incorporated. Whereas secondary sources are gathered from books, article, law journals, dictionary, and another online database.

#### **Meaning and Concept**

The notion of pardon is developed like the concept of punishment. It not only wipes out the guilt of the convicted person but brings him back to the original position of innocence as if he had never committed the crime for which he has been charged for the offence. Even this concept is supported by a legal maxim "*vaniae facilis incentivum est deliquendi*" meaning thereby that facility of pardon is an incentive to crime. This means it releases an offender from his guilt.

The term pardon is defined by Black's Law Dictionary as an official nullification of the punishment and other legal consequences of a crime committed by an offender.<sup>1</sup>

Justice Summer observed that a pardon is an act of grace from governing power which mitigates the punishment of the law, demands the offense and restores the rights and privileges forfeited on account of the offences.<sup>2</sup>

According to P. Chandra Reddi C.J "pardon not only absolve the person from the penal consequences of the offence but also from civil disqualification."<sup>3</sup>

However, H. Kapadia J. was of the view that "the pardoning power is vested with the President or the Governor as the case may be, not for the benefit of the convict only, but for the welfare of the people who insist on the performance of the duty."<sup>4</sup>

Thus in a simple word, the expression "pardon" can be equally used with "clemency" which is really an umbrella term enveloping the different

schemes through which an executive can remit the consequence of a crime.

#### **Nature of Pardoning Power**

From English rulers to existing democratic Government system the prerogative power of pardon is considered to be vested in the executive authority with an aim to mitigate the harshness of the punishment and to eliminate the error committed by the judiciary.

As per the American theory of separation of power, people are recognized as the ultimate source of all power which they embodied under the Constitution. Indeed, for the proper exercise of clemency power executive head has been created as a depository for the preservation of peace, orderly operation of the criminal justice system, protection of the public's life and liberty.

As it is stated by the Mitchell C.J. that "the Constitution deals with the pardoning power, not as a prerogative claimed by divine right, but as an adjunct to the administration of justice recognised in all civilized governments as necessary by reason of the fallibility of human laws and human tribunal."<sup>5</sup> Similarly, in his dissenting judgment Kennedy J. observed that the very nature of pardon as "the clemency power is designed to correct the injustice and to mitigate some discretion of those who enforce the law."<sup>6</sup>

Taft C.J. while delivering a classical interpretation concerning the nature of the pardon in *Ex Parte Phillip Grossman*<sup>7</sup> observed that "executive clemency exists to afford relief from undue harshness or an accidental mistake in the operation or the enforcement of the criminal law. The administration of justice by the Courts is not necessarily always be wise and may properly mitigate the guilt. To afford a remedy, it has always been thought essential in popular governments as well as in monarchies, be visit in some other authority than the Court's power to ameliorate or avoid particular criminal judgments."

Again in *United States v. Benz*<sup>8</sup> it was held that the clemency which is exercised by the President of the United States of America is almost exclusively an executive function and not a judicial function. However, in *United States v. Wilson*<sup>9</sup> the extent of the pardoning power of the president was explained by Marshall C.J. who observed that "A pardon is an act of grace, proceeding from the power entrusted with the executive of the laws, which exempts the individual, on whom it is bestowed from the punishment the law inflicts for a crime he had committed."<sup>10</sup>

Again while concerning the nature of the pardoning power of the President the Supreme Court of India has also propounded the similar view that of the United States of America. In relation to it, Pathak C.J. opined that "the power to pardon is a part of the constitutional scheme and we have no doubt in our mind that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the head of the State and enjoys high status. It is a Constitutional responsibility of great significance, to be exercised when the occasion arises in accordance with the discretion contemplated by the context."<sup>11</sup> Further in the instance case while

recalling the character of pardon the Court stated that even highest trained mind can do mistakes and judges being a human also commits error, but it could be ratified by assigning power to a superior authority, such as chief executive of the state which will scrutinize the validity of the threatened denial of life or the continued denial of personal liberty.

#### **Scope and Effect of Pardoning Power**

In Article II, Section 2(1) of the Constitution of the United States of America President's power to grant pardon was included as "The president shall have the power to grant reprieve and pardons for offences against the United States, except in cases of impeachment". This means that against all federal offences of the United States the President can grant reprieves and pardons.

However, the United States Supreme Court in *Ex Parte Garland* also explained the extensive view on Presidential pardon as that "the clemency power conferred is unlimited, except for impeachment cases... It reaches out to each offences known to law and might be practiced whenever after its commission or before initiation of the legal proceeding or during the pendency of legal proceedings or after the conviction and judgment. The intensity of the President is not liable to authoritative control, Congress can neither reduce the impact of his pardon nor prohibit from its activity any class of guilty parties. The favorable privilege of clemency rested cannot be shackled by any legislative confinements."<sup>12</sup> More so, while observing the dynamic scope of the pardoning power Field J. stated that "a pardon reaches both the punishment recommended for the offence and the guilt of the wrongdoer and when the pardon is full it emancipates the punishment and reaches out the presence of culpability so that in eyes of the law the wrongdoer is an honest as though he had never committed any offence." In *Ex parte Wells*<sup>13</sup> while interpretation the Article II, Section 2(1) of the U.S. Constitution Wayne J. opined that the "power of the President to pardon conditionally is not one of interference, but is conferred in terms that language being to 'grant, reprieves and pardon, which includes conditional as well as absolute pardons'. Whereas in *Re William Spences*, an apparently extraordinary view was observed by the United States Supreme Court that 'the effect of a pardon is prospective and not retrospective'. It removes the guilt and restores the party to a state of innocence, but it does not change the past and cannot annihilate the established fact that he was guilty of the offence.

Again in *Carlesi v. People of State of New York*<sup>14</sup> The Court herein strengthen the observation taken in *Re Spenser* and held a pardon could not keep the state from contemplating the absolved offence for the burden of punishment in a resulting one.

Therefore, these observation shows that even after getting pardon offender's stains are not completely washed out.

In India, the effect of a pardon is subject to the nature of the power enjoyed by the administrative authority is identical as in England. Since pardoning power was the Crown's prerogative function which is

used as a private act of grace wherein monarch grant mercy to delinquent person. Such an effect of a pardon was explained by Sinha C.J. in *K.M. Nanavati v. State of Bombay*<sup>15</sup> as when a "pardon is granted after the accused person has been convicted by the Court, has the effect of completely absolving him from all punishment or disqualifications attached to a conviction for criminal offences." In the same case, the Supreme Court while applying the principle of harmonious construction observed that during the sub-judice of the matter before the Apex Court or when the Article 142 is in operation the power of suspension of sentence under Article 161 does not apply.

In *Sarat Chandra Rabha v. Khagendranath*<sup>16</sup> the question was raised that what would be the effect of pardoning power when it is exercised on the judicial punishment of the prisoner, and in case of remission and commutation of sentence whether a similar effect would be seen or not? while replying to the question the Court held that when the sentence is remitted it did not in any circumstances impede with the Court's order and sustain full term of imprisonment as imposed by the Court, even though the Court's order of conviction inert as if it was before the remission. Further, in *Kehar Singh v. Union of India*<sup>17</sup> the Court observed that "Constitutional scheme revealed that the President and the governor in India do not pardon the offence, but pardon the punishment and the sentence. The power is one of an executive nature, cannot temper or supersede the judicial record and the consequence of its exercise is merely that the punishment or the sentence would not be exercised either fully or in part even though the offender has fully or in part, or even though the offender has been judicially convicted and held guilty.

#### **The Making of the Constitution**

Since both USA and India are the colonies of the British Crown thereby the system of criminal justice administration was also managed by the Crown.

In USA various charters and Acts were issued for empowering the Governor of different states to grant a pardon. Thereafter, various State's Constitution contains the provision of pardon such as fundamental law of Quaker, Fundamental Constitution of State of Eastern New Jersey, Constitution of Delaware, Constituting of Virginia, North Carolina, Georgia, New Hampshire Constitution and Constitution of Massachusetts. In 1787, at Philadelphia, the Constitutional Convention was gathered to set up a more flawless association wherein various significant consideration was suggested by the Constitutional framers regarding the inclusion of clemency power of the President. Charles Pinckney, Alexander Hamilton, and John Roulledge have moved the motion in favour of the inclusion of a provision for pardoning power of the President of the United States in the draft Constitution. Though while preparing the draft framers adopted analogous provision from the Act of Settlement 1700.

Conversantly, Mr. Roger Sherman proposed that some restriction must be imposed on clemency

power and permission from the Senate is mandatory which was rejected by the convention. Whereas Mr. George Mason suggested that "in impeachment cases, the President is not authorized to grant a pardon." While Mr. Luther Martin inserted that "after conviction" pardon must be granted. Similarly, Edmund Randolph suggests that "in cases of treason" the clemency could not be granted. While Mr. Gouverneur Morris opined that "pardon not be granted for conspiracy cases."

Objecting to the consideration of Randolph, Mason replied that "President of the United States has the unfettered power to allow pardon in matters involving treason, though this power might be exercised by him once in a while to safeguard a person from punishment who had quietly incited the commission of crime and henceforth hide himself from unearthing of his own culpability."

Therefore, while considering the checking capacity of the clemency the framers additionally comprehended that the pardoning power empowers the President to facilitate public welfare goals in the United States Constitution. Further, James Iredell also explained the pardoning power "as normally vested in the president since it is his obligation to watch over the public safety and it may regularly require the evidence of accomplices so that justice could be made by effectively producing offender before it."

Consequently, Confederation finally engraved Article II, Section 2 para first of the United States Constitution which provides that "The President shall be commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States, he may require the opinion in writing of the principal officer in each of the Executive Department, upon any subject relating to the duties of their respective offices and he shall have the power to grant reprieves and pardons for offences against the United States, except in case of impeachment."<sup>18</sup> Later on, separate office of Pardon Attorney was created under the subordination to the United States Department of Justice, to provide assistance in consultation with the United States Attorney and Assistant Attorney to the President of United States of America in his exercise of the clemency power vested under Article II, Section 2(1) of the United States Constitution.

Likewise in India, the issue of nature of pardoning power of the President of India was bought before the Constituent Assembly on 17th March 1947 for which constitutional adviser Sir B.N. Rao had moved a questionnaire "What should be the function of the President of India? among the assembly members seeking their reply in this regard. For which Dr. Shyama Prasad Mukherjee replied that "the President has the power to pardon and to commute or remit punishment". Similarly, pardoning power of the President was also included in a memorandum of Union prepared by Gopalaswami Ayyangar and Alladikrishnaswami Ayyar. Thereafter, Union Constitution Committee gave its recommendation that "President should possess with the right to pardon and commute or to remit punishment inflicted by any

court of criminal jurisdiction." On July 31, 1947, this recommendation is considered by Constituent Assembly. Subsequently, a draft was prepared by the constitutional adviser and included as clause 53, providing for the pardoning power of the President while taking reference from Section 7, 295(1) of the Government of India Act, 1935 and Article 13(4), (6) of the Irish Constitution. This Clause was renumbered as 53-A by the drafting committee on 5th November 1947. However, B.L. Mitter proposed that "the President's pardon to remit or commute should be executed where they were passed by Courts in the susceptibilities of Indian States and partly to bring the portion in accordance with a truly federal structure." Whereas N. Gopalaswami Ayyangar again substituted the re-drafted clause as "The power to grant pardons, reprieves, remissions, suspensions, or commutations of punishment imposed by any court exercising criminal jurisdiction shall be vested in the President in the case of convictions-

- I. For offences against federal laws relating to matters in respect of which the Federal Parliament as and the unit Legislature concerned has not, the power to make laws; and
- II. For all offences tried by Courts Martial.

Such power may also be conferred on other authorities by Federal law: Provided that sub-clause (ii) shall not intervene with the power conferred to any Armed Force Officer of the Federation with regards to remit, commute or suspend a sentence awarded by a Court Martial."<sup>19</sup> Ananthasayanam Ayyangar also moved an amendment suggesting that "the President should have, in addition, the power of pardon in all those cases where a death sentence is awarded to a person in a Province." The assembly accepted both the amendments moved by Gopalaswami Ayyangar and Ananthasayanam Ayyangar and renumbered as clause 59

"Draft Article 59: Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

1. 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-
  - i. In all cases where the punishment or sentence is by a Court Martial
  - ii. In all cases where the punishment or sentence is for an offence under any law relating to matter with respect to which parliament has, and the legislature of the state in which the offence is committed has not, the power to make laws;
  - iii. In all cases where the sentence is a sentence of death.
2. Nothing in sub-clause (a) of clause (1) of this article shall affect the power conferred by law on any officer of the Armed Forces of India to suspend, remit or commute a sentence passed by a Court Martial.
3. Nothing in sub-clause (c) of clause (1) of this article shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor or the Ruler of the State under any law for the time being in force."<sup>20</sup>

## Remarking An Analisation

While explaining the scheme embodied in Article 59 Dr. B.R. Ambedkar stated that:

"The power of commutation of sentence for offences enacted by the federal law is vested in the President of the union. The power to commute sentences for offences enacted by the State Legislatures is vested in the Governors of the States. In the case of sentences of death, whether it is inflicted under any law passed by Parliament or by the law of the States, the power is vested in both, the President as well as the State concerned."<sup>21</sup>

Thereafter, Mr. Tajmal Hussain moved an amendment that President of India must be the "Supreme Authority" with respect to offence committed under federal subjects and he alone should have extraordinary powers - similar to the United States. Hussain's proposal was opposed by R.K. Sidhwa who stated that it was important for the Governor to also possess extraordinary power over offences under federal law. He further argued that when clemency reached directly towards President he must first consult with the Governor of the concerned State. Similarly, Ambedkar also opposed the Hussain's amendment and characterized the President's clemency as the safeguard in cases where a condemned prisoner's mercy plea is rejected by the Governor of the State. On December 29, 1948<sup>22</sup> the amendment was rejected and clause 59 was adopted by the Assembly.

On 17th September 1949, the scheme was proposed by the Dr. B.R. Ambedkar was not given the full effect. On 17th October 1949 T.T. Krishnamachari moved an amendment to substitute sub-clause (b) of clause (1) of article 59, as follows:

"(b) in all cases where the punishment or sentence is for an offence under any law relating to a matter to which the executive power of the Union extends."<sup>23</sup>

The Assembly adopted Krishnamachari's amendment without any discussion. After a long wait finally on 26 November, 1949 the Constituent Assembly enacted and adopted the Constitution of India within which Pardoning power of the President is engraved under Article 72.<sup>24</sup> Moreover, to assist the exercise of Pardoning power of the President the Ministry of Home Affairs has been designated to prepare a recommendation and summary for President in all mercy cases in consultation with council of minister including Minister of Home Affairs, Government of India.

### Conclusion

While summing up it is observed that both United States of America and India have lots of similar characteristics in concerning with executive clemency power, since both had derived this prerogative of mercy power from the Crown of England who also exercised this power to mitigate the guilt and to eliminate the hardship of punishment. However, in regard to the nature of clemency, it is also observed that in the USA clemency can be granted to the person before trial, during the trial, and after conviction but this is not true with Indian position as in India only after conviction a person could be commuted. Whereas in connection with the effect of

pardon it is also opined by the Courts that even after pardon is issued some stains are left out over the person pardoned. Thus, it could be submitted that past conviction of a person is not completely vanished out by the clemency as it only mitigates the punishment of the offender and not the conviction.

### References

1. *Black's Law Dictionary*, 3519 (Thomson Reuters Publishers, 8th Edition, 2004)
2. *Verneco, Inc. v. Fidelity & Cas. Co. of New York*, 253 La. 721, 219 So. 2d 508 (1969)
3. *The DIG, North Range, Waltair and Anr. v. D. Rajaram and Ors.*, AIR 1960 AP 259 at para 5
4. *Epuru Sudhakar v. Government of Andhra Pradesh*, AIR 2006 SC 3385
5. *Diehl v. Rogers*, 169 Pennsylvania Supreme Court 323
6. *Dertke v. Haley*, 541 U.S. 386 (2004) at 399
7. 26 U.S. 87, 45 Sct. 332
8. 282 U.S. 304 (1931) at 311
9. 32 U.S. (7 Pet.) 150
10. *Id.* at 160
11. *Kehar Singh v. Union of India*, AIR 1987 SC 653
12. James N. Jorgensen, "Federal Executive Clemency Power: The President's Prerogative to Escape Accountability" 27 URLR 345-357 (1993), Available at <http://scholarship.richmond.edu/lawreview/vol27/iss2/10> (Last visited on June 25, 2016)
13. 59 U.S. 307 (1855)
14. 233 U.S. 51 (1941)
15. AIR 1961 SC 113
16. AIR 1961 SC 334
17. AIR 1989 SC 653
18. *Signed in Convention September 17, 1787, and Rectified on June 21, 1788*
19. C.A.D. Vol. IV, Dated Thursday, 31st July 1947, Available at <http://parliamentofindia.nic.in/ls/debates/vol4p14.htm> (Last visited on October 26, 2016)
20. *Draft Constitution*, 21<sup>st</sup> February, 1948, Article 59, Shiva Rao, *Framing of India's Constitution*, Select Documents, 536 (Universal Law Publishing Co. Ltd., Volume 3, 2nd Edition 2004), *The committee is of opinion that the President should have the power to suspend, remit or commute a death sentence passed in any State, without prejudice to the power of the Governor or Ruler.*
21. C.A.D. Vol. VII, Dated 29<sup>th</sup> December 1948, 1118-1120. (Lok Sabha Secretariat, Govt. of India,)
22. *Id.*
23. C.A.D., Vol X, Monday, Dated 17th October 1949, Available at <http://parliamentofindia.nic.in/ls/debates/v10p10m.htm> (last visited on October 26, 2016)
24. "Article 72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases - A. 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-

*(a) In all cases where the punishment or sentence is by a Court Martial;*

*(b) In all cases 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;*

*(c) In all cases where the sentence is a sentence of death*

*B. 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 passed by a Court Martial.*

*C. Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.”*