

“DEATH PENALTY AND PARDONING POWER OF PRESIDENT: A Comparative Analysis between the Position in India and United States of America”

Palasree Kirttania*

Introduction

“There is no reason why society should not rid itself of individuals proved socially harmful.” – Albert Einstein¹

Since the beginning of civilization there has been crime, and the retaliation from the civilized society has manifested in the form of punishment. Initially the punishments used to be extremely severe. In 7th Century B.C. under the Draconian Law of Greece death was the punishment for all crimes. Various forms of corporeal punishments like amputation of limbs, emasculation, torture on the rack, stoning to death, stampeding by elephants etc. were also prevalent. The very nature of the punishments was so cruel that it evoked strong response from the people in the modern times. Any form of torture, be it perpetrated on an innocent individual or a criminal, does not meet the approval of the civilized society any more.

Among these punishments, the death penalty has been the centre of controversy because it's drastic and irrevocable nature. Many countries have either abolished it formally or *de facto* abolition has taken place. The Second Optional Protocol to the International Covenant on Civil and Political Rights deal with death penalty. The state parties to the Optional Protocol has an obligation to abolish death penalty. But there are some countries where capital punishment is very much in existence, though may be only under rare circumstances. The controversy revolved around the fact that the deterrent factor is absolute; there is no chance of the offender repeating his offence. Yet, there may be cases where the accused is entitled to benefit of doubt. Or, a situation may exist where due to the exceptional nature of the crime some amnesty may be showed to the offender.

This is exactly where the question of presidential pardon comes in. In most civilizations, the head of the state has had the privilege of granting special pardon upon whom he saw fit for it. It was his prerogative to bestow his mercy upon the offender even if he has been convicted by a competent court. This principle has been incorporated in the Constitution of India also under Art. 72. The Constitution guarantees that a convict sentenced with death penalty can make a plea to the President for pardoning his sentence. This paper makes an analysis of validity of death penalty as a punishment in the present era of human rights and how far the pardoning power of the President furthers the interest of human rights.

*Teaching Assistant, NLSIU, Nagarbhavi, Bangalore

¹ Albert Einstein, *Berliener Tageblatt*, quoted in *Congressional Digest*, 243

² Jacques Barzun, *In Favour of Capital Punishment*, in *Social Ethics: Morality and Social Policy*, New York: McGraw Hill 1977, 89

“*The uncontrollable brute whom I want put out of the way is not to be punished for his misdeeds, nor as an example or as a warning; he is to be killed for the protection of others.*”- Jacques Barzun².

According to criminal jurisprudence there are four theories of punishment – deterrent, preventive, retributive and reformative. Death penalty can serve as deterrent, preventive and retributive, but certainly not reformative. This was valid in the bygone days where the policy was ‘tooth for a tooth, eye for an eye.’ The Islamic tradition supports death penalty. Shariat prescribes death penalty for various offences.

There has also been argument that penalty for one murder or more than one murders are same; therefore, the only way to prevent further homicides is to eliminate the perpetrator. Further, supporting the offenders is a burden on the honest taxpayers’ pocket. But in the present days of human rights jurisprudence where the focus of punishment has shifted from retributive to reformative, the validity of death penalty automatically comes into question.

One of the major opposition to death penalty is because of its irreversible nature. Not only legal but ethical question arises that if state cannot restore life of a person in case of error in judgement it cannot have the right to take away life. Yet, such situations are not rare where there can be no question as to the guilt of the accused. There may be instances where the convict, if kept alive, may pose as threat to others, even inside the prison.³In such circumstance the state is more than happy to execute such persons.

At present the countries of the world can be classified into four categories based on their treatment of death penalty. They are as follows:

- Retentionist – These countries has retained death penalty and has no hesitation about using the same in appropriate cases.
- Abolitionists – These countries have abolished death penalty altogether. No matter what the nature of the crime may be there will not be any death penalty.
- Abolitionist for ordinary crimes – These countries have adopted the position where the death penalty is applied only in most exceptional circumstances. For common criminal offences such sentence is not pronounced but only in case of treason or desertion from the armed forces during time of war would attract such penalty. India falls with in this category where the apex court has opined that only in ‘rarest of rare case’ death penalty can be awarded.
- Abolitionist *de facto* – There has been no formal abolition of death penalty in these countries but execution of death sentence has not taken place for such a long time that in practice death penalty has ceased to exist.

³Reference may be made to the case of Westly Alan Dodd who was executed on 5th January, 1993 by the State of Washington on his own request. He was charged and convicted for raping and murdering 3 young boys, the youngest being 4 years old. During the trial he declared his intention to kill a prison guard and run away from the jail after which he intended to kill many more young boys.

“Death Penalty and Pardoning Power of the President: A Comparative Analysis between the Position in India and United States of America”

In spite the classification showing that many countries still retain capital punishment, at least theoretically, only a few countries practice them actively. According to Amnesty International, 85% of the 1,813 executions that have been carried out in 1999 had taken place only in five countries, namely, China, Congo, Iran, Saudi Arabia and United States of America.⁴

The final debate is with relation to the mode of execution. If it is accepted that in certain circumstances it is necessary to carry out the death sentence then the method should also be prescribed. Some countries including India still practices hanging, though this method has been vehemently criticized as being inhumane and in violation of basic human rights. The other methods are shooting (used in China), electrocution (obsolete in most places), gas chamber⁵, and now most frequently used method is lethal injection⁶, which causes death almost instantly. The recent trend is to acknowledge that since death itself is the penalty there is no necessity to inflict pain while causing death; that it should be done as humanely as possible.

India treads very cautiously when it comes to sentencing someone to death penalty. The Supreme Court of India has opined in *Bachan Singh v. State of Punjab*⁷ that death penalty can be awarded only in the rarest of rare cases. So it is understood that death penalty is not awarded frequently but after much deliberation and only when the nature of the crime requires so. The problem arises when such a convict is pardoned by the President by virtue of his pardoning power.

Origin and Purpose of Pardoning Power

Origin: Vesting of pardoning power with the executive head of a state is a long established principle. This power has been exercised in England since time immemorial.⁸ It has been a royal prerogative to exercise the power of pardon at the advice of the Home Secretary, and such power is executive in nature.⁹

Position in India: In India, the power of pardon can be traced back to the Government of India Act, 1935. Sec. 295 of the said Act divided the power of pardon between the Governor General and the Provincial Governors.¹⁰ While framing the Constitution of India, the framers of the Constitution discussed the provision relating to pardon under Art. 59(1)¹¹ which later became

⁴Amnesty International News Release, 18th April, 2000

⁵Cyanide pellets are dropped into sulfuric acid to produce lethal gas.

⁶Combination of sodium thiopental, pancuronium bromide and potassium chloride.

⁷AIR 1980 SC 898

⁸59 American Jurisprudence, 2d, Pardon and Parole § 1

⁹3 D. D. Basu, Commentary on Constitutional Law of India, C.K. Thakker et al. eds., Nagpur: LexisNexis Butterworths Wahdwa, 8th ed., 2010, p.4445

¹⁰Sec. 295(1) - Where any person has been sentenced to death in a Province, the Governor General in his discretion shall have all such powers of suspension, remission of commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province. Provided that nothing in this sub-section affects any powers of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court-martial.

¹¹7 Constituent Assembly Debates, 1118 – 20, December 29, 1948

Art. 72. As it stands now, Art. 72 of the Constitution of India, 1950 speaks about the pardoning power of the President.¹²

Position in The United States of America: Art. II §2 Cl.1 of the Constitution of the United States of America provides for the pardoning power of the President.¹³ This power was granted to the President by the Constitutional Convention of 1787.¹⁴

Meaning, Nature and Scope

Meaning: “A pardon is an executive act of grace which exempts an individual from the punishment the law inflicts for a crime he has committed.”¹⁵ According to Lord Coke, a pardon is a “work of mercy, whereby the King, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical.”¹⁶ In other words, pardon means an act of forgiveness, remission or exemption. It may be forgiveness of an offence or remission of other liabilities.

Nature and Scope: Granting of pardon is an act of grace towards a convict in order to prevent miscarriage of justice. It is also a constitutional scheme where the executive head of the state exercises this power. It is an act of state and not an individual act.¹⁷

In India, the pardoning power of the President is unlimited and depends upon the discretion of the President. Though the President needs to exercise this power in accordance with the aid and advice of the Council of Ministers¹⁸, it does not delimit the power of the President. In contrast, the power of pardon of the President of America can be exercised in all cases except for impeachment.

Pardon restores the convict back to his original position as it was before commission of the crime. Once pardon has been granted, the convict is no more guilty of the crime.

¹² Art. 72. **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 –
(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.

¹³Art. II §2 Cl.1 - 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 Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

¹⁴ Encyclopedia of American Constitution, Leonard W. Levy & Kenneth L. Korst eds., New York: Macmillan Reference USA, 2nd ed., 2000, p. 1878

¹⁵67A Corpus Juris Secundum, Brooklyn, New York : The American Law Book Co. & West Publishing Co., Pardon & Parole §3

¹⁶ See *supra* note 4, § 3

¹⁷See *supra* note 4 § 12

¹⁸*Maru Ram v. Union of India* AIR 1980 SC 2147

“Death Penalty and Pardoning Power of the President: A Comparative Analysis between the Position in India and United States of America”

There is no fixed rule as to when pardon can be granted. It can be granted before indictment, before conviction as well as after conviction. Pardon cannot be granted as a matter of right. Neither can a convict claim the right to be heard.¹⁹

Types: Pardon can be of the following kinds:

- An absolute pardon which sets aside the sentence
- A conditional pardon
- A remission which reduces the amount of sentence without changing the character of the sentence.

In USA, the President has power to grant conditional pardons, to commute sentences, to remit fines and forfeitures and to grant amnesty.

When a pardon has been granted upon certain conditions and the convict has to fulfil such conditions in order to be eligible for grant of the same, it is conditional pardon. In common law as well as in USA a conditional pardon may be granted. But the conditions that have been imposed for granting pardon must be constitutional.

In USA a conditional pardon can be granted²⁰ provided such pardon has been accepted by the convict. Delivery must be made to him and either the convict himself or someone authorised on his behalf must accept the pardon.²¹ All necessary ingredients of a valid contract, like absence of fraud and free consent by a sane person are required. Such safeguards have been placed upon conditional pardon because the conditions imposed may be more objectionable than the punishment itself.²² But, in *Biddle v. Perovich*²³ the court upheld a commutation of sentence from death to life imprisonment even though the sentence was imposed without the prisoner’s consent.²⁴

Therefore, pardon would also mean that the accused was guilty of the offence in the first place. It is not being declared ‘not guilty’ but an admission of the offence. Presidential pardon is an admission of guilt because unless one has committed an offence, he cannot be pardoned.

Object of Pardoning Power

¹⁹ *Kehar Singh v. Union of India* AIR 1989 SC 653

²⁰ *Schick v. Reed* (1974) 419 L.J.S. 256 at 266 [President Eisenhower commuted Schick’s death sentence on the condition that he would be ineligible for parole.]

²¹ See *supra* note 2 § 68

²² *Ibid*

²³ 274 U.S. 480 (1927)

²⁴ John E. Nowak & Ronald D. Rotunda & J. Nelson Young, *Constitutional Law*, (St. Paul, Minn.: West Publishing Co., Handbook Series, 2nd ed., 1983, p. 240)

The pardoning power is to be exercised for general good and welfare of the public. If public welfare can be achieved by suspension of the execution of punishment, then there is no necessity of punishing a convict.²⁵

Another major reason behind granting the power of pardon upon the President is to rectify any error which may be committed by the judiciary. To err is human and judges are also human beings. Hence, there is a chance that inadvertently there might have been a miscarriage of justice in sentencing the convict. Under such circumstance, the executive head may exercise his power of pardon and rectify the mistake.

According to the Law Commission of India²⁶, a sentence passed by the court may require consideration because of the following reasons:

- Relevant facts might not have been placed before the court
- Even if the facts were laid down before the court, it may not have been done in the proper manner
- Certain facts may be discovered after passing the sentence
- Events that has developed after passing of the sentence

In the above circumstance, the President may exercise his power of pardon to avoid miscarriage of justice.

Position in America is quite similar to India. There too the President may exercise pardoning power for similar reasons. Further, at times it was necessary to reconcile warring factions. Since the Congress was not in session all the time, it was necessary to have such power readily available, otherwise its effectiveness would be diluted.²⁷

Other Forms of Reduction of Sentence

Under Art.72 of the Constitution of India, along with the power of pardon, the following other forms of reduction of sentences have also been contemplated:

4.1 Reprieve: The word '*reprieve*' has been taken from the French word '*reprendre*' which means 'to take back' or 'withdraw'. It imposes a stay on the execution of the sentence and merely delays the execution. In common law, there are three types of reprieve:²⁸

- *ex mandatoregis* (from the mere pleasure of the crown)
- *ex arbitriojudicis*(power which belongs to every tribunal where the judge is not satisfied with the verdict)
- *ex necessitate legis*(required by law to be granted under certain circumstance, e.g. a woman carrying a child when she was sentenced)

²⁵See *supra* note 9 §11

²⁶Report on Capital Punishment, (1967), pp. 317 – 18

²⁷See *supra* note 8

²⁸See *supra* note 2 § 6

“Death Penalty and Pardoning Power of the President: A Comparative Analysis between the Position in India and United States of America”

Respite: It means awarding of a lesser sentence keeping in view of the fact that the convict has no prior conviction. In India, this power can be exercised both by the judiciary as well as the executive.

Remission: It is the reduction of the amount of the sentence without changing the character of the sentence.

Commutation: It is substitution of a lesser sentence for a greater one by authority of law out of clemency. It is not necessary to take the consent of the convict to commute his sentence.

Amnesty: Amnesty means a general ‘blanket pardon’. It is usually granted in case of political offences or offences committed against the sovereignty of the state, where the trial is yet to be conducted. The guilt of the accused is not established and pardon may be granted by the legislature or the executive.

The distinction between the position of the President of India and the President of USA has to be taken into account. The President of India has been vested with the power to pardon, reprieve, respite, remit or suspend a sentence whereas the President of USA has the power to grant pardon, reprieve and amnesty.

But, the President of USA enjoys a broader scope when it comes to the cases in which he can exercise his power. He has the power to grant pardon for all offences against the United States where as the President of India can grant pardon only in the following instances:

- All cases where the punishment or sentence is by Court Martial
- In 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
- In cases of death sentence

Effect of Pardon

Effect: In India, a pardon absolves the convict of any liability, be it fine or imprisonment, which might be attached to him as punishment. In case of limited pardon, certain amount of punishment may be reduced. But he cannot be absolved from disqualification of civil rights.²⁹

In USA, pardon results in the restoration of the following rights:

- Civil rights belonging to a citizen
- All citizenship rights including right to serve on a jury and right to be a witness
- Right to have custody of children or ward

A pardon does not restore the following rights:

²⁹*D.I.G. v. Rajaram* AIR 1960 AP 259

- Right to be reinstated to his profession if his licence has been forfeited as a consequence of his guilt
- Right to recover forfeited pension
- Property or interest vested in others

Limitations of Pardoning Power

Safeguards Against Arbitrary Exercise of Power: The Constitution of India does not impose any limitation on the pardoning power of the President but it mentions the circumstances in which the pardoning power can be exercised by him. As per judicial interpretation³⁰, the President has to exercise this power in accordance with the aid and advice of the council of ministers, which amounts to a safeguard. Further, his decision is amenable to judicial review.³¹

Position in America: It was suspected that the pardoning power may be used not in the appropriate cases fit to be pardoned but to grant immunity to the favourites of the President. It was feared that such prerogative may be abused by the President. There have been instances where the President granted pardon either for personal or political reasons. Such pardons may have been constitutional in the broad sense of the term but defeats the purpose of the provision.

One of the most controversial Presidential pardon was pardoning of President Richard Nixon by President Gerald Ford. President Nixon was to be proceeded against for impeachment after the Watergate scandal. Nixon, after contemplating a grant of presidential pardon to himself, decided to resign. After his resignation, Vice-President Gerald Ford assumed the position of President and granted unconditional pardon to President Nixon. This action was challenged in *Murphy v. Ford*³² under the following the two grounds:

- One of the limitations that has been expressly mentioned in Art. II Sec. 2(1) is pardoning power will not be available in case of impeachment. Though after resignation President Nixon was not per se facing an impeachment motion, the resignation was given to avoid impeachment in the first place. President Ford transgressed the constitutional limitation by granting pardon when investigation was going on. Hence, such pardon can be considered as given for ulterior reasons.
- A pardon can be granted only when an offence has been committed. In this case, President Nixon's guilt was not yet proved. The pardon was granted on the assumption by President Ford that President Nixon had committed the offence. Granting of pardon, though is indirectly an admission of guilt, cannot be given on assumption of an offence.

President Clinton granted more than 300 pardons on the last night of his presidency, which are popularly known as 'midnight pardons'. One such pardon was granted to a billionaire named Marc Rich whose ex-wife was a friend of the Clintons. During investigation, Denise Rich exercised her 5th Amendment privilege of right against self-incrimination and refused to answer any question. The Bush administration refused to investigate further.³³

³⁰See *supra* note 13

³¹See *supra* note 12

³²(1975) 390 F. Supp. 1372

³³Otis H. Stephens, Jr. & John M. Scheb II, *American Constitutional Law*, (Thomson West, 3rd ed. p. 178)

“Death Penalty and Pardoning Power of the President: A Comparative Analysis between the Position in India and United States of America”

Some of the checks that were thought to have imposed a control on the pardoning power are as follows³⁴:

- If the President continues to be in office after grant of pardon, he can be proceeded against for impeachment on that ground.³⁵
- During election it may have an adverse effect on his vote bank
- Adverse public opinion

But, unfortunately, such safeguards have proved to be inadequate, as testified by the abovementioned instances. One reason is it is quite difficult to establish conclusively that such pardon has been granted because of favouritism or political motive. Also, though such pardons may be politically unwise or morally reprehensible, but constitutional all the same. The Constitution of America grants almost unlimited power of pardon with relation to offence against the state, excepting the impeachment proceedings.

Further, the decision of the President is amenable to judicial review. Though the President has been vested with almost unlimited power of pardon, the court retains its power to interpret the Constitution and to determine whether he has transgressed his constitutional power.³⁶ Further, while granting pardon, if the President imposes unconstitutional conditions the court can interfere. The President cannot grant pardon in anticipation of the commission of an offence as that would amount to dispensation of laws by the executive.

Scope of Judicial Review of Pardoning Power

The question here is if the pardoning power of the President is subjected to judicial review then what is the sanctity of the pardoning power? After all, it has been granted to rectify the errors that the judiciary may commit!

The position in *Kehar Singh*³⁷ was that the power of the President is a constitutional and executive power, hence cannot be brought under the scope of judicial review. The power has widest amplitude and the court cannot even suggest guidelines.

But the court can allow judicial review on certain specific grounds:

- To determine the scope of President’s power of pardon.
- If the President rejects the mercy petition on erroneous ground that he could not go beyond the highest court of the land.
- To determine whether there has been an *inordinate delay* in disposing of a mercy petition by the President.
- Where an earlier mercy petition has been rejected, the convict cannot obtain an order of staying execution of death sentence by submitting repeated mercy petition.

Exercise or non-exercise of power of pardon is not immune from judicial review.³⁸ The main aim of judicial review is restricted to the following question:

³⁴See *supra* note 2

³⁵One of the grounds for impeachment against President Andrew Johnson was corrupt use of pardoning power.

³⁶*U.S v. Nixon* (1974) 468 U.S. 683

³⁷ See *supra* note 13

- Did the decision making authority (the executive head) exceed its powers?
- Did the authority commit an error of law?
- Did the authority commit a breach of the rules of natural justice?
- Did the authority reach a decision that no reasonable tribunal would have reached?
- Did the authority abuse its power?

Pasyat J., in *Epuru Sudhakar v. Government of Andhra Pradesh*³⁹ laid down that judicial review of the pardoning power is available on the following grounds:-

- That the order was passed without application of mind
- That the order is mala fide
- That the order has been passed on irrelevant considerations
- That the relevant materials have been kept out of consideration
- That the order suffers from arbitrariness

It was further held in this case that it is not necessary to provide guidelines because the power of President is of widest amplitude. Specific guidelines may not be able to envisage all the types of cases that may come up. As the current position stands now, the President's power of pardon may come under judicial review.

Such a view puts the Constitutional provision in jeopardy because in the first place it is the power of the President to exercise mercy and hence cannot be usurped by the court. It violates the constitutional scheme. Secondly, all the cases of death penalty do not directly go to the President. It has to be recommended by the Home Secretary before a convict for death sentence can apply for mercy petition. Therefore a blanket statement cannot be made that the Presidential power of pardon is exercised arbitrarily. The president being the executive head of the country⁴⁰ is entitled to such power without intervention from judicial authorities.

It was further held in this case that it is not necessary to provide guidelines because the power of President is of widest amplitude. Specific guidelines may not be able to envisage all the types of cases that may come up. As the current position stands now, the President's power of pardon may come under judicial review.

Conclusion

In the course of the paper, the author has tried to establish that the nature and scope of the pardoning power is essentially the same in India and United States of America. In both the countries the President is vested with this power for the same purpose, that is, to rectify the mistake of the judiciary, if any.

Though the power in essence is similar in nature, there are certain differences. The President of USA enjoys unlimited power of pardon, except in cases of impeachment. The

³⁸ 1 D.D.Basu, Shorter Constitution of India, Dr. A.R. Lakshmanan J., V.R. Manohar & Bhagwati Prasad Banerjee J. eds., Nagpur: Wadhwa LexisNexis Butterworths, 14th ed., 2000 pp. 684 – 685

³⁹ AIR 2006 SC 3385

⁴⁰ Art. 53 of the Constitution of India

“Death Penalty and Pardoning Power of the President: A Comparative Analysis between the Position in India and United States of America”

President of India, on the other hand, have a narrower scope of pardoning power as the Constitution has defined under what circumstances the pardoning power can be exercised.

At the same time, it should be noted that there are chances of such power being abused. There have been instances where the pardoning power of the President has been used for political gain or personal motive. To regulate such instances, the concept of judicial review of the pardoning power has been introduced. The question arises is that if pardon is granted by the President after the decision has been rendered by the court, making the same decision amenable to judicial review makes the whole exercise of executive pardon futile. The author has tried to establish that though the court has interpreted that the pardoning power of the President is amenable to judicial review it should not be so because ultimately it is the prerogative of the executive head of any country to exercise the pardoning power. Especially in situations where a person is sentenced with capital punishment if the Presidential pardon is further subjected to judicial review the sanctity of the constitutional provision itself becomes diluted. The prerogative lies with the President and it should remain so. Therefore once the apex court has delivered its judgement the final decision should lie with the executive head. But as the position stands now, the decision of the President is amenable to judicial review.

Thus, we can see that in USA as well as in India, the President has some limitation imposed upon his power, and in both the countries the safeguard taken against abuse of the power is judicial review. Hence, the researcher comes to the conclusion that the pardoning power of President in both the countries are similar.