A Critical Study on Executive Power to Pardon and its Impact on the Criminal Justice System: An Analysis of Sri Lanka

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Abstract*: This study strives to ascertain the impact of the executive power to pardon on the criminal justice system. The power of pardon comes from the very beginning of human society, it has ancient origins. The executive power to pardon is a unique power vested with the executive, in Sri Lanka Article 34 of the Constitution grants power to the Executive President, and the scope of Article 34 was discussed by the researcher. To identify the concept of power to pardon and its impact on the criminal justice system, international and domestic authorities were analyzed while paying attention to the historical evolution and current application. The judges and courts of law in the criminal justice system are subject to substantial and procedural laws; the duty of the judges is strictly to apply the law. The prerogative of the executive pardon is only a constitutional devise that enables to redress of the unjust application of the law in a given situation. The analysis of executive pardon may relax the harshness and the rigidity of the legal provisions and customs, but it pointed towards several negative implications on the criminal justice system, to ridicule and rendered naught the entire processes which took place and the due application of the prevalent laws of the country. The constitutional power to grant a pardon does not have the freedom to do so in gross violation of the Rule of Law, a gross violation of the Fundamental Rights of the citizens, amounting to a violation of Article 12(1), in which there is a guarantee of equality and equal protection of the law. It became evident when comparing those theoretical implications with the actual practice, by closely studying selected cases of the research population and existing literature on the matter, that the executive power to pardon indeed has a negative impact on the criminal justice system. After realizing that the hypothesis of the research is true, the researcher attempted to rectify the situation by recommending both legal and procedural reforms that would make domestic law and procedure consistent with the standards recognized by international instruments. In this regard, several theories of law, as stipulated by jurists were used for inspiration, and also as validation for the recommendations suggested.

I. INTRODUCTION

The "Presidential Pardon" has become a debated topic in society due to the reasons that the former president Hon. Maithripala Sirisena in his final week in the office has granted the presidential pardon to Shramantha Jayamaha, who is the offender whom the conviction was affirmed by the five-judge bench of the Supreme Court for the murder of 19 years old girl at Royal Park Residence in 2005. And President Gotabaya Rajapaksa granted a presidential pardon to former Lance Corporal Sunil Ratnayake, a prisoner on death row for the murder of eight persons in Mirusuvil in 2000. The group of civilianizes demanding "Presidential Pardon" to the convicted former member of parliament Duminda Silva who is convicted for the murder of former presidential advisor Bharatha Lakshman Premachandra and three others. The executive power to pardon is known as the "Presidential Pardon" in Sri Lanka.

The executive's power to pardon is the main subject matter going to discuss in this research. The executive power to pardon is one of the unique powers vested with the executive. In Sri Lanka Article 34 of the Constitution grants the power to pardon the executive president. "*The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka*". The executive power to pardon has not been open to public discussion, it generally applies to the persons who were convicted of crimes and charged before the court, but it is a direct intervention in the criminal justice system.

There are several reasons why the study of executive power to pardon has become an important and timely need. The exercise of executive power to pardon or presidential pardon is not new to Sri Lanka, but up to now executive power to pardon was not challenged or reviewed before the court. For the first time in history, a fundamental right application has been filed in the Supreme Court of Sri Lanka by the non-profit organization challenging the presidential pardon granted to Shramantha Jayamaha. The author realized that there is no comprehensive study or there is a lacuna of authorities, articles, and research regarding the executive power to pardon. This area was concealed from professional discussions. The objective of this research is to have a professional discussion regarding the executive power of pardon.

This research primarily intends to make a historical evaluation of the executive power of pardon and do a critical study of the executive power to pardon and finally examine how it affects the criminal justice system. This study is going to do comprehensive research on the constitutional and legal history of the executive power to pardon, the conceptual basis of the executive power to pardon, and the current application of executive power to pardon in Sri Lanka, further expected to discuss the political history surrounding the executive power to pardon as well.

1.1 An important area to analyze

- The judicial and social impact of the executive power to pardon is based on correctional theories.
- Expects to suggest legal and procedural recommendations to use in the execution of the executive power to pardon.
- Expecting to get interviews regarding the personal views and ideas from the various groups in the society, for example, judges, lawyers, offenders who were convicted and their family members, victims or their family members, religious leaders, civilians, social workers, and people who were benefited or got a pardon.

1.2 Background

The power of pardon comes from the very beginning of human society, it has ancient origins. The power of pardon is a feature of human society which has a long history. It originates from the tribal custom exercised by the tribal chief to relax the harsh rigor of embedded tribal customs. According to the concept of power in civilized constitutional governance, all power is derived from the people. The 'state' is only the 'instrument' through which the sovereign will of the people is exercised. The powers of the state consist of legislative power, judicial power, and executive power. The executive power to pardon held by the President of the republic stems from an exceedingly more refined principle. Judges and courts of law in the criminal justice system are subject to substantial and procedural laws: the duty of the judges is strictly to apply the law. The prerogative of the executive pardon is only a constitutional devise that enables to redress of the unjust application of the law in a given situation.

The courts of justice have a duty to give fair hearings for the parties before the law as a result of it the courts of justice will use their inherent power to penalize all persons who convict end of the trial or proceedings. A pardon is usually granted if evidence has later surfaced which indicates that there has been a miscarriage of justice. The important feature of pardon is a person granted a pardon is deemed never to have been convicted.

In the case of *United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61 (1833)*, Chief Justice Marshall of the U.S. Supreme Court defined a Presidential Pardon as *"an act of grace, proceeding from the power entrusted with the execution of laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."*

The executive power to pardon study commences with the statutory history of powers in early England. The pardoning power of England was applied in the American colonies and subsequently was incorporated into the United States Constitution. *William F. Duker*, in his text *The President's Power to Pardon: A Constitutional History*, states that *the President's power to pardon is descended from authority that had been vested in English kings since at least the eighth century*, and In the case of *United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61 (1833)*, held *inter alia* it has been described as a power *"exercised from time immemorial by the executive of that nation whose language is our language and to whose judicial institutions ours bear a close resemblance."* According to the Department of Justice in the United States, Clemency Statistics: the exercise of executive clemency is an extraordinary remedy, as several thousand petitions are submitted each year to the President, and few are granted.

In Sri Lanka, under Article 34 the executive president has wide power to grant pardon to any offender convicted of any offence in any court. According to Article 34(1), the President may grant a pardon either free or subject to lawful conditions; grant any respite, either indefinite for such period as the President may think fit, of the execution of any sentence passed on such offender; substitute a less severe form of punishment for any punishment imposed on such offender or remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence.

Concerning a pardon for an offender who was convicted and sentenced to death by any court the President shall call a report to be made to him by the Judge who tried the case and shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the subject of Justice, who shall forward the report with his recommendation to the President.

Article 89 of the constitution discusses the disqualification from being an elector and Article 91 discusses the disqualification for election as a member of parliament, by the pardon power granted under Article 34 the President is empowered to grant a pardon, either free or subject to lawful conditions or reduce the period of such disqualification any person who is or has become subject to any disqualification specified in paragraph (d), (e), (f), (g), or (h) of Article 89 or subparagraph (g) of paragraph (1) of Article 91. The Article 89(d) states that disqualification to be an elector or disqualification for election as a member of parliament includes a person serving or has during seven years immediately preceding the completed serving of a sentence of imprisonment (by whatever name called) for a term not less than six months imposed after conviction by any court for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving or has during seven years immediately preceding completed the serving of a sentence of imprisonment for a term not less than six months awarded in place of execution of such sentence. But the proviso says that if any person disqualified under this paragraph is granted a free pardon such disqualification shall cease from the date on which the pardon is granted. The executive president has the power to pardon a person who is not eligible to become an elector or member of parliament as a result of an offender of a criminal offence.

Article 34(3) of the constitution discusses the pardon for an accomplice of an offence, accordingly any person when any offence has been committed for which the offender may be tried

within the Republic of Sri Lanka, the President may grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender or of any one of such principal offenders if more than one.

It is argued that the executive power to pardon is a mechanism that out of court involves correcting a miscarriage of justice. The executive pardon may relax the harshness and the rigidity of the legal provisions and customs. The other arguments are that executive pardon renders the criminal justice system ridiculed. Apart from subverting the course of justice, it had also rendered naught the entire processes which took place and the due application of the prevalent laws of the country, including the Penal Code and the Code of Criminal Procedure. The constitutional power to grant a pardon does not have the freedom to do so in gross violation of the rule of law, as well as all notions of justice, equity, and rationality. It is a gross violation of the fundamental rights of the citizens, amounting to a violation of Article 12(1), in which there is a guarantee of equality and equal protection of the law.

1.3 Research Problem

The power of pardon is a feature of human society which has a long history. In civilized constitutional governance, all power is derived from the people. The 'state' is only the 'instrument' through which the sovereign will of the people is exercised. The powers of the state consist of the power of the legislature, judicial and executive. The executive power to pardon is one of the unique powers vested with the executive. It is important to see how the executive power to pardon affects the criminal justice system. To address that problem, it is important to get an idea of the constitutional and legal history of the executive power to pardon. The theoretical basis of the executive power to pardon will make guidance identifying the current application of executive power to pardon in Sri Lanka. A conviction of an offender for an offence is a judicial process, and granting of a pardon is an executive decision, it is important to carefully study the judicial and social impact of the executive power to pardon based on correctional theories.

The judges and courts of law in the criminal justice system are subjected to comply with substantial and procedural laws; the judges strictly must apply the law. The prerogative of the executive pardon is only a constitutional devise that renders the criminal justice system ridiculed. Therefore, it can be argued that apart from subverting the course of justice, it had also rendered naught the entire processes which took place and the due application of the prevalent laws of the country, including the Penal Code and the Code of Criminal Procedure.

1.4 Research questions

Maintaining law and order in society is of paramount importance because if society loses law and order, the society's whole system is at risk. The rule of law is essential to protect law and order in society. The criminal justice system has its independent system of law to govern the matters before it. There are recognized substantial and procedural laws to the administration of criminal justice. The criminal justice system follows the procedure established by the law to convict an offender for an offence: any person before the law is entitled to equal protection of the law, which is a right recognized by the constitution. The accused has a right to have a fair trial and he is entitled to the presumption of innocence until the conviction of a competent court. After the conviction, an Accused person has an appeal right to appeal to a higher court on any irregularity/error in law or facts. At the end of the criminal justice administration system, an offender who is convicted is liable to punishment. However, there is a mechanism that out of court involves correcting a miscarriage of justice calling it executive power to pardon. The executive power to pardon may relax the harshness and the rigidity of the legal provisions. Modern states are facing the challenge of maintaining the balance between the executive and judiciary. This research strives to become of assistance in that regard, by providing answers to the following research questions:

- What is the current interpretation of the pardon and its origin?
- What are the concepts based on the executive power to pardon?
- What are the legal effects and consequences of the pardon?
- What recommendations can be made to develop the concept of pardon?

1.5 Objectives of the research

The researcher believes that the executive power to pardon is not a general transaction between the state and the offender; it is an exercise of power given by the people of the state. The executive has the responsibility to exercise that power to safeguard the expectation of the people. The researcher aims to critically analyze and introduce recommendations to the executive to develop the application of pardon to the benefit of the state. Particular objectives of this research are:

- To discuss the current interpretation of the pardon and its origin.
- To recognize the concepts based on the executive power to pardon.
- To assess the legal effects and consequences of the pardon.
- To analyze the current application of pardon in Sri Lanka.
- To make recommendations to be made to develop the concept of pardon.

1.6 Hypothesis

This research will test the following hypotheses:

The executive power to pardon affects the criminal justice system.

1.7 Significance of the study

There is a lacuna of research, publications, and authorities which discuss the power of pardon and its impact on the

criminal justice system. The executive power of pardon has never been challenged before courts in Sri Lanka. But the power of pardon has conclusive power to make a free person who is convicted by the due process of law which comes under the criminal justice system. This research will make an effort to do a comprehensive study of above mention area and will discover that the executive power of pardon affects the criminal justice system.

II. LITERATURE REVIEW

Hugh C. Macgill (1974) in his article discusses the executive power to pardon paying special attention to President Ford's grant of pardon to Richard Nixon who was impeached. This article examines the concept of impeachment as an exception to the executive power of pardon and how it affects criminal prosecution. Accordingly, point out that at what are limitations of the pardoning power under the constitution of the United State.

Harold W. Chase and Craig R. Ducat (1974) in the publication of "Constitutional Interpretation" under the title of the president's power to pardon engage in an informative discussion of the different applications of pardoning power between civil and criminal contempt. He discusses the judge's power to summarily punish criminals, but it was not a detailed examination of that area with reference to the criminal justice system.

William F. Duker (1977) discusses the constitutional and legal history of the United States. Regarding the executive's power to pardon and observe the power of the US colonies and embryo states. Further analyze the court decisions given by the Supreme Court of the US, the exclusivity of the power, and the offenses that come within its scope. There is no critical analysis of the Criminal Justice System.

Leslie Sebba (1977) has exhaustively dealt with a world survey on pardoning power. He has given several reasons for abolishing pardoning power in the modern world, reasons based on the democratization of political power on the one hand and attainments in penal reform on the other. He discusses the differences in pardon under the common law and civil law systems. He has emphasized that there are certain apparent or formal similarities between systems, but he is unable to analyze the impact of the criminal justice system caused by the executive power to pardon.

Dr. J.N. Pandey (2001) in his book "The Constitutional Law of India" drew his attention to narrating the executive power of pardon under Article 72 of the Indian Constitution, this is not a comprehensive assessment of the power of pardon. Under Article 72 President has the power to grant pardons, reprieves, respites, or remissions of punishment or to suspend, remit or commute the sentence or any person convicted of any offence by (1) Court Martial, (2) an offence against any law relating to a matter to which the executive power of the union extends, or (3) in all cases in which the sentence is one of death. Dr. J.N. Pandey narrates the object of conferring the executive power to pardon as "Judicial power on the President is to correct possible judicial errors, for no human system of Judicial administration can be free from imperfections" *(Basu – Introduction to the Constitution of India, Part II, p21(3rd Edition).* Dr. J.N. Pandey further pointed out that the pardon completely absolves the offender from all sentences and punishments and disqualifications and places him in the same position as if he had never committed the offence. But Dr. J.N. Pandey did not make any comment regarding the impact upon the criminal justice system by the executive power to pardon. Mainly discuss the distinction between the pardoning power of the governor and the president as well as the scope of the pardoning power of the president. The text does not discuss the historical background and there is no discussion connection with the criminal justice system.

L.J.M. Cooray (2005) examines the succeeding constitutions of Ceylon in the colonial period and its gradual development up to the present constitution. This text discusses the executive power except for the executive power of pardon.

Erwin Chemerinsky (2006) in his book "Constitutional Law Principles and Policies" briefly explains the executive power of pardon under Article II of the United State constitution. According to Erwin Chemerinsky, the President of the United State has broad power, and it includes the ability to pardon or reduce the sentence for all accused or convicted of federal crimes. Erwin Chemerinsky discusses three major questions that must be addressed in connection with the executive power of pardon, firstly what offences may a pardon issue? Secondly what forms may a pardon take? Thirdly what, if any, conditions can be imposed? Erwin Chemerinsky paid attention to identifying what type offences can be pardoned under Article II and what form of pardon can be granted either to excuse the individual for the criminal acts or reduce the sentence. Finally, Erwin Chemerinsky discussed about the President may grant a pardon subject to what conditions, but the impact of the executive pardon was not addressed by him. However, there is no reference about the historical evaluation also and critical analysis in connection with the criminal justice system.

Pranjal Shekhar (2014) discusses the development and broad application of Article 72 of the Indian constitution. The author has made an effort to discuss the scope of Article 72 to get a complete understanding of the pardoning power under the Constitution of India. The main analysis has been made based on the case laws about the presidential pardon. The author identified the concept of power pardon as a concept based on mercy; accordingly, he studied the concept and the question of why mercy is vested with the executive and not with the judiciary. And also, he looked at other aspects of the power of pardon as well, but he missed studying the impact caused no the criminal justice system by the power of pardon.

Dr. Suresh V.Nadagoudar (2015) has provided a brief overview of the origin and nature of pardoning power and seeks to examine several issues determining the scope of the pardoning power of the President under the Indian constitution. He points out the urgent need to make amendments to the law of pardoning to prevent delay in disposing of the clemency

petitions. He is suggesting an independent commission to regulate and give directions to focus on justice-enhancing reasons for remitting punishment. He paid attention to the judicial review of the pardoning power, and he discuss Judicial interference in pardoning power. The impact on the criminal justice system has not been discussed in his article.

Vivian Chu (2016) is a former legislative attorney who wrote a comprehensive report under the title of "The President's Pardon Power and Legal Effects on Collateral Consequences" has discussed the origins of the pardoning power of the United States. He has discussed *inter alia* the types of pardons, when pardons may be issued, how pardons are granted, standards for granting clemency, and warrants of pardon. He has concluded the effects of the president's pardon powers under the headings of Legal effects of receiving a pardon, Effect of a presidential pardon, and Effect of presidential pardon under current interpretation. However, in this report, the author has not paid attention to analyzing the impact on the criminal justice system.

Glenn Harlan Reynolds (2018) intends to discuss questions related to the executive power of pardon regarding the regulated legislation of the executive power of pardon. And he discussed the nature and limits of pardon power, and what type of executive power of pardon can be permissible under the Constitution of the United State. In this short Essay, he makes some suggestions for how rehabilitation but there is no comparative study with the Criminal Justice System.

Akash S.C. Renuga (2018) in his research "There is a significant change in the pardoning power of the president regarding Rajiv Gandhi assassination case", the researcher analyzed changes in the president's pardoning power with special reference to a specific case. The research provides the constitutional framework and a brief overview of the origin and nature of pardoning power. He examines several issues of the president's pardoning power under the Indian constitution. This research paper aims to know about the pardoning power of the president with special reference to the Rajiv Gandhi Assassination case does not analyze the impact on the entire criminal justice system.

Imo Udofa (2018) in his paper examined the nature and application of the presidential power of pardon in Nigeria, the United States of America, India and South Africa, and others. He elaborates that the power of pardon is an important component as a way of "dispensing the mercy of government" in exceptional cases. He examined the abuse of the presidential power of pardon subject to different jurisdictions and he made suggestions to ensure a more purposeful and beneficial exercise of the pardon power, but no reference has been made to the impact on the criminal justice system by the presidential power of pardon.

Kumar (2019) this article focuses on the role of the president's power of pardon and its present and past application under Article 72 of the Indian constitution. He has drawn attention to areas such as pending mercy petitions, rejection of mercy petitions, and judicial review of the pardon power. And he discusses the good and bad of judicial review of the pardoning power. However, he has not examined the impact on the criminal justice system under the presidential power of pardon.

Michael A. Foster (2020) this is an overview of an application of Article II of the United States Constitution. He discusses the roots of the king's prerogative to grant mercy under early English law. He emphasized several forms of grants that can be given to overrule criminal punishment. Michael A. Foster addressed legal questions concerning the President's pardon power under three major topics, firstly, the legal effect of clemency; secondly, whether a President may grant a self-pardon; and finally, what role Congress may play in overseeing the exercise of the pardon power. However, he has not specifically discussed the president's pardon power and its impact on the criminal justice system.

Ahalya Lelwala (2020) has extensively dealt with; *inter alia* presidential pardons in Sri Lanka: an unchecked executive power. The writer has identified the power to pardon as a power vested in the executive, to 'check' on the powers of the judiciary, as it provides a means of rectifying any miscarriage of justice. *(William F. Duker, 'The President's Power to Pardon: A Constitutional History' (1977) 18 William and Mary Law Review 475)* However, leaving this executive power 'unchecked' could result in abuse. Accordingly, the article discovers how the executive has exemplified the abuse of presidential pardons, as present and former presidents have granted controversial pardons using this executive power. Therefor the writer analyzed the abuse of pardoning power by the executive, but not analyzed the overall impact on the criminal justice system.

Fordham Law Review (1937) under the title of "The Pardoning Power of the Chief Executive" paid attention to the exercise of the pardoning prerogative, through the comparative analysis made between the executive and administration of justice. But not paid any attention to the criminal justice system.

Looking at all the literature considered above, few patterns emerge from the above discussion. Firstly it can be identified that there is considerable literature that discusses the concept of executive power to pardon in general, such as Hugh C. Macgill (1974), Harold W. Chase and Craig R. Ducat (1974), and Dr. J.N. Pandey (2001) in his book of "The Constitutional Law of India" and discuss a constitutional and legal history of the executive's power to pardon such as William F. Duker (1977). However, both of these types of literature have not paid particular attention to a critical study on executive power to pardon and its impact on the criminal justice system.

Secondly, several texts examine constitutional provisions and articles of the executive power of pardon contained in the constitutions of individual jurisdictions. For example, Erwin Chemerinsky (2006) in his book "Constitutional Law Principles and Policies" briefly discusses the executive power of pardon under the Article II of the United State while Abhimanyu Kumar (2019) in his article focuses on the role of the president's power of pardon and its present and past application under Article 72 of the Indian constitution.

However, they have not analyzed the impact on the criminal justice system in their texts.

Thirdly it can be recognized that several pieces of literature examine the judicial review of the executive power to pardon, such as Fordham Law Review (1937) comparative analysis made between the executive and administration of justice, Dr. Suresh V.Nadagoudar (2015) paid his attention to the judicial review of the pardoning power and he discusses Judicial interfere for pardoning power. But none of these texts have attempted to ascertain the exact impact on the criminal justice system.

Fourthly, it can be mentioned that there is literature discussing the different applications of pardoning power between civil and criminal contempt such as Harold W. Chase and Craig R. Ducat (1974). However, that study had not been done on the impact on the criminal justice system caused by the executive power of pardon.

Fordham Law Review (1937) has paid attention to the exercise of the pardoning prerogative through the comparative analysis made between the executive and administration of justice while Ahalya Lelwala (2020) has identified the power to pardon is a power vested in the executive, to 'check' on the powers of the judiciary, as it provides a means of rectifying any miscarriage of justice. It became evident through the above discussion that there is a gap in existing literature as there is no text addressing the impact of the criminal justice system, as well as there is no text to discuss the area of the criminal justice system comprehensively and directly. This research attempts to address this lacuna by binding all the above together with a single thread.

III. METHODOLOGY

According to research problems and questions the overall approach has to be decided in considering the investigation and the kind of data needed to answer them. Six research questions attempt to answer this research and the hypothesis it attempts to prove requires an extensive analysis of a wide array of sources which are essentially qualitative. Therefore, the research has taken a qualitative approach, by implementing one of the qualitative research techniques, namely, content analysis. The technique of content analysis was used throughout the research to test the research questions by closely examining the sources. Sources of the research included several international instruments relating to Constitutional law, the Constitution of Sri Lanka, legislative enactments including the Penal Code, Code of Criminal Procedure, decided cases, books, journal articles, and other pieces of academic writing compiled by scholars. When analyzing the sources, special attention was paid to the principles, concepts, and patterns common to all the sources.

Information on the history of executive power to pardon under prominent international authorities and the domestic laws and sources was collected as the very first step of the research. Thereafter, relevant case records and other sources of qualitative data were examined, in order to ascertain the impact of the executive power to pardon on the criminal justice system, as recognized by the international instruments and the domestic law, identified in the first stage of the research.

Then the domestic legal provisions applicable to the research were compared with the principles that emerged through case law and subsequently, the essence of both of them; the written domestic law and the case law were compared with that of the international instruments in order to assess the compatibility of domestic legislative enactments and domestic case law with the developments in the international law. Special attention was paid to identifying the instances where the domestic law explicitly contradicts the standards set out in the international instruments and also gaps or lacunas within the domestic law. The findings in this regard were used to come up with legal and procedural recommendations to improve domestic law and procedure by making them in compliance with international instruments. Special attention was paid to coming up with recommendations the underlying objective of the research is to contribute, specifically to the protection of the criminal justice system and generally to the advancement of the public trust in the judiciary and the criminal justice administration system in Sri Lanka and the protection of the rule of law.

IV. DISCUSSION, ANALYSIS OF FACTS, AND FINDINGS

Historical evolution and origins of the power of pardon.

A crime is any act committed in violation of a law that prohibits it and authorized punishment for its commission.[1] Crime is always connected with punishments. According to the holy bible, the first sin of mankind was committed in the Garden of Eden, and the first crime was committed by Cain by killing his brother Abel, holy bible says that God never pardon either Eve or neither Cain. Rama's qualities of compassion and kindness, his readiness to lend a helping hand to all, his nature to pardon the faults in people, and his adherence to truth stand as the very basis and core message of the Ramayana. Samsu Illuna, the son of the Great Hammurabi, more than 2,200 years, B. C., pardoned a runaway slave that had, according to the law, but the code of Hammurabi, with its long line of statutory crimes, is silent as to the pardoning power and gives no such authority to the king, we know that it was one of the kingly prerogatives. "The Mosaic Law nowhere gives the kings or judges the right to pardon, yet we know that King David exercised the right. The cities of refuge were established as places where those who innocently shed blood might escape the hands of the avenger. The right of sanctuary was a merciful provision to free the individual from the consequences of his unlawful act".[2] Plato's laws in Greeks, the prisoner after conviction of his crime and an exile of two or three years, be pardoned by a group of citizens, twelve in number, and allowed to return.

[1] James Q. Wilson & Richard J. Herrnstein (1998) , Crime and Human Nature, New York, Simon & Schuster Inc, p22

[2] James P. Goodrich, Use and Abuse of the Power to Pardon, 11 J. Am. Inst. Crim. L. & Criminology 334 (May 1920 to February 1921)

The concept of pardon is universal, the Jewish community celebrates Yom Kippur, the Day of Atonement, while the Jain community in India celebrates Kshamavani, a beautiful tradition where each person greets the other with Michhami Dukkadam which means seeking forgiveness for deeds or words spoken that may have hurt someone consciously or subconsciously.

The power to pardon is one of the oldest powers of a governmental function. The rulers have exercised those powers to soften the rigor of tribal customs. The kings and rulers were the leaders in the ancient community; they exercised the pardon power without any express authorization contained in the law, but by common consent. The king derived his power from God and not from the people unlike in the present, the king is vested with divine right, therefore the king is superior to and above the law, and the king exercised that power when the ends of justice so required. During the republic and monarchy of Rome, the power to pardon was freely exercised by the executive as it was by the early English, Scottish and Irish kings.

Interpretations of the power of pardon

The Black's Law Dictionary (Garner, 2009) defines the word "pardon", as "the act or an instance of officially nullifying punishment or other legal consequences of a crime. A pardon is usually granted by the Chief Executive of a government such as the president in respect of federal offences and the Governor in respect of State offences in the United States. In *US v Wilson*, Chief Justice Marshall defined a pardon as: … an act of grace, proceeding from the power entrusted with the executive of laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though the official act of the executive magistrate delivered to the individual for whose benefit it is intended and not communicated officially to the court. [3] In Sri Lanka Article 34 (1) (a) of the Constitution grants the power of pardon to the executive president, "*The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka- (a) grant a pardon either free or subject to lawful condition……* ".[4] Article 34 has not been judicially reviewed in Sri Lanka and no provisions to review like in other jurisdictions, there is no judicial interpretation for Article 34. "Although the Constitution confers the pardoning power on the president in general terms, the judiciary has served as the supreme interpreter of the scope of constitutional powers."[5] Because of the imprecise language of Article 34 (1) (a), it is important to discover the meaning and operation of the clause. In *Marbury v. Madison* and *United States v. Wilson*, Chief Justice Marshall defined the power as "The Constitution gives to the president in general terms, "the power to grant reprieves and pardons for offenses against the United States." As this power has been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."[6] Article 34(1) of the Sri Lankan Constitution empowers the president to pardon an offender convicted of any offence in any Sri Lankan court. When an offender has been sentenced to death, the constitutional process is as follows: (1) the president shall require the judge who tried the case to make a report; (2) it shall be forwarded to the Attorney-General for his advice; (3) thereafter, the report shall be sent to the Minister of Justice to forward to the president with his recommendation.

Pardon and Amnesty

The Black's Law Dictionary defines Amnesty as a pardon extended by the government to a group or class of persons usually for a political offence; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted.

Amnesty is a crime against State sovereignty, it is not an ordinary pardon. Amnesty is general, addressed to classes or even communities also termed a general pardon. The political offences are subjected to pardon on the basis that public welfare is more than prosecution and punishment. Amnesty allows the government of a nation or State to "forget" criminal acts, usually before the prosecution has occurred. Amnesty has traditionally been used as a political tool of compromise and reunion following a war. An act of amnesty is generally granted to a group of people who have committed crimes against the State, such as treason, rebellion, or desertion from the military.21 From the foregoing, it can be firmly established that an amnesty is a form or specie of pardon which is usually granted to a group or class of persons.[7]

The rationale behind the executive power of pardon.

The main rationale for the power of pardon is that to show the dispensing of the mercy of government, "the presidential pardon power is an important component of executive powers, and it allows the president to intervene and grant pardon as a way of "dispensing the mercy of government" in exceptional cases where the legal system fails to deliver a morally or politically acceptable result. It exists to protect citizens against the possible miscarriage of justice, occasioned by wrongful

[3] 32 US (1933) USSC 33, (7 pet) 150 (1833) at 160 Approved by the Supreme Court in Burdick
v United States (1915) USSC 134, 236 US 79, 89 (1915).

[4] Article 34(1)(a), the Constitution of Sri Lanka 1978, Chapter VII. The Executive, The President of the Republic

[5] William F. Duker,The President's Power to Pardon: A Constitutional History, 18 Wm. & Mary L. Rev. 475 (1977), https://scholarship.law.wm.edu/wmlr/vol18/iss3/3

[6] William F. Duker.The President's Power to Pardon: A Constitutional History, 18 Wm. & Mary L. Rev. 475 (1977), https://scholarship.law.wm.edu/wmlr/vol18/iss3/3

[7] Udofa, I. (2018). The Abuse of Presidential Power of Pardon and the Need for Restraints. Beijing Law Review , 9, 113-131. https://doi.org/10.4236/blr.2018.92008

conviction and excessive punishment or where, in the interest of social and political stability and peaceful co-existence, it is necessary to show mercy. [8] However, in *Biddle v Perovich*, Holmes J. declared that: A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflecting less than what the judgment fixed.[9] In strict constitutional jurisprudence, the exercise of pardon power amounts to interference by the executive with the exercise of judicial power; in breach of the sacred doctrine of separation of powers.[10] The presidential pardons are by design, a check upon the occasional excesses and misjudgments of the judiciary.

Justifications for the Pardon Power

In *Ex - parte Phillip Grossman*[11] Case, Chief Justice Taft made a classical exposition of the justifications for the pardon power within the legal system, when he stated as follows: Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances that may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the court's power to ameliorate or avoid particular judgments. The most important justifications for the pardon power which could be gleaned from the above exposition include, 1) Remedying the Injustice done by the Judiciary. The judiciary, like any other institution, is not infallible. Judges can make mistakes and the Constitution has to have a safety valve that allows for injustice to be remedied. Thus, the pardon power may be exercised in favour of a person who may have been wrongly convicted. On the other hand, a person may be rightly convicted, yet the punishment may appear to be excessive and disproportionate or there may be extenuating circumstances that justify lowering the sentence.[12]

Arguing in favour of the pardon power, Alexander Hamilton posited that, "humanity and good policy" require that the benign prerogative of pardoning was necessary to mitigate the harsh justice of the Criminal Code. The pardon power could provide for "exceptions in favour of unfortunate guilt". He continued, "The Criminal Code of every country partakes so much of necessary severity, that without easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel".[13] The pardon power acts as an important check and balance upon the judicial branch. 2) The Public Policy Purpose is another purpose of the pardon power that focuses not on obtaining justice for the person pardoned, but rather on the public-policy purposes of the government. For instance, James Wilson argued during the convention that "pardon before conviction might be necessary to obtain the testimony of accomplices". Pardons have also been used for the broader public policy purpose of ensuring peace and tranquility in the case of uprisings and bringing peace after internal conflicts. Hamilton asserted that "in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the Commonwealth; and which, if suffered to pass unimproved, it may never be possible afterward to recall". Thus, after the American Civil War in the 19th Century, Abraham Lincoln and his successor pardon most of the soldiers who fought for the confederacy.[14]

What are the legal effects and consequences of the pardon?

In *Ex - Parte Garland* the legal effect of pardon was stated that the inquiry arises as to the effect of a pardon, and on this point, the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full; it releases the punishment and blots out of existence the guilt so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities and restores him to all his rights. It makes him, as it were a new man, and gives him new credit and capacity. There is only this limitation to its operation; it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and sentence.[15] In that case, an Act of the United States of 1865 prescribed an oath that a deponent should swear that he had never borne arms against the United States as a qualification for admission or call to the American bar on pains of conviction for perjury and deprivation from holding any office or place in the United States for life. Garland had held office in the confederate army which had rebelled against the Federal Government during the American civil war. President Andrew Johnson pardoned him.. He sought from the court by petition permission to practice his legal profession without taking the oath required by the Act of 1865 which he was unable to take because of the office he had held in the Confederate army. He rested his case on two planks, namely, that the Act of 1865 was unconstitutional and void, and that he had been released from compliance by the pardon.[16]The same legal effect would appear to be the conclusion of the

[8] Udofa, I. (2018). The Abuse of Presidential Power of Pardon and the Need for Restraints. Beijing Law Review, 9, 113-131. https://doi.org/10.4236/blr.2018.92008

[9] Udofa, I. (2018). The Abuse of Presidential Power of Pardon and the Need for Restraints. Beijing Law Review, 9, 113-131. https://doi.org/10.4236/blr.2018.92008

[10] J. Locke, Second Treaties of Civil Government, Chapters 12-13, B.O. Iluyomade and B.U. Eka, Cases and Materials on Administrative Law in Nigeria (1980) pp. 1-2. See F. Ogoloma, "The Theory of Separation of Powers in Nigeria: An Assessment" (2001) 6(3) African Research Review 26, 128.

[11] 267 US 87 (1925).

[12] Udofa, I. (2018). The Abuse of Presidential Power of Pardon and the Need for Restraints. Beijing Law Review. 9, 113-131. https://doi.org/10.4236/blr.2018.92008

[13] A. Hamilton, The Federalist N0. 74.

[14] Udofa, I. (2018). The Abuse of Presidential Power of Pardon and the Need for Restraints. Beijing Law Review , 9, 113-131. https://doi.org/10.4236/blr.2018.92008

[15] 71 U.S. 333 (1866).

[16] Udofa, I. (2018). The Abuse of Presidential Power of Pardon and the Need for Restraints. Beijing Law Review. 9, 113-131. https://doi.org/10.4236/blr.2018.92008

English courts. Thus, in *Hay v Justices of the Tower Division of London*,[17] the plaintiff was convicted of an offence but was pardoned by the Queen. He then applied for a licence to sell spirits by retail. The law then was that persons convicted were forever disqualified from being granted a licence to sell spirits by retail. The court held that: When the crime of which a man has been convicted is pardoned, he is absolved not only from the punishment inflicted upon him by the judge who pronounced the sentence but from all penal consequences, such as disqualification from following his occupation. To treat it otherwise would be contrary to all good sense.[18]Similarly, in *Cuddington v Williams*, the plaintiff brought an action against the defendant for calling him a thief. The plaintiff had earlier been granted a pardon for the offence. The court held that though he had been convicted of the offence, yet when the pardon came, it had cleared the person of the crime and infamy.[19] The Nigerian courts follow the English and American courts on the legal effect of a pardon. There is no distinction between "pardon" and "a full pardon." A pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and privileges on account of the offence. The effect of a pardon is to make the offender a new man, or *Novus homo*, to acquit him of all corporal penalties and forfeitures annexed to the offence pardoned. Any title, property, or monies earlier forfeited on account of the offence, are as a general rule, usually restored forthwith to the person who is pardoned. Except where the pardon is not full, or the property can no longer be specifically restored, because the property has legally vested in other persons, in which case monetary compensation is usually paid to the person pardoned to enable him to recover what he loses, otherwise, all monies and properties earlier forfeited, or abandoned is usually restored in kind and in full to the person pardoned.[20] In the earlier case of *Okongwu v State*,[21] the court held that the effect of a free pardon is such as to remove from the subject of the pardon, "all pain, penalties, and punishments whatsoever that from the said conviction may ensure, but not to wipe out the conviction itself". Thus, the conviction will still be in the court's record even though the penalties have been nullified. Accordingly, a person who has been granted a pardon can still appeal against his conviction.

The criminal justice system has been affected by the executive power of pardon

A criminal justice system is a set of legal and social institutions for enforcing criminal law by a defined set of procedural rules and limitations. The criminal justice systems include several major subsystems, composed of one or more public institutions and their staffs: police and other law enforcement agencies; trial and appellate courts; prosecution and public defender offices; probation and parole agencies; custodial institutions (jails, prisons, reformatories, half-way houses, etc.); and departments of corrections (responsible for some or all probation, parole, and custodial functions). Some jurisdictions also have a sentencing guidelines commission. Other important public and private actors in the system include defendants; private defense attorneys; bail bondsmen; other private agencies providing assistance, supervision, or treatment of offenders; and victims and groups or officials representing or assisting them (e.g., Legal aid commission). In addition, there are numerous administrative agencies whose work includes criminal law enforcement (e.g., driver and vehicle licensing bureaus; agencies dealing with natural resources and taxation). Legislators and other elected officials, although generally lacking any direct role in individual cases, have a major impact on the formulation of criminal laws and criminal justice policy. Such policy is also strongly influenced by the news media and by businesses and public-employee labor organizations, which have a major stake in criminal justice issues.[22] The criminal justice system is a well-organized system maintained by the taxpayers of the country. The Criminal Justice System is to deliver an efficient, effective, accountable, and fair justice process for the public. The purpose of the Criminal Justice System is to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending while protecting the innocent. The crimes are offences against the public or state, for the safety of the innocent public crimes should be prevented and crimes should be controlled. The crime control model believes that the overriding purpose of the justice system is to protect the public, deter criminal behavior, and incapacitate known criminals. Those who embrace its principles view the justice system as a barrier between destructive criminal elements and conventional society. Speedy, efficient justice-unencumbered by legal red tape and followed by punishment designed to fit the crime is the goal of advocates of the crime control model. Its disciples promote such policies as increasing the size of police forces, maximizing the use of discretion building more prisons, using the death penalty, and reducing legal controls on the justice system. The crime control philosophy emphasizes protecting society and compensating victims. The criminal is responsible for his or her actions, has broken faith in society, and has chosen to violate the law for reasons such as anger, greed, or revenge. Therefore, money spent should be directed not at making criminals more comfortable but at increasing the efficiency of the police in apprehending them, the courts in effectively trying them, and the corrections system in punishing them. Punishment is critical because it symbolizes the legitimate social order, and the power societies have to regulate behavior and punish those who break social rules. The criminal justice guaranteed certain rights to

[17] (1890) 23 QBD, 561.
[18] 71 U.S. 333 (1866).
[19] (1615) 80 ER 216.
[20] Gov. of Lagos State v Ojukwu (1986) 1 NWLR (Pt. 18) 621 SC. See also Ogualaji v A.G. Rivers State
(1997) 6 NWLR (Pt. 508) 209 Okeke v Oruth (1999) 6 NWLR (Pt. 606) 175.
[21] (1986) 5 NWLR (Pt. 44) 721.

[22] From Criminal Justice System by Richard S. Frase and Robert R. Weidner. Encyclopedia of crime & justice / Joshua Dressler, editor in chief, 2nd Ed., 2002

suspect or accused, An accused subjected to the criminal justice has a right to a fair trial, the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the Constitution) has recognized the right to a fair trial, Article 13(3) of the Constitution states "Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court". Three important rights of a person accused of an offence are enshrined in Article 13(3) of the Constitution, namely, (i) the trial must be carried out by a competent court, (ii) the accused is entitled to be heard in person or by an attorney-at-law, and (iii) the trial must be fair. The Supreme Court of Sri Lanka in The Attorney General v. Segulebbe Latheef and Another [2008] as well as in The Attorney General v. Goniyamalige Kamal Viraj Aponso and Others [2008] held that the right to a fair trial, among other things, includes the following rights: 1) The equality of all persons before the court. 2) A fair and public hearing by a competent, independent, and impartial court/tribunal established by law. 3) Presumption of innocence until guilt is proven according to law. 4) The right of an accused person to be informed promptly and in detail, in a language he understands, of the nature and cause of the charge against him. 5) The right of an accused to have time and facilities for preparation for the trial. 6) The right to have counsel and to communicate with him. 7) The right of an accused to be tried without much delay. 8) The right of an accused to be tried in his presence and to defend himself or through counsel. 9) The accused has a right to be informed of his rights. 10) If the accused is in indigent circumstances, he has the right to be provided with legal assistance without any fee from the accused. 11) The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him. 12) If the accused cannot understand or speak the language in which proceedings are conducted, he has the right to have the assistance of an interpreter. 13) The right of an accused to not be compelled to testify against himself or to confess guilty. 14) Right to trial by jury. Those rights enable a fair hearing for an accused before conviction. The presumption of innocence is intrinsic to the right to a fair trial. It is a fundamental principle in criminal justice that derived from the Latin expression "*ei incumbit probatio qui dicit, non qui negat*", which means that the burden of proof is on the one who declares, not on the one who denies (Quintard-Morénas 2010). A careful study of the criminal justice administration system in Sri Lanka demonstrates that the right of an accused to defend through counsel has been recognized in several enactments. Section 41(1) of the Judicature Act, No. 2 of 1978. Section 144, Section 195(f), and Section 353 of the Code of Criminal Procedure Act, No. 15 of 1979 have also recognized the right to legal representation during the trial stage.

All the principle rights of the accused, protect by the criminal justice system, those rights are as follows: the right to protection from retrospective criminal laws, right to a public hearing, right to examine witnesses, right to know the charges against him, right to be tried in his presence, right to be informed of his rights, right to know the materials against him, right to have time and facilities for preparation for the trial, right to trial by jury, right to have the assistance of an interpreter, right to read over the evidence, right to make an unsworn statement, right to appeal and other rights recognized in the domestic law. The doctrine of double jeopardy is enshrined in Section 314 of the CCPA which in its marginal note states "No person to be tried twice for the same offence". Right to appeal Sections 316 to 360 of the CCPA provides for appeals, references, and revisions. The right of appeal is recognized in Section 320. According to Section 320(1), any person who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in law, or in fact. Section 4 of the ICCPR Act also guarantees the right to appeal which reads "every person convicted of a criminal offence under any written law, shall have the right to appeal to a higher court against such conviction and any sentence imposed". The criminal justice system is a comprehensive, impartial and transparent system that has been designed to administer justice. An accused person has ample opportunity to defend himself before the conviction: once he is convicted, he has the right to appeal to review the verdict. A conviction is the final outcome of the criminal justice system; it comes out as a result of the collective operation of law enforcement agencies; like trial and appellate courts; police and prosecution, and other institutions. The government spends tax payee funds to maintain law enforcement agencies; with the intention of protecting the public, deterring criminal behavior, and incapacitating known criminals. In recent times, the pardon power has been abused as political and other extraneous factors tend to determine its application. It has also been seen as capricious and inaccessible by ordinary people. The decision of a president to pardon a person who is convicted on due process negated the scope and motive of the criminal justice system accordingly the presidential power of pardon negatively affects the criminal justice system.

Findings

The analysis above proves that the concept of executive power of pardon is not a recently developed legal concept, it has gradually developed throughout history, according to the origin and the interpretation of the power of pardon is an important concept of law. Like the pardoning power according to constitutional theory, the legislature nor the judiciary can question the motives of the president in the use of the power. And also, the subsequent analysis of the legal provisions and the impact of such on the criminal justice system have proven the hypothesis of the research, the executive power to pardon affects the criminal justice system. In the opinion of the researcher, the most worrisome finding is the powers enumerated in the Constitution, the power to pardon proceeds unfettered, and this power has the greatest potential for abuse. In recent times, this power has, in practice, become a personal prerogative of the president, a remnant of tribal kingship generally reserved for the well-heeled or well-connected. The

power of pardon is virtually unfettered and unchecked by formal constraints in most jurisdictions, thereby rendering it susceptible to abuse. However, in some jurisdictions, there are conventionally specified criteria that guide the grant of pardon. The exercise of presidential pardon power has, in recent times, come under severe attack in Sri Lanka, where the power has been abused by presidents who have allowed personal and parochial considerations to dictate their decisions. The current practice of granting presidential pardons in Sri Lanka is deeply problematic. However, the course of action provided through the Nineteenth Amendment for the Supreme Court to review pardons is a positive feature in Sri Lanka's constitutional framework. It can provide an avenue to maintain checks and balances on executive power, and prevent a culture of injustice, which undermines the rule of law. What is more, all that is needed to put this remedy in place is the passage of legislation that is likely to be, at least as a matter of politics, noncontroversial. Such legislation would not tie a president's hands, and it would certainly help establish clearer norms against which future presidential behavior may be measured. In the present age, such norms would be most welcome. To the extent that presidential discretion to award pardons is (or becomes) a question of presidential abuse of power. The recommendations mentioned in the following chapter are meant to act as catalysts that push the executive power of pardon in the right direction.

V. ANALYSIS OF LAWS

Analysis of Laws about the power of pardon in Sri Lanka

Article 34 of the constitution empowers the executive power of pardon. Under Article 34 the executive president has wide power to grant pardon to any offender convicted of any offence in any court. According to Article 34(1), the President may grant a pardon either free or subject to lawful conditions; grant any respite, either indefinite for such period as the president may think fit, of the execution of any sentence passed on the such offender; substitute a less severe form of punishment for any punishment imposed on the such offender or remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence. Concerning a pardon for an offender who was convicted and sentenced to death by any court the President shall call a report to be made to him by the Judge who tried the case and shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the subject of Justice, who shall forward the report with his recommendation to the president.

Article 89 of the constitution discusses the disqualification from being an elector and Article 91 discusses the disqualification for election as a member of parliament, by the pardon power granted under Article 34 the President is empowered to grant a pardon, either free or subject to lawful conditions or reduce the period of such disqualification any person who is or has become subject to any disqualification specified in paragraph (d), (e), (f), (g), or (h) of Article 89 or subparagraph (g) of paragraph (1) of Article 91. The Article 89 (d) states that disqualification to be an elector or disqualification for election as a member of parliament includes a person serving or has during seven years immediately preceding the completed serving of a sentence of imprisonment (by whatever name called) for a term not less than six months imposed after conviction by any court for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving or has during seven years immediately preceding completed the serving of a sentence of imprisonment for a term not less than six months awarded instead of execution of such sentence. But the proviso says that if any person disqualified under this paragraph is granted a free pardon such disqualification shall cease from the date on which the pardon is granted. The executive president has the power to pardon a person who is not eligible to become an elector or member of parliament as a result of an offender of a criminal offence.

Article 34(3) of the constitution discusses the pardon for an accomplice of an offence, accordingly any person when any offence has been committed for which the offender may be tried within the Republic of Sri Lanka, the President may grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender or of any one of such principal offenders if more than one.

It is argued that the executive power to pardon is a mechanism that out of court involves correcting a miscarriage of justice. The executive pardon may relax the harshness and the rigidity of the legal provisions and customs. The other arguments are that the executive pardon renders the criminal justice system ridiculed. Apart from subverting the course of justice, it had also rendered naught the entire processes which took place and the due application of the prevalent laws of the country, including the Penal Code and the Code of Criminal Procedure. The constitutional power to grant a pardon does not have the freedom to do so in gross violation of the rule of law, as well as all notions of justice, equity, and rationality. It is a gross violation of the fundamental rights of the citizens, amounting to a violation of Article 12(1), in which there is a guarantee of equality and equal protection of the law. In Sri Lanka, except for decisions to declare war, the official decisions of a president may be challenged by invoking the fundamental rights jurisdiction of the Supreme Court as per Article 35(1) of the Constitution. This mechanism was introduced through the Nineteenth Amendment to the Constitution. As such, a solution to 'check' controversial presidential pardons is available in Sri Lanka, thus upholding the separation of powers. This remedy has been used to challenge the presidential pardons granted to Gnanasara Thera, Jayamaha, and Ratnayake.

Women & Media Collective v. Attorney General (Fundamental Rights Application, "Don. Shamantha Jude Anthony Jayamaha's Case)

The Petitioner in this matter is a non-profit organization, dedicated to the promotion and protection of the rights of women in Sri Lanka, The Hon. Attorney General has been made a party respondent to the application on a three-fold basis. A) under and in terms of Article 35 of the constitution, because the acts and orders which are impugned in this application are those made, done, and or resorted to by the president B) in terms of the Supreme Court rules be made party respondent C) given the role that the Hon. Attorney General is entitled to perform, in terms of the proviso to Article 34. Don. Shamantha Jude Anthony Jayamaha, named as a 2nd Respondent that material to the application that had been sentenced to death by the Court of Appeal by its judgment dated 11.07.2012, which was confirmed by Supreme Court by refusing Special Leave to Appeal against the said Judgment of the Court of Appeal, and the purported decision to pardon him by the President.

In this case, the Accused is being indicted before the High Court by the Hon. Attorney-General, for murdering Ms. Yvonne Jonsson, who was 19 years of age at the time, on or about 01.07.2015 in terms of Section 294 of the Penal Code and punishable under Section 296 of the Penal Code. the High Court judge pronounced a finding of culpable homicide not amounting to the murder, thereby convicting the accused and sentencing him to a term of 12 years of rigorous imprisonment in conjunction with a fine of Rs. 300,000. The Attorney-General, and the accused, preferred an appeal to the Court of Appeal. The Court of Appeal delivered a very detailed and comprehensive judgment of 33 pages and their Lordships Justices W.L.R Perera and Nalin Perera (as his Lordship then was), whilst dismissing the appeal of the accused, allowed the appeal of the Hon. Attorney-General and set aside the conviction for culpable homicide, not amounting to murder, made a pronouncement and finding that the accused had committed the offence of murder under and in terms of Section 294 of the Penal Code, and convicted him of murder and accordingly passed a sentence of death. The Supreme Court by refusing Special Leave to Appeal against the said Judgment of the Court of Appeal affirms the conviction.

The Petitioner states that their petition, even though the accused, was sentenced to death as a result of the criminal justice system and its machinery coming to fruition through the judicial system, the president, Maithripala Sirisena, in a move that has shocked and left the public aghast, purported to invoke his powers of Article 34 of the Constitution and granted a Presidential Pardon to the accused. Further states that this stunningly obnoxious move on the part of the president, especially in respect of a convict on death row, who has been sentenced both by the Court of Appeal, which is the penultimate court of the country, as well as the Supreme Court, which is the apex court, on the eve of the relinquishment of his term of office as president, has led to concerted public censure both locally as well as internationally, and brought the criminal justice system to ridicule. Apart from subverting the course of justice, it had also rendered naught the entire processes which took place, *inter alia*, before the Court of Appeal as well as the Supreme Court and the due application of the prevalent laws of the country, including the Penal Code and the Code of Criminal Procedure. The petitioner claim that the president, though vested with the constitutional power to grant a pardon, does not have the freedom to do so in gross violation of the Rule of Law, as well as all notions of justice, equity, and rationality, as well as in reckless disregard of the sensibilities and sensitivities of the matter, including the existence of an aggrieved family, which is still to come to terms with the gruesome murder of Yvonne Jonsson, whose life was snuffed out at a very young age at the hands of the Accused. The petitioner further states that It is trite law, as expounded by judicial dicta and textual authority, that even the widest plenary power purported to be vested in a decision-making authority, be he the highest in the land or otherwise, can never be untrammeled or unrestricted and must necessarily be subjected to freedom from whim, caprice, arbitrariness, and disregard of all notions of reasonableness. Furthermore, given the large number of convicts on death row, it is a matter of serious consideration as to how the president decided to select the Accused, to the exclusion of all other convicts, to grant him the privilege of a presidential pardon. If a proper system of assessment and evaluation was adopted to guide the exercise of the powers of a presidential pardon vested in terms of Article 134, then cognizance would necessarily have to be taken of those whose culpability as well as the less heinous nature of the offences committed by them, and also special mitigatory circumstances would necessarily have to be considered. In the totality of these circumstances of this case, the petitioner respectfully pleads that there has been a gross violation of the Fundamental Rights of the Petitioners as well as the citizens, the people of Sri Lanka, as well as of the family of Yvonne Jonsson, amounting to a violation of Article 12(1), in which there is a guarantee of equality and equal protection of the law.

The Petitioner claim that the in particular and specific circumstances attendant upon in this singular case involving the Accused, for *inter alia*, the reasons pleaded in the aforementioned paragraphs, the impugned decision of the President to grant a pardon to the Accused amounts to an interference, effectively with the judicial power of the people which is exercised by Parliament through, *inter alia*, the courts of the country which in turn goes to sovereignty as articulated in Articles 3 and 4 of the Constitution. Although the power *per se* of the Presidential Pardon is conceded in as much as it is manifest in Article 34 of the Constitution, nevertheless the grievously arbitrary nature in which is it exercised by the president, in this particular instance is tantamount to an undermining of the separation of powers, in as much as, the president as the Head of the Executive has made serious inroads into the decisions of the Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka, which are identified by Articles 105 (1) (a) and (b) respectively, as institutions for the administration of justice, which protect, vindicate and enforce the rights of the people.

The petitioner highlighted that in this particular context, as well as in general, the rights of the people include the right of protection of the people from criminal elements of the nature

and character of the Accused, and when a crime of this nature is committed it is committed against the Republic of Sri Lanka, in which is subsumed, the citizenry and people of Sri Lanka. The Petitioners reiterate that both the deterrent theory of criminal sentencing/punishment and the punitive theory of criminal punishment/sentencing demand that in the context of crimes of the nature committed by the Accused, must not be negated in the manner which has now been done by the President. The other important aspect is the fact that if found by the Court of Appeal the Accused committed this heinous crime in his full senses, there is also the propensity that he may well perpetrate a further offence against some other person and that is why murderers of this nature and scale are removed from General Society, for the protection of the people. These are matters which should have been given the most acute and anxious consideration by the President, in terms of and regarding objective benchmarks, criteria, and indicia.

The petitioner seeking declarations *inter alia* Declares that the President, has violated the Fundamental Rights to equality and equal protection of the law, of the Petitioner, and the people and the citizenry of Sri Lanka, as guaranteed by Article 12(1) of the Constitution; to declare that by the grant of the Presidential Pardon to the Accused by the President, as represented by the Hon. Attorney-General, there has been a violation of the principles and concepts of the sovereignty of the people as enshrined in Articles 3 and 4 of the Constitution, and also that there has been an interference with the judicial power of the people as contemplated in Article 4 (c) of the Constitution; to declare, in the special and particular circumstances of this case, an interference with the judiciary, as defined in Article 105 (1) (a) and (b) of the Constitution; and declare the Presidential Pardon given to the 2nd Respondent by His Excellency the President Maithripala Sirisena, as represented by the 1st Respondent, as being null and void and of no force or avail in law; This Fundamental application is still pending before Supreme Court.

VI. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

The power of pardon is a feature of human society which has a long history and ancient origin It has been recognized today in almost every nation. The executive power of pardon is not a recently developed legal concept, it has gradually developed throughout history, according to the origin and the interpretation of the power of pardon is an important concept of law. The main rationale for the power of pardon is to show the dispensing of the mercy of the government. The justification for the power of pardon is it capable of correcting the errors of the criminal justice system, were to redress the wrong convictions and punishments. The current application of the power of pardon has been abused by political and other extraneous factors. Based on the above discussion, it can logically be concluded that the amendment of the law is imperative to prevent the abuse of the power of pardon. Sri Lanka can no longer rely on the word of the written law to execute or justify an executive power of pardon, blatantly violating the rights of people, as giving limitless power to the executive. The power of pardon can be seen as a concept that is not equally applied and not accessible to ordinary people in recent time. Pardoning power is the most sacred and difficult of all executive functions. The usefulness of the power of pardon has been seriously misused during the last decades in Sri Lanka. Though it is regarded as a prerogative, based solely on presidential or executive discretion, there ought to be checked and guiding principles to avoid injustice in the quest for equity. The prisoners who have political contacts much benefitted from the other prisoners, on behalf of the public at large, and also in order to preserve the efficacy of the criminal justice system and the imperative need to punish offenders of the ferocity, intensity, premeditation, and heinous nature. A proper system of assessment and evaluation was adopted to guide the exercise of the powers of a presidential pardon vested in terms of Article 134, then cognizance would necessarily have to be taken of those whose culpability as well as the less heinous nature of the offences committed by them, and also special mitigatory circumstances would necessarily have to be considered.

It is also ironic that it is this very president who put in place and/or sought to put in place mechanisms for the executions of several convicts on death row and to carry out the death sentence despite public criticism, who nevertheless now, selects a convict who has been convicted for gruesome murders. The decisions are utterly unacceptable and should be subject to the review of the Court in the exercise of Fundamental Rights jurisdiction vested in Article 126 of the Constitution. the Fundamental Rights of the citizens and people of Sri Lanka, as well as of the family of aggrieved parties, amounting to a violation of Article 12(1), in which there is a guarantee of equality and equal protection of the law. It is abundantly evident from the media release that in any event that the constitutional process set out in the Proviso to Article 34 (1), to be followed in the case of offenders condemned to suffer death by the sentence of any court has not been followed by the president, and therefore the constitutional due process has been grossly violated. In fact, in lieu thereof, various spurious reasons of the most amazing proportions, which will leave the public utterly incredulous, have been sought to be adduced in the said media release, none of which reasons are ascribable to any intelligible process, duly countenanced or mandated by law. This is an effective case where the defence is worse than the offence.

Recommendations

Recommendations for legislators

- The power granted to the president under Article 34 should be exercised on the advice of the parliament, not by the president on his own. And should amend the law to bind the president from the advice of the parliament.
- A provision should be introduced to the executive power of pardon and should be subjected to judicial review, subject to other recommendations stipulated below.

- A provision should be introduced to establish grounds/conditions to decide the eligibility of a convicted person to apply for a pardon and other alternative measures. By considering the international instruments discussed in the early chapters.
- A provision should be introduced to grant opportunity to the public and specifically to the aggrieved party to represent themselves and submit their objection or opinion before they implement the pardon.
- The law amendments should be introduced to strengthen the check and balance system regarding the presidential pardons, the presidential pardons should be subject to checks and balances. Such checks and balances are vital to avoid abuse of powers by the executive.
- Consideration of alternatives to avoid the miscarriage of justice in the criminal justice system and develop the criminal justice system to get an accurate verdict. Such alternative methods may include scientific criminal investigation, and the development of the criminal justice infrastructure.
- To appoint a committee to consider pardoning applications and to make a recommendation.
- Constitutional limits should be introduced to limit the broad power of pardon vested with the executive president. Such as how the president should consider a pardon application, what information the executive president should seek or consider, and what weight should attach to the judicial decision.
- Take the advice of the Council of State on the grant or refusal of pardon to applicants should be made binding on the President in all cases.
- The provisions should be introduced to call/give reasons for the decision for pardon by the president.
- Maintain a waiting list of applications for pardon to avoid privilege selection by the executive president.
- A proper system of assessment and evaluation should be adopted to guide the exercise of the powers of a presidential pardon vested in terms of Article 134, then cognizance would necessarily have to be taken of those whose culpability as well as the less heinous nature of the offences committed by them, and also special mitigatory circumstances would necessarily have to be considered.
- Bring an amendment to the Constitution, to prevent the use of the power of pardon is not any self-pardoning apart from the executive. The reason for this is that in such a case there would be bias, and abuse of power will take place.
- Set a period for the application for the pardon as well as the exercise of this power, this will help in the early disposal of the cases and prevent abuse of the power.
- A provision should be included regarding the death penalty's minimum mandatory time of detention before pardon.

Recommendations for the judiciary

- Sri Lanka Judge's Institute was established (by Act No. 46 of 1985) to enhance the skills and knowledge of the judicial officers should strive to organize training and lectures to enhance judges' knowledge.
- Update the knowledge of judicial officers to face future challenges and give training showing the need to examine all facts arguing for or against the release of pending judgment and to demonstrate justifications for their decisions convincingly should be emphasized in such training.
- A set of guidelines should be issued (possibly by the Sri Lanka Judge's Institute) to guide the judiciary with special attention to judicial reasoning derived from the facts of the case and the individualization of each accused.

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