

PRESIDENTIAL PARDON AND PREROGATIVE OF MERCY: A NECESSARY NATIONAL SOOTHING BALM FOR SOCIAL JUSTICE

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[Pardon] has never been crystallized into rigid rules. Rather, its function has been to break rules. It has been the safety valve by which harsh, unjust, or unpopular result of formal rules could be corrected.¹

Abstract

A wrongful acquittal can sometimes involve injustice as grievous as wrongful conviction. The conviction as a matter of record, survives the pardon. Pardon expresses forgiveness not innocence. An innocent man cannot be pardoned but to apply for rescindment which is a total cancellation, not a pardon that leaves the record intact. Because the President as an Executive does not deal with law, he concerns himself with mistake of facts while the courts concern itself with mistake of law. There are usually wrongful convictions that are suitable for presidential pardon or prerogative of mercy. Some Presidents and Governors use this constitutional provision to add luster to their names or party patronage or to score political points. The danger of convicting the innocent calls for greater and greater care. This article examines the necessity of the prerogative of mercy as a means of correcting mistakes in the process of justice delivery and its use as a tool for calming political tides and uniting the nation. It is expected that this will kick start scholarly and legislative action for acceptable guidelines for the exercise of Presidential pardon and prerogative of mercy in the interest of our justice system.

Key words: Pardon, Prerogative, Presidential, Mercy, Justice, Constitution, Governor

1. Introduction

The foundation of Presidential Pardon and Prerogative of Mercy may be traced to the Holy Bible from where different nations have adopted them in their Constitutions. In the Bible it is said, “I will therefore chastise him, and release him.”² In the same chapter,³ our Lord Jesus Christ told a criminal

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¹ 3U.S. Dept. of Justice, *The Attorney General's Survey of Release Procedures: Pardon* 295(1939).

² St Luke 23:16, *The Thompson Chain-Reference Bible*, 5th Improved Edn. B.B. Kirk bridge Co. Ltd. Indianapolis, Indiana, U.S.A., 1988, 1115.

³ *Ibid.* Chapter 23:43. See also *Jeremiah* 33:8 and *Psalms* 25:11.

crucified with him that he would be with him in heaven as the criminal repented. In the case of Jesus Christ, he was innocent but crucified, while the criminal was guilty and crucified.

Every sovereign nation shall according to its laws manage its affairs. In managing a nation, the available arms of government interrelate for good governance. The guide is usually the Constitution especially in a democratic government. In most constitutions there are provisions for prerogative of mercy or presidential pardon. This enables the President and Governors as the case maybe, to look at justice through their own spectacles, knowing that leadership is additional responsibility having been elected by the people and also knowing that justice is the first condition of the society. Royal/Executive prerogative is an integral part of the constitutional system and it exists to protect the citizens against possible miscarriage of justice. Few provisions in the constitution are as misunderstood and underestimated as the President's power to pardon⁴. There should not be hesitation to recommend the exercise of that power if there are substantial grounds for believing that a miscarriage of justice may have occurred for which there is no remedy in the courts⁵. Also the persistence of erroneous ideas, the lack of exact information, and absence of publicity concerning the acts of pardoning authority envelop the power in a veil of mystery.⁶

Our administration of justice on the adversary system, and the trial retains many of the responsibility of each side to get its troops on the field on time. Napoleon could not appeal against the verdict of Waterloo on the ground that Marshal Grouchy and his army were still on their way when Bliicher and the Prussions arrived in the nick of time. Once a President or Governor exercises the discretion, there is no appeal to any quarter and nobody has anything to do about it no matter how bad the person feels. Judgment according to law does not equate with justice in a particular case. When this occurs, in the civil law, the afflicted party is left to draw such consolation as he can from the maxim that 'hard cases make bad law'. For defendant in a criminal case, one of the uses of the prerogative is as a means

⁴ See P. Shane & H. Bruff, *The Law of Presidential Power*, 1988.

⁵ See C.H. Rolph, *The Queen's Pardon*, Cassell Ltd., London, 1978,85.

⁶ W.H. Humbert, *The Pardoning Power of The President*, 1941,6.

of avoiding the application of that maxim. When the case gets to the President or the Governor, the appellant has lost the protection of the law and is ‘in mercy.’⁷It is at this point that mercy seasons justice, because in the course of justice, none of us should see salvation.

Most countries seem to share a traditional belief, sometimes erected into constitutional principles, that the courts represent God, judicial infallibility or anyway Absolute Good. Failure in such a system is simply not to be spoken of. Therefore, the process of correcting the failures, if it is to be done at all, must be dressed up in words like mercy, clemency and pardon. It is as though you and I, moved by the desire to knock a man down, carelessly knocked down the wrong one; and then, rather grudgingly helping him to his feet, explained graciously that we were prepared to consider conferring upon him our clemency, mercy or pardon for being the wrong man.⁸ It is proposed in this article that the President has a duty to pardon, not so much to do justice in particular cases, but to be merciful as a more general obligation of office by dispensing the mercy of the government and to deal expeditiously with situations involving political upheavals or emergencies.

There has been cacophony of opinions and comments on the latest exercise of Presidential pardon by the President, Dr. Goodluck Ebele Jonathan. It generated a lost of heat, wave, tide and comments. This may be due to current national/political tempo and tide. It is lamentable that the pardoning provision as with many other provisions of the constitution, has not received more attention from scholars and writers. It is hoped that the recent interest in the subject occasioned by the pardon granted His Excellency Chief (Dr.) D.S.P. Alamieyeseigha and others will lead to studies of the provision by the National Assembly, and the Bench/Bar with a view to developing acceptable guidelines for its exercise in our system of justice. What may be looked at, considered or blamed may be Nigerian pluralistic nature, multi-religious, multi-ethnic and multi-political philosophies and ideologies. Given the heat generated by Alamieyeseigha’s pardon the question is whether the situation could have been different if the beneficiary did not come from Niger

⁷ *ibid.* 90.

⁸ C.H. Rolph, *The Queen’s Pardon*, Cassell Ltd; London, 1978,85.

Delta the goose that lay the golden egg for Nigeria. If the present President was not the Deputy Governor of Alamiyeseigha when he was a governor, should he have granted him pardon as the President of Nigeria.

2. What is Pardon?

Pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individuals, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive.⁹ This is why it can never be a subject of litigation in any court, because of its discretionary nature.

Also pardon is a part of the constitutional scheme to be exercised for the ‘public welfare.’¹⁰ It is also called “a matter of grace” that need not be justified or defended within legal system.¹¹ The court in *Biddle v. Perovich*¹² said that a pardon in our day is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.¹³

It is also seen as a manifestation of public mercy that has a legitimate role in a retributivist legal system, to override the law where its outcome is unjust or where the common welfare otherwise requires it. In strict legal theory, the reason for pardon is mercy. So the President or the Chief executive by the Constitution is empowered to make “exceptions in favour of unfortunate guilt” but ordinarily is not obliged – to except in cases where a compelling moral claim has been established. President grants pardon as a more general obligation of office. This duty of he’s to pardon is neither grounded in nor limited by considerations of law or morality, but is

⁹ *United States v. Wilson*, 32 U.S. (7. Pet.) 150 (1833) at 159-60.

¹⁰ *Biddle v Perovich*, 274 U.S.A. 480, 486 (1972).

¹¹ *Ohio Adult Parole Authority v Woodard*, 523, U.S.A. 272,282, 285 91998). *Where the federal pardon power concerned, the courts have consistently declined to limit its exercise; see eg Schick v Reed*, 419, U.S 256,264-66 (1974) (upholding President’s right to commute a death sentence condition upon service of life without parole); cf *Burdick v United States*, 236. U.S. 79,89-90(1915) (upholding that the fifth Amendment privilege against self-incrimination may not be overcome by device of pre-emptive pardon). See generally Margaret Colgate Love, *President’s Duty To Be Merciful of Pardons, Politics And Collar Buttons: Reflections On The President’s Duty To Be Merciful*, *Fodharn Urban Law Journal*, 2000,20.

¹² *Op. cit.* Footnote 10.

¹³.citing *In Re Grossman*, 267 U.S. 87,120,12 (1925).

essentially one of politics. It could be likened to the situation where Bassanio in Merchant of Venice begs the Court to bend the law slightly in order to exonerate Antonio, reasoning that such a small infraction is a little wrong for a great right. Though, pardon is a political duty and not a duty of law or justice, the President would be under no obligation to grant clemency to all offenders with arguably similar equitable claims. There is no obligation on the President to treat like cases alike. In view of the manifest crisis in the Niger Delta which Chief Alamiyeseigha has perfectly handled in the interest of the nation, any national attention to his favour should be understood and welcome. Based on this, the President has right to grant pardon to Alamiyeseigha because even the like cases may have different facts and circumstances within different spaces and times. Pardon serves as an executive check on courts' discretionary decisions.¹⁴

A definition of "pardon" is incomplete without a consideration of the powers incident to it. One such incidental power is the authority to issue amnesties.¹⁵ Pardon is granted both for innocence and guilt. It (pardon) expresses and does not show innocence as accusation becomes nine points of conviction in the public esteem. A pardon for innocence is an acquittal, and must be given all the effects of an acquittal. An innocent man cannot be pardoned but needs mercy. For other reasons, pardon leaves the determination of the convict's guilt stand, and only relieves him from the legal consequences of that guilt.¹⁶ This is the reason for the decision in *In re Grossman*¹⁷ where it was said, "[w] however is to make (pardon) useful must have full discretion to use it". For pardon to be valid, it must specify the offence(s) covered.

3. Prerogative of Mercy

¹⁴ *ibid.*

¹⁵ "Amnesty differs from pardon in that it applies to a whole of persons or communities rather than to individuals. It also differs from pardon in that it is granted regardless of proof of the fact of guilt..." J. Matthews, *The American Constitutional System* 176 (1940). See also *Brouer v Walker*, 161 U.S. 591 (1896).

¹⁶ *Weihofen, The Effect of a Pardon*, 88 U.Pa Rev. 177,179 (1939).

¹⁷ *In Re Grossman*, 267U.S.87,121 (1925). See also *YeIvington v Presidential Pardon and Parole Attorneys*, 211F.2d 642 (D.C.Gr. 1954) (the court will not compel compliance with internal Justice Department clemency regulations so as to interfere with administration of pardon power).

In some cases prerogative of mercy is for those offenders who have been two severely punished; or wrongly convicted (even though probably guilty) by reason of some technical or procedural error; or convicted on the right facts under the wrong law; and whose plight is discovered too late for redress in any judicial court of appeal. This may have been informed by the provisions in the Constitution of the Federal Republic of Nigeria.¹⁸ The Constitution on states:

1. The President may –

- (a) *grant any person concerned with or convicted of any offence created by an Act of National Assembly a pardon, either free or subject to lawful conditions;*
 - (b) *grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;*
 - (c) *substitute a less severe form of punishment for any punishment imposed on that person for such an offence;*
or
 - (d) *remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.*
2. *The powers of the President under subsection (1) of this section shall be exercised by him after consultation with the Council of State.*
3. *The President, acting in accordance with the advice of the Council of State, may exercise his power under subsection (1) of:-*
this section in relation to persons concerned with offences against the army, naval or air force law or convicted or sentenced by a court-martial.

In the same Constitution, the same prerogative of Mercy was provided for offences created by any Law of a State. It is provided in the Constitution¹⁹ which stated as follows:

1. The Governor may –

- (a) *Grant any person concerned with or convicted of any offence created by any law of a State a pardon, either free or subject to lawful conditions;*

¹⁸ Section 175 of the Constitution of the Fed.Rep. of Nigeria, 1999 (as amended).

¹⁹ Section 212 of the 1999 Constitution of Federal Republic of Nigeria (as amended).

- (b) *grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;*
 - (c) *substitute a less severe form of punishment for any punishment imposed on that person for such an offence;*
or
 - (d) *remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the state on account of such an offence.*
1. *The power of the Governor under subsection (1) of this section shall be exercised by him after consultation with such advisory Council of the State on prerogative of mercy as may be established by the Law of the State.*

It may be observed that some states in the Federation exercise their powers in line with the above stated provision of the constitution. However, some Governors do not have in place Council of the State for prerogative of mercy. The Council of State in place in some states, appear to be mere rubber stamp who just sign documents to fulfill all righteousness.

The United States of America Constitutional provision on this subject is at *Article II Section 2* which provided thus:

Article II Civilian Power over Military, Cabinet, Pardon Power, Appointments.

Section 2 – The President shall be Commander in chief of the Army and Navy of the U.S., and of the Militia of the several States, when called into the actual service of the U.S, he may require the opinion, in writing, of the principal officer in each of the executive Departments, upon any subject relating to the Duty of the respective offices, and he shall have Power to grant Reprieves and Pardon for Offences against the United States, except in cases of impeachment.

Also, the Constitution of the Republic of Uganda provided in Section 121 for Prerogative of Mercy thus:

- (1) *There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of–*
 - (a) *the Attorney general who shall be the chairperson; and*
 - (b) *six prominent citizens of Uganda appointed by the President*
- (2) *A person shall not be qualified for appointment as a member of the committee if he or she is a member of parliament, the Uganda Law Society or a district Council.*

- (3) *A member appointed under clause (i)(b) of this article shall serve for a period of four years and shall cease to be a member of the committee –*
 - (a) *if circumstances arise that would disqualify him or her from appointment; or*
 - (b) *if removed by the President for inability to perform the functions of his or her office arising from infirmity of body or mind or for misbehavior, misconduct or incompetence.*
- (4) *The President may on the advice of the Committee*
 - (a) *grant to any person convicted of an offence a pardon either free or subject to lawful conditions;*
 - (b) *grant to a person a respite, either indefinite or for specified period, from the execution or punishment imposed on him or her for an offence,*
 - (c) *substitute a less severe form of punishment for a punishment imposed on a person for an offence; or*
 - (d) *remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.*
- (5) *Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as maybe necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy.*
- (6) *A reference in this article to conviction or imposition of a punishment, sentence or forfeiture includes conviction or imposition of a punishment, penalty, sentence or forfeiture by a court martial or other military tribunal except a field court martial.*

Comparatively the Constitution of Republic of Uganda is more detailed as to the procedures, steps and requirements of Prerogative of Mercy or Pardon. The Nigerian Constitution gives the Nigerian President more space to manoeuvre in his exercise of his power to grant pardon as our own Constitution is not very verbose.

Mercy is an attribute of God; in Shakespeare's Merchant of Venice,²⁰ there are these memorable lines that express the meaning and import or purport of mercy. The lines are as follows:

The quality of mercy is not strain'd, It droppeth as the gentle rain from heaven Upon the place beneath: it is twice blessed; it blesseth

²⁰ *Merchant of Venice, Act IV Scene 1. This is believed to have been written between 1596 and 1598.*

him that gives, and him that takes; is mightiest in the mightiest; it becomes the throned monarch better than his crown” His scepter shows the force of temporal power, The attribute to awe and majesty; wherein dot sit the dread and fear of kings; But mercy is above this sceptered sway, it is enthroned in the hearts of kings, It is an attribute of God himself.

And earthly power doth show likest God’s When mercy seasons justice, Therefore, Jew, Though justice be thy plea; consider this That, in the course of justice, none of us should see salvation: we do pray for mercy; And that same prayer doth teach us all to render the deeds of mercy. I have spoke thus much to mitigate the justice of thy plea; Which if thou follow, this strict court of Venice Must needs give sentence ‘gainst the merchant there.

In the course of justice there should be prerogative of mercy as law is an ass. This is because a wrong person may be convicted and the real criminal who should be convicted is discharged and acquitted. In view of this, prerogative of mercy may be the last line of defence for justice. We may recall the case of *Umaru v The State*²¹ where **Nnamani JSC** in his lead judgment said:

Those accused persons ought not to have been discharged. Luckily for them, however, their case is not before this court there being no appeal against their discharge. What is, therefore, in issue is whether these errors do in any way affect this case of the appellant.

Also in the case of *Emmanuel Ebiri v The State*²² the Supreme Court on Friday May 21, 2004 by the lead judgment of **Niki Tobi J.S.C.** had cause to say:

*Of course, the appellant in Umaru’s case was discharged and acquitted by a majority judgment. And so I have no alternative than to discharge and acquit the appellant, a person I think clearly committed the offence of murder. This is clearly one area where **the law is really an ass**²³. There is nothing I can do about it.*

4. Implications of prerogative of mercy or presidential pardon

The implication of Presidential pardon or prerogative of mercy granted a citizen is to wipe out not only the sentence or penalty but the conviction and

²¹ (1988)1 NWLR (pt70) 274 at 286.

²² (2004)11 NWLR (pt.885) 589.

²³ *Emphasis Mine.*

all its consequences and from the time it is granted leaves the person pardoned in exactly the same position as if he had never been convicted²⁴.

The American view of the *effect of a pardon, as expressed by Justice Field in Ex parte Garland*²⁵ is that:

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 eyes of the law the offender is as innocent as if [sic] he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction it removes the penalties and disabilities and restores to him all his civil rights.

It makes him, as it were, a new man, and gives him a new credit and capacity²⁶. Also in the opinion of **Wade and Philip's Constitutional Law**, a free pardon 'rescinds both the sentence and the conviction'. This is similar to that of **Frank Newsman** who said:

*a free pardon wipes out not only the sentence or penalty but the conviction and all its consequences and from the time it is granted leaves the person pardoned in exactly the same position as if he had never been convicted.*²⁷

The Criminal Code of every country partakes so much of necessary severity that, without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.²⁸ In *R v Cosgrove*²⁹ the Supreme Court of Tasmania said that:

a pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity.

You cannot pardon a man for something he has not done. So in most countries it will be seen that the words pardon, redress, remission, rescission, commutation, grace, mercy, exoneration, exculpation, *droit de grace*,

²⁴ *Op.cit seen footnote 16.*

²⁵ *Ex Pate Garland* 4 Wall 1867,333-80 (Garland an attorney, had been pardoned by President Andrew Johnson for offences committed during the civil war).

²⁶ *C.H. Rolph, op cit at 113..*

²⁷ *ibid, The Home Office, Allen and Unwin, 1954.*

²⁸ *James Iredell, Address in North Carolina Ratifying Convention, 1987,17.*

²⁹ *Tas S.R., 99.*

Weideraufnahme, and a variety of others are called in aid to rescue the victims of the law's mistakes; but only in those countries where it is possible to admit that the law can possibly fall into error. There may be instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. This is because it is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.

Many situations arise at different places and times; this necessitates pardon. This is because an innocent man can sometimes get a retrial, supposing him to have unusual resource in money and determination. In *R v Davies and Cody*³⁰ two men convicted of murder applied to the Victoria Court of Criminal Appeal for leave to appeal against conviction. Both applications were dismissed. Then an important witness for the prosecution announced that he had given false evidence against them, and swore an affidavit to that fact. As these exciting last minute witnesses usually do, he then withdrew his statement, but on the strength of it the two convicted men sought special leave to appeal to the High court of Australia. The High Court decided that it could not consider fresh evidence, and Chief Justice Latham observed that the best course would be for the Victoria Attorney – General to invoke the Crimes Act 1958 (Victoria) and refer the case to the Supreme Court of Victoria. That Court dismissed the case once more. Again the prisoners went to the High Court of Australia, and this time their appeal was allowed, a retrial was ordered, and they were acquitted. It may be said that the High Court could have done this in the first place; but the case illustrates an interesting and heartening reluctance on the part of a Supreme Court to accept the proposition that courts and juries cannot possibly go wrong or cannot redress their errors if they do. Their team of counsel, among whom were the future Mr. Justice Nimmo of the Federal Court of Australia and Mr. Justice Barry of the

³⁰ *R v Davies and Cody*, 1937, V.L.R. 226.

Supreme Court of Melbourne, were from the outset convinced of their innocence.³¹

In 1877 the Supreme Court of America in the case of *Knote v U.S.*³² declared that the pardoning power –

affords no relief for what has been suffered by the offender in his person by imprisonment, forced labour or otherwise, it does not give compensation for what has been done or suffered, nor does it impose on the Government any obligation to give it..... However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers, that it cannot touch moneys in the Treasury of the United State except expressly authorized by Act of Congress. The Constitution places this restriction upon the pardoning power.

It has to be noted that quashing is a complete purge of the conviction, whereas a pardon draws a veil over the conviction without establishing whether the party was guilty or not and the veil may be rent if the person offends again. Moreover, a pardoned person can be convicted of perjury if he gave false evidence at his own trial for the crime for which he had been pardoned.³³

The President or Governor's personal intervention in a case through the pardon power reassures the public that the legal system is capable of just and moral application. It enables him correct legal errors that for one reason or another could not be corrected by the courts, and to make equitable accommodation where a sentence has been imposed according to the strict requirements of the law but nonetheless seems unfair. It is especially important that the public be confident in clemency as the “fail safe” of the justice system in certain cases. The President uses the public welfare opportunity provided by post-sentence pardon to emphasize the rehabilitative goals of the justice system by recognizing criminal justice success stories.³⁴

5. History of Prerogative of Mercy or Presidential Pardon

During the coronation Oath of kings and Queens they promise that justice in their country shall be ‘administered in mercy.’ Legal historians like Sir William Blackstone have traced the royal pardon to the laws of Edward

³¹C.H. Rolph, *The Queen's Pardon*, Cassell, London, 1978,123.

³² *Knote v U.S.* 95 U.S. 149 (1877).

³³ *R v Dean* 17 N.S.W.Law Reports, 35.

³⁴ Margret Love, *of Pardons, Political and Collar Buttons: Reflections on the president's Duty to be*

the Confessor, the King using the ‘royal prerogative of mercy’ as part of the ‘power of the sovereign’ of his pure grace to show mercy to an offender by mitigating or removing the consequences of conviction.³⁵

One cannot study the history of the royal pardon without repeatedly coming across the words ‘pure grace’ always used as though their meaning were self-evident. It seems to mean no more than disinterested decency, doing the ‘right thing’ at long last because no one else has the supreme or divine power to do it: and sometimes doing it without imposing conditions.³⁶ A royal prerogative is theoretically subject to no restriction, it is the power of God acting upon earth, the Divine Right of Kings in a country where the sovereign has become ‘the sole fountain of justice’. By divine contagion Kings and now Presidents and Governors could do no wrong. They may not be the wisest or oldest but by providence are where they are. Blackstone reverently, described the king as ‘a magistrate who has it in his power to extend mercy when he thinks it is deserved, holding a court of enquiry in his own breast.’ And it was under the Norman Kings, particularly Henry II, that anti-social conduct came to be divided up into torts and crimes, the former still to be redressed (or forgiven) at the choice of the victim or his family, but the later now to be punished (or forgiven) always in the name of the Crown. Every crime was ‘contrary to the Peace of our Sovereign Lord the King, his crown and dignity’; and to this day every common law crime (i.e every crime not created by Parliament), is thus described in indictments at most of our courts, though some are now daring to omit the incantation and just say ‘common law’. The sovereign alone could forgive a crime. In due course his mercy came to be partially delegated to the judges; and it was when they failed, when they had been deceived or misled into the infliction of injustice, that the king could still be moved to reach for his prerogative and confer his pardon. Judges as human beings living in the societies may be influenced or affected by the contagion of the society and may flow with the tide of corruption. This may becloud their sense of judgment. The lawyers may not help matters anyway.

³⁵ *Knote v U.s.* 95 U.S. 149 (1877).

³⁶ *ibid.*

According to Sir William Holdsworth's History of English law, by the end of the fifteenth century the royal power to pardon was confined to cases in which the offence was merely *malum prohibitum* (wrong because the law said so).³⁷ With *malum in se* [wrong in itself] neither the king nor any other can dispense; and yet when the offences have been committed the king may pardon them. When a forfeiture has been incurred he may well release it, but not before it has been incurred. Similarly, added Holdsworth, quoting a judge's ruling in 1496; neither King nor priest can give a license to commit fornication. But after it has been committed they can pardon it.

And it was perhaps the priestly power to pardon the fornications it couldn't license which led Henry VIII, that paragon of erotic self discipline, to enact the Jurisdiction in Liberties Act 1535. That extinguished the power of the church and the great landowners to grant pardons at all, and for the first time established the royal prerogative in the statutes.³⁸

This view is believed to be mistaken. The Act of 1535 merely ratified and preserved the royal power, while extinguishing that of Bishops and priors and other bigwigs to order executions of their own choosing. In Spalding, for example, the prior was still hanging or several astonishing survivals of local despotism which has somehow escaped the unification measures of Henry II.³⁹

Following are two illustrations of the way in which monarchs had been misusing the mercy that God had entrusted to them. This first, example⁴⁰ may help to explain why that Episcopalian – turned – Anglican Bishop was not greatly revered among politicians. In 1684, records Burnett, a youth accused of homicide was persuaded to plead guilty to murder on the assurance that a pardon could be obtained from James II. It seems that his crime amounted at the worst to manslaughter, but his family was rich and this was no occasion for plea-bargaining and other legal vulgarities. The king's pardon cost £16,000, 'of which', wrote Burnett (living prudently in Holland at the time

³⁷ Holdsworth: *History of English law*, Vol. II, 218.

³⁸ It is printed in the *Statutes Revised*, Vol. I, 176. It has been seen by some writers – e.g Mr. Fenton Brester in his interesting book *Reprieve* (Harrap 1965), 29 as proof that the royal power to pardon criminals and to indemnify the innocent is not a prerogative, but has been vested in the sovereign by parliament.

³⁹ *Myntling Register of the Priory of Spalding* (*Spalding Gentlemen's Society Folio 200 v*). See C.H. Rolph, *The Queen's pardon*, Cassell Ltd, London, 1978, 19-20.

⁴⁰ In Gilbert Burnett's *History of My Own Times* (published in 1723, eight years after his death, and available in a 1906 Everyman edition – if you can find one).

and not destined to come back until the advent of William III four years later), ‘the King had one half and the other half was divided among the two ladies then most in favour’.

Secondly, and a century earlier, the astonishing case of Francis Bacon, Viscount St. Albans, Lord High Chancellor of England. In 1620 this great lawyer, scholar, philosopher, scientist and essayist was impeached by the House of Commons on twenty – three charges of having taken bribes, as Lord Chancellor, in connection with chancery suits. There seems to have been little or no evidence that the ‘bribes’ had made many difference to the outcome of any trial, but there was over whelming evidence that his lordship had had the money. Accordingly, he pleaded guilty, and the decision of the House of Lords (before whom he had to go for sentence) was that he pays a fine of £40,000 be imprisoned in the Tower ‘during the King’s pleasure’, and never be permitted to hold office or sit in parliament again,⁴¹ He was out of the Tower in four days. He then petitioned James I for ‘a complete and total remission of sentence, urging that ‘the bolt of ignominy may be removed from me and from my memory with posterity, and that I die not a condemned man but may be to your majesty, as I am to God, *nova creatura*’.⁴² Having asked for ‘remission of sentence’, what he got was a ‘full and entire pardon’.⁴³

What is therefore especially interesting about the case of Francis Bacon is that, in an area of legal argument where the appeal to historical precedent is normally thought most persuasive, it has been conveniently forgotten (by modern judge) that Bacon was pardoned although he had pleaded guilty. Today if you have pleaded guilty and it turns out that you were mistaken in doing so, you may have the Queen’s Pardon (or Presidential Pardon) if it transpires that you did it under mistaken or pressure; but not until the passing of the Criminal Law Act 1977 could your conviction be expunged⁴⁴.

⁴¹ C.H. Rolph, *The Queen’s pardon*, Cassell Ltd, London, 1978, 19-20.

⁴² There appear to be similarity in the weight of offences of Chief Alamieseigha and Francis Bacon. Both similarly should be granted pardon as they were. Recall also the case of Alhaji Salisu Ibrahim in *C.O.P v Buhari* (2000) F.W.L.R. [pt.1]164. The Court has power under Section 23 of C.P.A. to grant the option of fine notwithstanding the mandatory sentence of imprisonment and fine. See also *Price Control Board v Ezema of Ekwem* (1982) INLR, 7.

⁴³ C.H. Rolph, *The Queen’s pardon*, Cassell Ltd, London, 1978, 21.

⁴⁴ Howell’s *State Trials*, vol 1, 1113-14. See. C.H. Rolph *opcit*, 21.

In the sixteenth, seventeenth and eighteenth century the royal pardon was in fact being granted pretty freely, the Stuart Kings in particular placing great reliance on the hot line by which they felt themselves to be connected with the Holy Ghost. In 1678, for example, the Earl of Danby, Charles II's chief minister was impeached in the House of Lords for treasonable dealings with France. With Charles I fresh in their minds, the House of Commons really wanted to impeach the King, whom they regarded as the principal 'traitor; but finding that Kings could not now be impeached they turned their wrath upon Danby. The King appeared before the House of Lords to say that he had given Danby's 'free pardon' and dismissed him from office. Thus all inquiry into the King's own conduct was frustrated by his own astute employment of the prerogative of mercy as it then existed. In 1701, Parliament made certain this could never happen again by providing in the Act of Settlement that a royal pardon could not be pleaded in bar of impeachment. (But there is nothing to prevent the sovereign from pardoning after the impeached person has been convicted and sentenced; and some of the Scottish Lords impeached for the Rebellion of 1715 received pardons).⁴⁵

Surviving also into this period was the absurd historical convention, an aspect of the 'divine right' conveniently protecting King and Church, that the King and his courts could not condemn a member of the clergy. Although they could try him and find him guilty, or even hear him describe himself as guilty, he must then be accorded his 'benefit of clergy' and handed over to the church for his punishment. The church, more often than not, failed to punish him at all. It was a good time to be a cleric. As the severity of punishment in the temporal courts increased and was visited upon more and more kinds of crime, clergy or cleric came to mean 'clerk' in the sense of anyone able to write, and then of anyone just able to read. So when the jury had said 'Guilty' and the officer of the court had said, 'Prisoner at the Bar, you stand convicted of felony, have you anything to say why sentence of death should not be passed upon you according to law?' the prisoner said he had, and claimed his benefit of clergy. This required that he kneel in the dock, take the Bible.

6. Instances of Presidential Pardons

⁴⁵ C.H. Rolph, *The Queen's Pardon*, Cassell Ltd., London, 1978, 21.

The pardon power or prerogative of mercy of Presidents and Governors are used for purposes of calming and unifying the country. The first country study is America which began Presidential system of government that Nigeria has adopted.

(a) America

President Washington⁴⁶ used the pardon power to pacify the Whiskey rebels in 1794-95.⁴⁷ Adams⁴⁸ also used the power to bring an end to the Tariff Insurrection in 1800⁴⁹, and Madison⁵⁰ used it on three separate occasions during the War of 1812 to persuade deserters from the army to return to service.⁵¹ The pardon power was also used, as it had been in England, to man the military.⁵² President Wilson⁵³ and Truman⁵⁴ both issued a number of pardons to mark the end of the two world wars.⁵⁵

In the case Richard Nixon, the most famous pardoned American of them all, President Gerald Ford presented his compatriots with a controversy such as neither Americans nor Britain had ever known; and he presented the rest of the world with a statement on the U.S President pardoning power such as had never before seen the light of day. On 9th August, 1974 he announced that the “long Watergate nightmare” was over; and then, exactly a month later, by an act of mercy which raised more questions that it could possibly resolve, he granted his predecessor – “pursuant to the pardon power conferred upon me by Article II, Section 2 of the Constitution, a full, free and absolute

⁴⁶ *George Washington took the presidential Oath in New York on April 30, 1789 and died on Dec., 14, 1799 at Mount Vernon.*

⁴⁷ *See 1 Annals of Congress 1411-1413.*

⁴⁸ *John Adams, the second President of U.S.A. from 1797 to 1801. He died on July 4, 1826 in Braintree, .*

⁴⁹ *See 1 Annals of Congress 1552-53.*

⁵⁰ *James Madison was the fourth President of U.S.A., 1809-17. He died on June 28, 1836 at Montpelier.*

⁵¹ *See James D. Richardson, 2.A Compilation of the Messages and Papers of the President 413, 497,528 (1897).*

⁵² *See 1, Op. Att’y Gen. 341,342 (1820).*

⁵³ *The 28th President of U.S.A. 1913-21, a lawyer. His wife died Aug. 6, 1914 and he died on Feb. 3, 1924 at Washington.*

⁵⁴ *Harry S. Truman was the 33rd president U.S.A 1945-53. He was born on May 8, 1884 and died on Dec. 26, 1972 in Kansas City.*

⁵⁵ *See Clemency Board Report of 1975 at 374-379 .*

pardon... for all offences against the United States which he ... has committed, or may have committed,” during his years as President. With that statement President Ford abruptly ended the four weeks honey-moon with Congress and the American people with which he had begun his non-elected Presidency. He had been advised by White House Counsel that “the granting of a pardon can imply guilt-there is no other reason for granting one.⁵⁶ And it was in that knowledge that the granted it.

But what had Nixon done? For what was he now being pardoned? No formal charge had ever been brought against him, though everyone knew that he had (at least) conspired with considerable number of politicians and civil servants to conceal a burglary and to defeat the ends of justice; and that in the course of doing so, he had not only lied his head off but had made it plain to his henchmen that if they wanted to keep their jobs they had better do the same: their salvation lay in harmonious perjury. In a statement from his California home he “accepted the pardon”. Any pardon granted must be accepted for it to be valid.⁵⁷ For the rest of his life, he said, he would bear the burden that the way I tried to deal with Watergate was the wrong way; without defining ‘wrong’. On 10 September Federal Judge Sirica was asked by three of the Watergate defendants who not unreasonably, were expecting a pardon too, for a ruling that the case against them must be dismissed because Nixon’s ‘acceptance’ of his pardon must suggest to everyone that they were at least as guilty as he was. Their trial, they said, would be prejudiced by his admission

⁵⁶ *Congressional Quarterly*. 14 September.

⁵⁷ *Indeed the effect of ‘accepting’ a pardon without being tried or even accused has been nicely illustrated in 1915 by the case of Mr. George Burdick, City Editor of the New York Herald. In course of his investigative journalism he exposed a racket which was defrauding the customs. His article trod on so many toes that eventually he was brought before a grand jury for interrogation. There he ‘pleaded the 5th amendment (i.e. refused to answer questions for fear of incriminating himself). Pardon was produced for him signed by President Woodrow Wilson. This he refused to accept, maintaining that to accept it would be to admit guilt of matters of which he knew nothing. When, in consequence, he was prosecuted for contempt, the judges held that the pardon could **not** be effective without acceptance, and that therefore a charge of contempt must fail. It comes to this, that President Ford is considered to have had no power to pardon Richard Nixon in such general terms. No one knows what he is pardoned **for**. And if other crimes involving him are now uncovered, the Pardon cannot possibly apply to them.*

of guilt. This seemed no less true of about forty other defendants; but the judge ruled against them, and a number of them, unlike their leader, went to prison. Senator Sam Ervin Jr. said the President ‘ought to have allowed the legal processes to take their course, and not issued any pardon to former President Nixon until he had been indicted, tried and convicted’.⁵⁸

But on 17 October, 1974 President Ford told the House Judiciary Subcommittee on Criminal Justice that his purpose had been-

to change our national focus – I wanted to do all I could to shift our attention from the pursuit of a fallen President to the pursuit of the urgent needs of a rising nation. We should be needlessly diverted from meeting those challenges if we as a people were to remain sharply divided over whether to indict, bring to trial and punish a former President who is already condemned to suffer long and Deeply in the shame and disgrace, brought upon the office that he held --- As a people we have a long record of forgiving even those how have been our country’s most destructive foes The pardon granted to the former president will not cause us to forget the lessons we have learned – that a government which deceives its supports and treats its opponents as enemies must never, never be tolerated..

The Pardon power entrusted to the President under the Constitution of the United States has a long history and rests on precedents going back centuries before our Constitution was drafted... the Constitution does not limit the pardon power to cases of convicted offenders or even indicted offenders.⁵⁹

If Richard Nixon had been brought to trial, it would (it was generally agreed) have taken nine months or a year to empanel an acceptable jury. Then the trial itself, with the inevitable appeals, could have dragged on for several more years. The pardon had obviated all this by producing (in effect) a plea of guilty.

The acceptance of the pardon [said the new President] according to the legal authorities – and we’ve checked them out very carefully – does indicate that by the acceptance the person who has accepted it does, in effect, admit guilt.⁶⁰

⁵⁸ C.H. Rolph, *The Queen’s Pardon*, Cassell Ltd., London, 1978, 109

⁵⁹ Ford’s story of Nixon Pardon”; *U.S. News and World Report*, 28 October, 1974 See generally C.H. Rolph *ibid.*

⁶⁰ *Ibidi.* (But in this of course the U.S. Constitution differs from those of many U.S. States). See generally C.H. Rolph, *ibid* at 110.

The Nixon pardon was unique, not in *obviating* trial and conviction⁶¹ but in using the phrase ‘full, free and absolute’ (which was new, and ironically vague in scope) and in dispensing with the three-year hiatus during which a recipient must normally ‘demonstrate his rehabilitation’.

b. In Nigeria

It is part of Nigerian Constitutional history for Presidents and perhaps Governors to exercise their pardon powers. In the present 1999 Nigerian Constitution⁶² it is provided in *Sections 175 and 212* for the President and Governors Prerogative of Mercy respectively. *Section 15(5) of the 1999 Constitution* provided for Oath of Office wherein the President swore that “he would strive to preserve the Fundamental Objectives and Directive Principles of State Policies, that he would not allow his personal interest to influence his official conduct or official decisions, that he would to the best of his ability preserve, protect and defend the Constitution, abide by the Code of Conduct contained in the 5th schedule of the Constitution and that he would do right to all manner of people, according to law, without fear or favour, affection or ill will”.

When the provision of *Section 175 of the Constitution* is construed, it is clear that the authority that exercises the power of pardon in relation to offences created by an Act of the National Assembly is the President, and not the Council of State, as has been suggested by the Presidency, whilst attempting to justify these pardons. The Council of States is established by section 153 (1) of the Constitution to advise the president in the exercise of his powers with respect to prerogative of mercy (among other powers and whenever required to do so in the maintenance of public order within the federation or any part thereof and on such other matters as the president may direct).

A former Head of state of this nation, General Yakubu Gowon pardoned Chief Obafemi Awolowo who repeatedly applied for the pardon. In his application he stated his achievements, his contributions to the unity and progress of the nation. He also alluded to the testimonies of his good deeds even by his inveterate enemies. The letter from him to the then Head of state

⁶¹ *White House Counsel Philip W. Buchen, at a press conference on 8 Sept., 1974, Cited twenty- one such instares, some of which concerned deserters or rebels (Congressional Quarterly, 14 September, 1974, 2458).*

⁶² *Constitution of the Federal Republic of Nigeria, 1999 (as amended), sections 175 and 212. ibidi.*

were written from Calabar prison. He saw himself as a truly public spirited person.

President Shehu Shagari as NPN member brought back Ikemba Nnewi, Chukwuemeka Odumegwu Ojukwu from exile and granted him pardon. He also released Mrs. Helen Gomwalk and. Captain Peter Temlong from jail. General Badamosi Babangida pardoned Nduka Irabor and Tunde Thompson after they were released from a Decree four inspired jail. Again General Abubakar set General Obasanjo free. Also Major General Oladipo Diya, Shettima Bulama, General Musa Yar' Adua (late) and Major-General Abalukareem Adisa (late) were granted pardon.

President Olusegun Obasanjo granted pardon to Alhaji Salisu Ibrahim Buhari who was alleged to have doctored his resume with forged educational results and certificates including an N.Y.S.C. discharge certificate and a University degree appearing to issue from the University of Torsion, Canada. He was alleged to have made false declaration of age wherein his youthful age of 29 was bloated to 36 years all in a bid to meet the statutory age for the office he vied for.

After due investigation, indictment and sentence, he made public confession of the allegations of forgery and false declaration of age. He was summarily tried under *Section 157 of Criminal Procedure Code* and convicted. After series of *allocutus* the sentence was mitigated. The Attorney-General of the Federation has this to say:

*The house of Buhari has recently become one of sorrow.
Let us therefore, one and for all, sojourn to that house and
share in the sorrow that has befallen it.*

Also the House of Representatives passed resolution calling for justice to be tempered with mercy. It was urged that resolution could be safely said to be the voice of Nigerian people. The convict admitted his guilt and did noting that impeded the investigation and prosecution of the matter. The very act of conviction alone is already a big colossal disadvantage to the convict.

Afterward he apologised in these words:

*I apologise to the nation. I apologise to my family and friends for
all the distress I have caused them. Everything in life is for a
purpose and my prayer is that my humiliation will illustrate that
in our democracy, nobody, no matter how highly placed, will be*

above the law. As I look up from the ground following my fall from grace. I solemnly ask for forgiveness.

The above apology from Alhaji Buhari influenced public opinion in his favour and this led to his pardon by the then President Chief Olusegun Obasanjo.

7. Conclusion

Prerogative of mercy or pardon is a necessary soothing balm in a nation. This is why section 153(1) of the Constitution stated that it is for the maintenance of public order. Circumstances, events and situations arise even unforeseen, unanticipated and unexpected come up in a nation. It is for this that the end justifies the means so whatever action that should bring peace need to be encouraged. The military obviously do not bring peace. It may be a tiny disguised gesture that may bring peace, unity and progress in a nation.

Pardon is a good means of redressing the wrong done to a wholly innocent person convicted in a court of law either rightly or wrongly. It is a stratagem, a face-saving and last resort correction, which has its counterpart in many countries but not in all countries- there are legal systems which simply will not admit that the courts can go wrong: or if they secretly suppose such error to be theoretically possible, they are presumably content, at the prisoner's expense, to regard it as the wrath of God. It is sustained by the sufferings of individuals rather than by assertion of abstract principles.

In the case of Chief (Dr.) D.S.P Alamiyesigha he deserves a pardon whether the now President was his Deputy or not. This is because Chief (Dr.) Alamiyesigha has shown extraordinary conduct after conviction that shows he has contributed to the community in a unique or significant fashion, such as charitable contributions or dousing the Niger Delta militants. Pardon is for maintenance of public order and Alamiyesigha has made Nigerians not contend with Niger Delta militants and Boko Haram at the same time. This shows that he has gone the extra mile over what an ordinary citizen may do for peace and unity of our nation.

An executive is popularly elected to be the “dispenser of the government”, has more robust world view and has more apparatus for consideration of future benefits of the nation. This provides more effective

safety valve for unity, peace, development and important attributes of a healthy society.

It was said that some past presidents of the nation did not attend the Council of State meeting when chief (Dr.) D.S.P. Alamieyesigha was granted pardon. This appears unnecessary now. It is likely that quorum was formed before the meeting went on. If it was not formed and the issue of a quorum was not raised, the members present must have waived same. However, we were not told if those who were absent sent in their apologies. It appears too late in time to raise the issue because the President has exercised his powers in the overall interest of the nation.

It is unlikely that pardon will ever fade away entirely, even if the criminal justice system could be made to work perfectly. Pardon will always be useful from a political standpoint.⁶³ Knowing that law must take account of reasonable probabilities and not fantastic possibilities⁶⁴ reserved for political considerations.

The only exception to presidential pardon or prerogative of mercy is impeachment. This is because many procedures and processes have been duly passed, observed and certified before impeachment takes effect. However, there is nothing to prevent the President or Governor from pardoning after the impeached person has been convicted and sentenced some of the Scottish Lords impeached for the Rebellion of 1715 received pardon.

GENERAL COMMENTS

1. The paper discusses a topical issue and in our view is publishable subject to the modification tracked in the body of the work.
2. The paper should clearly discuss issues of criteria for grant or refusal of pardon, the role of the courts if any and any exceptions
3. The conclusion needs to be rewritten to capture the analysis in the paper.

⁶³ *ibid.*

⁶⁴ *Pardon v Harcourt-Rivington* 146 L.T. 391.