



Beyond the Stroke of a Pen: The Legal Consequences of Pardons in Nigerian and American Jurisdictions

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Abstract. The executive power of pardon, deeply rooted in constitutional traditions like Section 175 of the Nigerian 1999 Constitution and Article II of the United States of American constitution transcends simple sentence mitigation. While historically designed as an equitable safety valve to temper justice rigidity, promote public safety, among many others, the exercise of pardon power/executive clemency increasingly challenges the separation of powers and judicial finality frameworks. This paper analyses how the "stroke of a pen" impacts civil rights restoration and criminal records, among others. The paper contrasts the unrestricted scope of federal clemency in the United States with Nigeria's advisory model via the Council of State. The paper further scrutinizes the legal fiction established in *Ex parte Garland* - that a pardon blots out guilt - against contemporary jurisprudence where historical convictions persist despite the restoration of civic privileges. Finally, the paper concludes that historical conviction embedded within state law enforcement archives can still be factored in by sentencing courts as an aggravating circumstance for sentencing enhancement during subsequent criminal prosecutions.

1. Introduction

The executive prerogative of mercy, which in modern constitutional democracies is expressed only in the pardon of the president, is one of the most potent and interesting survivals of the absolute sovereignty of the past. In the past, the pardon power was understood within the context of the monarchy as an expression of God's divine favor and grace, and as a means of mitigating the harshness of the early criminal laws. This prerogative, as put by the English jurist William

Blackstone, was a "fountain of mercy" and the King "may always (when) circumstances call for it", may take into consideration "exceptions of equity" and show "the most compassionate lenity of his disposition" when "his benign and tender regard" for those who suffer from a "privileged situation" deems it "just" to provide relief.

This monarchical tool did not suddenly vanish as states changed from absolute monarchies to constitutional republics, but rather was deliberately transferred into current constitutional systems. The framers of the two supreme laws of the land in both Federal Republic of Nigeria and the United States of America considered an executive clemency mechanism an essential safety valve. It was felt that it was necessary to set right "natural" mistakes made by the courts; to compensate for "moral rehabilitation" which was long overdue; and to offer a means for social healing and reconciliation in the event of civil strife or political changes.

However, in modern constitutional practice, the use of this power often goes beyond its classic, textbook purpose and renders itself to be active and engaged at a highly volatile and contested nexus between constitutional law, partisan politics, and institutional ethics. The benefits of a president's clemency extend much further than the "stroke of the pen". A pardon is not simply an end to a prison term - it precipitates significant institutional, civil and legal changes. It changes the civic identity of the recipient, interferes with existing criminal records and makes the separation of powers in a democratic state a pressing matter. To understand the post - pardon reality, some deep-dive work is required to be done on how

administrative mercy affects the finality of judicial decisions.

2. Constitutional Frameworks of Pardon or Prerogative of Mercy or Clemency

The constitutional authority for the exercise of executive clemency in the Federal Republic of Nigeria is explicitly anchored in Sections 175¹ and 212² of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)³. Section 175 provides:

(1) The President may -

- (a) grant any person concerned with or convicted of an offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions;
- (b) grant to any person a respite, either for an indefinite or a specific 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;
- (d) remit the whole or any part of such 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.

One thing that sets the Nigerian model apart from an absolute executive is the institutional safeguards against the exercise of the sovereign power. Section 175(2) requires the president to act on the powers under this section only after consulting the Council of State.

The constitutionally stipulated requirement for consultation is a requirement that has been carefully separated from the obligation to obey by Nigerian jurisprudence. The President, as the ultimate decision maker, has no obligation to follow the advice of the Council of State as the case in *FRN v Achida*⁴ demonstrates. However, a pardon which is announced without reference to the Council of State is a breach of a mandatory condition precedent in the Constitution and therefore is ultra vires, null and void.

Also, Section 175 does not apply to state charges. There is also a sub-national level parallel architecture with Section 212 of the Constitution⁵ giving equivalent powers to State Governors, who consult the

State Advisory Council on the prerogative of Mercy. This division of structure ensures that federal government does not overreach into state prosecuted crimes, thus creating a clear jurisdictional limit in Nigeria's Federal system.

Unlike the Nigeria model of structurally checked executive with consultation on the results of checks, Article II, Section 2, Clause 1 of the United States Constitution is marked by near unlimited executive autonomy.⁶ The United States Constitution gives the president the power to grant reprieves and pardons for offences against the United States, except in Cases of Impeachment, in Article II, Section 2, Clause 2. It should be emphasized that the simplicity of this clause highlights its broad scope. By virtue of the royal prerogative commonly used in England this power has been held to be an inherent executive attribute of the President. The U.S. President is not required by the Constitution to consult with any council, cabinet or legislative body before issuing a pardon, unlike the Nigerian President. The Department of Justice has an Office of the Pardon Attorney to consider clemency applications based on administrative guidelines, but those guidelines are administrative and do not have any legal effect on the President.⁷ A Pardon Attorney is not required, and the President can issue a pardon without his help through a simple executive order.

It should also be emphasized that there are dual and absolute restrictions on the U.S. presidential pardon as expressed in the text. Firstly, the authority is limited to "Offences against the United States", which are federal offences, and the President has no constitutional authority of pardon over people who are convicted of state offences which are the responsibility of state governors. Second, it is clear that the pardon power cannot be exercised in Cases of Impeachment. This restriction prevents the heads of executive power shielding civil officers from removal and disqualification by the legislature.

3. Comparative Analysis: Unilateralism vs. Advisory Consultation.

The United States has a model of pure Executive unilateralism. Congress may not limit, amend or audit the exercise of the pardon power by the President, as the Supreme Court of the United States explained in

¹Constitution of the Federal Republic of Nigeria 1999 (as amended), s 175.

²Constitution of the Federal Republic of Nigeria 1999 (as amended), s 212.

³Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁴*Federal Republic of Nigeria v Achida* (2018) LPELR-46132 (CA).

⁵Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁶ US Const art II, § 2, cl 1.

⁷J Crouch, *The Presidential Pardon Power* (University Press of Kansas 2009) 44.

United States vs Klein.⁸ This is a framework that emphasizes rapid and unobstructed executive decision making and treats the president as a constitutional player who can ensure equity without bureaucratic delay.

By contrast Nigeria's model is a reflection of a deep-rooted fear of the possessor of unchecked power. The Nigerian Constitution seeks to force consensus-seeking through the institutionalization of the Council of State as an advisory filter, through the wisdom of the heads of all three branches of government, either at the time or from the past. The Council's role is not a legal one and their contributions are advisory, but in structure there is a political and bureaucratic face to the process in the Council which is entirely lacking in the United States. Consequently, while in the United States of America, the President is not required to consult the Council, there is a constitutional assembly in Nigeria that must be consulted before the President can give an absolute pardon in a highly controversial case, and the assembly is composed of diverse members to act as an institutional check on arbitrariness, granted at nighttime.

In the United States, the final case on jurisprudential ground is the post-Civil War decision of *Ex parte Garland*.⁹ In *Garland*, the U.S. Supreme Court faced a law passed by Congress which prohibited those who had supported the Confederacy from practicing law in federal Courts. One of those pardoned by President Andrew Johnson, A.H. Garland, challenged the statute. In the course of this opinion, Justice Field established a broad rule on the legal implications of pardon that can be found in the following text:

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 consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as he were a new man and gives him a new credit and capacity.¹⁰

In other words, the *Garland* doctrine established that a presidential pardon completely obliterates both the penalty and the legal guilt, acting as a total erasure of the conviction's legal memory.¹¹

Also, in *Carlisle v United States*¹², the court had this to say about the effect of pardon:

It is true, the pardon and amnesty cannot alter the actual fact that aid and comfort were given by the claimants, but they forever close the eyes of the court to the perception of the fact as an element in the judgment, no rights of third parties having intervened....All have agreed that the pardon not only releases the offender from the punishment prescribed for the offence, but that it obliterates in legal contemplation the offence itself.¹³

That's the centerpiece of American clemency law, and the *Garland* case is still the mainstay of that principle, in which the pardon power is protected from legislative erosion. However, in cases like *Burdick v United States*¹⁴ and *Biddle v Perovich* the courts backed away from the principle enunciated in the above two cases that a pardon serves as a remission of guilt. In the second instance the court said that a pardon does not result in the removal of guilt. As Justice Holmes says:

A pardon in our days 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.¹⁵

The court here made the point that a pardon is not for the guilt but is to be used to lessen or modify a penalty. The idea behind this is that a pardon eradicates not the entire guilt of the person receiving it.

Toeing a similar path, the Supreme Court observed in *Burdick* that the 'the grace of a pardon, though good its intention, may be only in pretense or seeming;involving consequences of even greater disgrace than those from which it purports to relieve.' Moreover, the court recognized the "imputation of guilt" in the acceptance of a pardon; that is, by accepting a pardon, there is an "imputation of guilt. A pardon does not erase the historical or legal fact of the conviction, but rather recognizes its validity.

⁸*United States v Klein* 80 US (13 Wall) 128 (1871).

⁹*Ex parte Garland* 71 US (4 Wall) 338 (1866).

¹⁰*Ex parte Garland* 71 US (4 Wall) 338 (1866) 380–81.

¹¹WH Humbert, *The Pardoning Power of the President* (American Council on Public Affairs 1941) 67.

¹²*Carlisle v United States* 83 US 147 (1873).

¹³*Carlisle* (n 13) 151.

¹⁴*Burdick v United States* 236 US 79 (1915).

¹⁵*Biddle v Perovich* 274 US 480 (1927) 486; see also OS Buchanan, 'The Nature of a Pardon under the United States Constitution' (1929) 39 Ohio State Law Journal 36.

A pardon cannot take away a forfeiture, therefore, in the Nigeria case of *Falae v Obasanjo*¹⁶, the then Musdapher JCA (now Justice Abu-Salli) had this to say about the legal effect of a pardon:

In my view, under Nigerian law there is no distinction between "pardon" and "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 the 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 forfeiture annexed to the offence pardoned.

But in the earlier case of *Okongwu v State*, the same court held that the effect of a free pardon is 'to remove all pain, penalties and punishments whatsoever that from the said conviction may arise' but not the conviction itself.¹⁷

It is clear from the above that the impact of a legal pardon is not as straight-forward as a casual reader may imagine. The *Garland* and *Obasanjo* courts would say that a pardon eradicates the guilt of any crime. But *Burdick* and *Okongwu* figured a pardon is just a forgiveness from punishment of a crime. There are many questions that need to be considered here. First, does pardon erase a crime or does it only take the punishment for a crime? Secondly, does a conviction still exist after the pardon? Ironically, any answer provided to any of these questions is bound to trigger a number of other troubling questions.

4. Deconstructing *Garland* and *Falae*

The jurisprudential limits of clemency were put to the test in *Falae v Obasanjo* in Nigeria.¹⁸ The case was brought up following the 1999 presidential election where Chief Olu Falae challenged the election of General Olusegun Obasanjo. One of the main arguments in the petition was that Obasanjo was constitutionally barred from running for President as he had been convicted of treasonable felony by the military tribunal during the Abacha era. Obasanjo responded with a full pardon accorded him by the transitional Head of State, Gen. Abdulsalami Abubakar, in the interim constitutions that preceded the 1999 Constitution. The Court of Appeal had to now clarify the exact meaning of that pardon in terms of Obasanjo's civil and political rights. The court held that a full pardon virtually cancelled out the effects of

the conviction and restored the person so pardoned to his civil status, including the right to run for office.

The Nigerian and the American courts in *Okongwu* and *Burdick* respectively, however, took a more pragmatic approach, unlike *Garland*'s sweeping poetic language which claimed to "blot out guilt" from existence. The courts decided that the disqualification was extinguished, but the facts of a previous conviction still stood and the Judicial records did not. This separation between the restoration of civic capacity and the erasure of historical truth, which began to crystallize in the United States with the cases of *Biddle v Perovich*¹⁹ and *Burdick v United States*²⁰, and scholarly and judicial attitudes in Nigeria, set the stage for the contemporary debate about the realities of the post-exoneration in the two jurisdictions.

Scholarly and judicial opinions in modern times do not support the view that pardon blots out all guilt for the underlying offence. In one of his essays in the Harvard Law Review, Professor Samuel Williston questioned the *Garland* notion of a pardon as he wrote: Everybody knows that the word "pardon" naturally connotes guilt as a matter of English. Everybody also knows that the vast majority of pardoned convicts were in fact guilty; and when it is said in the eye of the law they are innocent as if they had never committed an offence, the natural rejoinder is, then the eyesight of the law is very bad.²¹

In the same way, in *Knote v United States*²², the Supreme Court of the United States attacked the absolute conception of mercy, calling it a legal fiction. According to the court, the idea of a presidential order that in essence rewrites history and makes a convicted felon an immaculate innocent is a fiction of the law. Rejecting the view that pardon wipes away all guilt from its recipient, the Supreme Court stressed thus: Pardon does not make amend for the past. It 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 upon the government any obligation to give it. The offence being established by judicial proceedings, that which had been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required.

¹⁶*Falae v Obasanjo* (No 2)(1999) 4 NWLR (Pt 599) 420.

¹⁷*Okongwu v State*(1986) 5 NWLR (Pt 44) 721.

¹⁸ *Falae v Obasanjo* (No 2)(1999) 4 NWLR (Pt 599) 476.

¹⁹*Biddle v Perovich*274 US 480 (1927).

²⁰*Burdick v United States*236 US 79 (1915).

²¹Samuel Williston, 'Does a Pardon Blot out Guilt?' (1915) 28 Harv L Rev 647, 653; see also *United States v Noonan*906 F 2d 952, 958–59 (3d Cir 1990).

²²*Knote v United States*95 US 149 (1877).

Another good reason for accepting the position of the courts in *Burdick* and *Okongwu* is premised on the doctrine of separation of powers. The separation of powers has been the subject of several decisions by the Courts of Nigeria²³ and the United States of America specifically in the context of pardoning power. No doubt, it is the intention of the constitutions of the two jurisdictions under reference that each of the great coordinates of departments of government - the Legislature, the Judiciary and the Executive- shall be, in its sphere, independent of others. The presidential pardon power is an important aspect of this system of checks and balances. The pardoning power is a power to curb the power of the judiciary as it allows the president to make a pardon for any person who has been convicted of a federal offense, it is trite that the other powers of government should not encroach on the power of the president. Hence, if the arguments of Garland and Obasanjo that pardon eradicates guilt, and the fact of conviction is accepted as law, that would equate to the executive taking over judicial power, running counter to the balancing effect of a pardon, and creating a power in the executive which itself must be quickly neutralized. The rejection of the expansive view of the blotting out doctrine is therefore laudable. It's an illusory legal fantasy and is not practicable.

It is therefore necessary to consider some other related issues that are fundamental to the proper understanding of the consequences attached to the position taken above that a pardon obliterates the guilt and not the fact of conviction.

5. The Legal Status of Criminal Records and Expungement in Both Jurisdictions

It is noteworthy that there is a major difference between the judicial or administrative act of expungement and the executive act of pardon in the United States and Nigeria. A presidential pardon does not necessarily result in the expungement or sealing of a criminal record in the United States.²⁴ The Department of Justice's Office of the Pardon Attorney clearly states in its information to recipients that their criminal history files will still report the conviction along with the executive pardon decree.²⁵ Therefore, the crime for which one is pardoned, and a description

of the pardon, will remain listed if a background check is performed on the pardoned person. There could be employment challenges in this area as barriers could be raised with respect to a person's suitability.²⁶ If the recipient "qualifies" for separate, statutory record eradication or sealing provisions, those provisions are not typically available for serious federal felony convictions. This conviction remains an historical fact that can be retrieved by law enforcement authorities, academics, and employers.

A similar situation exists in Nigeria, but is underpinned by a much more diverse statutory framework. A presidential pardon under Section 175 will not be an expungement order. The point is, though the Nigeria Administration of Criminal Justice Act²⁷ seeks to institutionalize and centralize the collection and biometric tracking of data of criminals, it fails to provide provisions on mechanisms or protocols for the expungement of those records once a person has serviced his sentence. So, there is a dearth of a single, all-encompassing federal statute in Nigeria to expunge adult criminal records. The Nigerian Police Force Central Criminal Records Registry²⁸ archives Criminal records. The President's pardon would have to go to the Ministry of Justice for the official gazette to be passed to the police to change the person's file. The record is not erased on the model, or physically destroyed. The entry is changed to show that a pardon was issued, and that the conviction will still be available in state intelligence records. Thus, clearing a criminal record in Nigeria relies primarily on executive discretion vide executive clemency. Going by the decision of the Supreme Court in *Falae v Obasanjo*²⁹ that a pardon extinguishes conviction and blots out the effect of guilt, a pardon operates as an expungement of criminal record. The problem here however is that the a radically opposed decision of the same court in *Okongwu v State* still subsists and was neither brought to the attention of the court nor overruled in *Falae v Obasanjo*³⁰. In *Okongwu v State*³¹, the Supreme Court had earlier held that the effect of a free pardon is 'to remove all pain, penalties and punishments whatsoever that from the said conviction may arise' but not the conviction itself.

²³See *Solola v The State* (2005) 11 NWLR (Pt 937) 460; *FRN v Achida* (2018) LPELR-46065 (CA).

²⁴United States Department of Justice, *Effects of a Pardon* (Office of the Pardon Attorney 2021) 3.

²⁵ibid 4.

²⁶Congressional Research Service, *The President's Pardon Power and Legal Effects on Collateral Consequences*, R44571 (2015).

²⁷Administration of Criminal Justice Act 2015, s 16.

²⁸Police Act 2020, s 67.

²⁹*Falae v Obasanjo* (No 2) (1999) 4 NWLR (Pt 599) 420.

³⁰*Falae v Obasanjo* (No 2) (1999) 4 NWLR (Pt 599) 420.

³¹*Okongwu v State* (1986) 5 NWLR (Pt 44) 721.

6. Civic Restoration: Voting Rights, Gun Ownership, and Professional Licensure

The fundamental purpose of a full pardon is to eliminate the civil disabilities that are attached to a criminal conviction, which are sometimes referred to as "collateral consequences"³². In the United States, a federal pardon restores important civil rights — the right to vote in federal elections, serve on a federal jury and hold a federal public office³³.

But the return of other privileges is quite complicated. Generally, a federal pardon will restore the right to possess a gun, unless the pardon paper explicitly denies it, under the Gun Control Act of 1968³⁴. Professional licensing boards (e.g., the state bar, medical boards, or financial regulatory boards) are, on the other hand, independent and autonomous entities³⁵. A pardon does not remove the statutory requirement of having good moral character, and the licensing board may still take into account the conduct underlying the conviction in determining whether the individual has good moral character³⁶.

A pardon in Nigeria has constitutional repercussions. The 1999 Constitution bans disqualification of persons convicted of dishonesty or fraud from contesting National Assembly or presidential elections for a ten-year period from the date of their conviction³⁷. As the Court of Appeal had ruled in *Falae v Obasanjo*, the 10-year disqualification period is automatically nullified upon the issuance of a full pardon and the disenfranchised person will be granted the full political rights to vie for any public office.

In addition, a pardon in Nigeria re-enables basic civil freedoms such as being appointed to civil boards or being awarded state honours. It is submitted here, however, that like the American system, a pardon is not a licence for professional organisations like the Legal Practitioners Disciplinary Committee (LPDC) or the Medical and Dental Council of Nigeria (MDCN) to reinstate a debarred professional³⁸. In this context, the decision of Judge Schwelb in *re Abrams*³⁹ is encouraged to the Nigerian courts. Judge Swchwelb said:

Suppose that an alcoholic surgeon performs an operation while intoxicated. He botches the surgery. The patient dies. The surgeon is convicted of manslaughter and is sentenced to imprisonment. The president grants him a full and unconditional pardon. According to Abrams, the surgeon now has the right, as a result of the pardon, to continue to operate on other patients, without any interference from the medical licensing authority.....this is altogether unacceptable and even irrational.⁴⁰

Another possible explanation for this stance is that these regulatory agencies have different statutory jurisdictions and may be able to deal with the pardon as irrelevant to their investigation of the moral character of the practitioner. It is confirmed by the very strong arguments of Prof. Samuel Williston in the following statement:

If the mere conviction involves certain disqualifications which will not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of the crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.⁴¹

7. The Use of Pardoned Convictions for Sentence Enhancement

Perhaps the clearest indicator that a pardon does not "blot out guilt" is the capacity of courts to utilize a pardoned conviction to increase the punishment for a subsequent crime.⁴² The Supreme Court in the United States squarely faced this question in *Carlesi v New York*.⁴³ The court determined that although a person may have been acquitted once, due to a presidential pardon, for a federal crime, a state court could still consider such past conviction for a different crime, committed at a later date, under a "habitual offender" or "three strikes" provision in a state statute⁴⁴. The court concluded that a second time use of a past conviction for sentence enhancement is not punishment for the offense that has been already

³²NV Demleitner, 'Preventing Internal Exile: The Need for Restrictions on Collateral Sanctions' (1999) 11 Federal Sentencing Reporter 169, 171.

³³*Knote v United States* 95 US 149 (1877).

³⁴Gun Control Act 1968, 18 USC § 921(a)(20).

³⁵*In re Ring* 401 SE 2d 279 (Ga 1991).

³⁶*Page v Watson* 192 So 205 (Fla 1938).

³⁷Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 66(1)(h), 137(1)(e).

³⁸Legal Practitioners Act Cap L11 LFN 2004 (as amended), s 11.

³⁹*Re Abrams* 689 A 2d 6 (DC 1997) (en banc) 19.

⁴⁰*Re Abrams* 689 A 2d 6 (DC 1997) (en banc) 19.

⁴¹Williston (n 22) 653.

⁴²Samuel Williston, 'Does a Pardon Blot out Guilt?' (1915) 28 Harv L Rev 647, 653.

⁴³*Carlesi v New York* 233 US 51 (1914).

⁴⁴*ibid* 57.

forgiven, but rather is serving as context of the individual's chronic criminal behavior.⁴⁵

Under statutory interpretation the jurisprudential basis of sentence enhancement after pardon is not as developed in Nigeria. Section 311 of the Administration of Criminal Justice Act (ACJA)⁴⁶ requires a sentencing court to take into account the character and criminal history of the defendant. If a defendant has a previous conviction that has been subsequently discharged, and he commits a second crime, then the prosecution may introduce evidence of the previous crime. But given the Supreme Court's ruling in *Falae v Obasanjo*⁴⁷ that the consequences of a pardon is to make the offender a new man (*novus homo*) therefore acquitting him of all corporal penalties and forfeiture attached to the offence for which he was being prosecuted, it is hard to see how a pardon conviction can be used to enhance his punishment for another subsequent offence, except the Supreme Court desires to be guided by its earlier judgment in *Okongwu v State*.⁴⁸ If the Supreme court sticks with its decision in *Falae v Obasanjo*⁴⁹, however, it could take the view that taking into consideration a prior conviction for an offence committed by the same offender against the laws of the Federal Republic of Nigeria despite a pardon is tantamount to a punishment for such prior crime which would make the act of the state void because it destroys or circumscribe the effect of the pardon granted under the constitution. However, it is submitted that sticking with its decision in *Okongwu v State* is a better option for the Supreme Court. What this means is that by so doing the court is not seeking to make the pardoned offence an aggravating circumstance to be considered when it comes to the second offence, but rather it is making the conduct which is the basis of the pardoned offence itself an aggravating circumstance.

8. Conclusion

The paper has examined the legal, constitutional and institutional implications of the executive prerogative

of mercy in the Federal Republic of Nigeria and United States of America. The analysis confirms that the expression of a presidential pardon is far from a 'stroke of a pen' and tends to create an immediate disarray within the administration of justice and the separation of powers of the Constitution. This paper, which engages with classic jurisprudence, notably *Ex parte Garland* in the United States and *Falae v Obasanjo* in Nigeria, through systematic breaking down of the legal myth of a complete blot-out of historical guilt by a full pardon. In both common law systems, it is recognized as an effective way of terminating the continuous execution of punishment and reaffirming important civil rights, it should not, and cannot, be an automatic expungement order. Even years after the historic conviction, it is still a factor that can be fairly considered by sentencing courts in later criminal prosecutions as aggravating factors that warrant sentence enhancement, and a factor that should be easily retrievable from state law enforcement records.

⁴⁵*United States v McMurtrey* 949 F 2d 403 (8th Cir 1991).

⁴⁶Administration of Criminal Justice Act 2015, s 311.

⁴⁷*Falae v Obasanjo (No 2)* (1999) 4 NWLR (Pt 599) 420.

⁴⁸*Okongwu v State* (1986) 5 NWLR (Pt 44) 721.

⁴⁹*Falae v Obasanjo (No 2)* (1999) 4 NWLR (Pt 599) 420.