



Taming Executive Mercy: The Imperative for Regulatory Guidelines in Nigeria's Constitutional Pardoning Regime

SOGUNLE BENJAMIN ABAYOMI

Olabisi Onabanjo University, Ago-Iwoye, Ogun State, Nigeria

abayomi.sogunle@oouagoiwoye.edu.ng,

abayomi.sogunle@iuokada.edu.ng

NAT OFO,

UGIOMO ERUTEYA

Igbinedion University, Okada, Edo State, Nigeria

natofo@iuokada.edu.ng,

eruteya.ugiomo@iuokada.edu.ng

Abstract. The prerogative of mercy is an old constitutional bulwark. It's intended to be law that's firm yet fair and kind. Under the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), this power is given to the President and the State Governors under sections 175 and 212 of the constitution respectively. But this comprehensive power is unconstrained by objective statutory standards, administrative procedures or procedural precautions. As a result, the regime is today a vehicle for political patronage, isolation of elites and politicization of the criminal justice system. This paper will discuss the institutional weaknesses of the unchecked executive mercy system in Nigeria. It draws on certain tenets of modern constitutionalism, the rule of law and separation of powers to examine a form of clemency which is exercised without restraint and of which the high-profile pardons for politically exposed persons convicted of grand corruption provides a case in point. This paper, by comparing the pardon processes of South Africa, India and the United States, shows how a rational, transparent and fair standards framework has become increasingly a component of pardon systems in modern democracies. The paper concludes by presenting a blue print of legislative and institutional changes

which include the enactment of a Prerogative of Mercy (Regulatory and Procedural) Act, an independent statutory Advisory Board and the codification of mandatory criteria for the restoration of public trust, respect to victims' rights and tame monarchical executive mercy in Nigeria.

Keywords: Executive Mercy, Constitutional Law, Section 175, Rule of Law, Judicial Review, Political Corruption, Nigeria.

1. Introduction

Executive clemency, or the prerogative of mercy, as it has been traditionally understood, is a strange concept in modern constitutional democracy¹. It is a formal and official disruption of the criminal justice process. It allows an executive official to overrule, cancel or lessen the final judgment of a court. The pardon was traditionally understood as an expression of pure sovereign grace², and acted upon to correct judicial error, to offer mercy to those who were sentenced too severely, or to further the general interest of the state at times of national emergency³ or transitional justice. In Nigeria, this sovereign remnant is enshrined in the country's highest law. The President of the Federal Republic of Nigeria is

¹ See Jonathan T Menitove, 'The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency' (2009) 3 Harv L & Pol'y Rev 447, 449; Schick v Reed, 419 US 256, 260–61 (1974) (tracing the President's pardon power to the English sovereign).

² See Kathleen Dean Moore, 'Pardon for Good and Sufficient Reasons' (1993) 27 U Rich L Rev 281, 282.

³ See *Burdick v United States*, 236 US 79, 95.

granted authority to pardon anyone found guilty for an offence under a federal law, either free or subject to lawful conditions, in Section 175 of the Constitution⁴. Section 212 is an expansion of this generous endowment into the sub-national sphere, giving State Governors similar authority over state crimes. For the purpose of emphasis, Section 175 of the Nigerian Constitution 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.

The text is structured so that the President must seek the advice of the Council of State, and Governors at the sub-national level, must seek the advice of a State Advisory Council on the Prerogative of Mercy⁵. Thus, section 175(2) provides that the President must consult with the Council of State before exercising the prerogative of mercy. Importantly, but not always, the constitutionally provided text is usually interpreted to mean that these bodies are advisory only. The final authority of decisions has remained authoritative, subjective and very centralized in the person of the President or Governor, as the case may be.⁶

Of course, when it is realized that one of the underlying justifications for pardon is to enhance. The justice enhancing aspects of this power obviously demands that the benign prerogative of mercy be as little fettered as possible so that exceptions in favour of 'unfortunate guilt could be

made; otherwise, justice would wear a countenance too sanguinary and cruel'.⁷ In the words of Hamilton:

There may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. 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 grave injustice. For this reason, such a power ought to exist somewhere; and where could it be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people?⁸

The principal argument for vesting the power to pardon in the President alone is that in seasons of insurrection, a well-timed offer of pardon to the rebels could be essential to the preservation of government, aside from the fact that shrewd use of the power might prevent a civil war.⁹

However, the real problem with this regime is there aren't any specific and clear and enforceable limits. The constitution confers the power, but does not specify the criteria upon which that power may be exercised, the time limits under which it may be exercised, or the minimum standards on which it may be determined to be eligible. The executive has no statutory obligations to listen to victims of crime and to make independent rehabilitation assessments, or to articulate the legal and moral imperatives supporting a grant of clemency¹⁰. This institutional hole has systematically turned a tool for "divine-like" compassion into "political self-preservation" and "elite capture". This paper looks at this structural deformity. It states that the unchecked power of the executive is a fundamental attack on the bedrock of the Nigerian state which is based on the rule of law, separation of powers and the Nigerian constitution's provision to fight systemic corruption as provided in Section 15(5) of the Constitution. The paper begins by outlining the theoretical foundations and philosophical conflicts at the heart of the concept of clemency. Further, it

⁴ Constitution of the Federal Republic of Nigeria 1999 (as amended) s 175.

⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended) s 212(2).

⁶ Constitution of the Federal Republic of Nigeria 1999 (as amended) s 175(2).

⁷ See Address by James Iredall, North Carolina Ratifying Convention (July 28, 1788) reprinted in 4 *The Founders' Constitution* 17 (P. Kurland & R. Lerner ed. 1987)

⁸ *The Federalist* No. 74, 639 (A. Hamilton) (C. Rossiter ed. 1961).

⁹ See *The Federalist* No. 74, 447-449 (A. Hamilton) (C. Rossiter ed. 1961)

¹⁰ See Kathleen Dean Moore, 'Pardon for Good and Sufficient Reasons' (1993) 27 *U Rich L Rev* 281, 283.

examines the constitutional/organisational structure of Sections 175 and 212 and provides a critical review of the current abuse of this power in Nigeria. A cross-jurisdictional comparative study is further attempted. Also, the paper goes on to develop a normative base for change. Finally, the paper concludes with recommendations for action in order to tame the monstrous nature of the power.

2. Theoretical Foundations and Philosophical Tensions of Executive Mercy

The background to the prerogative of mercy needs to be understood in its historical and philosophical context. This idea has been rooted in the traditional English common law concept of the royal prerogative. The rulers of England thought of the king as the fountain of justice and the only one to execute the laws¹¹. All offenses were considered acts against the King's peace and the King had an inalienable right to pardon any violation of his peace. Mercy was an unparliamentary mode of absolute sovereignty, outside of any formal judicial framework¹². When democratic constitutionalism arrived, some politicians found it hard to make this monarchical relic mesh with democratic governance. Taking a swipe at the exercise of pardon power, Cesare Beccaria¹³, the famous Italian writer, strongly advocated for the total elimination of the pardon power. Beccaria argued that the power of pardon is superfluous and that the laws are cruel or incorrect because it adds a random element to the law. For Beccaria the clemency was a systemic acknowledgment of judicial failure and therefore was a way of undermining the deterrent effect of the criminal law by signaling that political influence can elude penal consequences.

On the other hand, Baron de Montesquieu¹⁴ and John Locke¹⁵ argued that the usefulness of clemency is

warranted, but in different theoretical paradigms. Locke developed the concept of "executive prerogative": a power given to "the executive" to act according to discretion for the public good, without the prescription of the law, and sometimes even against the prescription of the law. Because of this universal applicability, Locke knew that general laws would be blind to the specifics, the idiosyncrasies, of human action. The legislature cannot anticipate all contingencies. Thus, the executive has to keep an equal safeguard to avoid the danger of absolute injustice (*summum jus summa injuria*¹⁶).

This places a permanent conflict between the two fundamental principles of a constitutional democracy: . . . The concept of the Rule of Law and Separation of powers. A.V. Dicey's¹⁷ postulations on the rule of law is that the rule of law prevails over arbitrary power. It demands that all the actions of the government are predictable, uniform and standardized. If the executive clemency decree, instead of upholding a conviction, is without any open, objective, and reviewable process, then it creates an environment of caprice. It is a clear indication that the law is not the most important thing, but the perception of the executive, which is above the legislation and above the formality of the judiciary.

2.1 Separation of Powers

In the classical sense of *Trias Politica*¹⁸, the judiciary would interpret and apply the law to particular controversies, the legislature would create the laws, and the executive would enforce them¹⁹. A court engaging in a full public trial, evaluating evidence in accordance with strict constitutional standards, and issuing a criminal conviction is exercising its proper judicial core power as provided under Section 6 of the Constitution²⁰. The pardon

¹¹ William Blackstone, Commentaries on the Laws of England (Clarendon Press 1765–1769).

¹² See Jonathan T Menitove, 'The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency' (2009) 3 Harv L & Pol'y Rev 447.

¹³ Cesare Beccaria, An Essay on Crimes and Punishments (W C Little & Co, new edn, 1872) 158–59.

¹⁴ See generally K Moore, Pardons: Justice, Mercy, and the Public Interest (1989) 15–54; Charles de Secondat Montesquieu, The Spirit of the Laws (17th edn, Anne M Cohler and others eds, Cambridge University Press 1989).

¹⁵ John Locke, Second Treatise of Government (C B Macpherson ed, Hackett Publishing 1980).

¹⁶ 'Summum jus, summa injuria' means that extreme justice may result in extreme injustice.

¹⁷ AV Dicey, Introduction to the Study of the Law of the Constitution (10th edn, Macmillan Education 1959) 183.

¹⁸ See Charles de Secondat Montesquieu, The Spirit of the Laws (17th edn, Anne M Cohler and others eds, Cambridge University Press 1989).

¹⁹ See Constitution of the Federal Republic of Nigeria 1999 (as amended) ss 4–6.

²⁰ See A-G, Cross River State v FRN (2019) 10 NWLR (Pt 1681) 401 (SC); Inuwa v Gov, Gombe State (2020) 5

in essence vacates or nullifies that judicial determination. Lamenting about the monstrosity and deleterious consequences of this power, Edmund G. Brown, one time Governor of California, quipped:

The longer I live, the larger loom those decisions about justice and mercy that I had to make as governor. They didn't make me feel godlike then: far from it; I felt just the opposite. It was an awesome, ultimate power over the lives of others that no person or government should have, or crave. And looking back over their names and files now, despite the horrible crimes and the catalogue of human weaknesses they comprise, I realized that each decision took something out of me that nothing - not family, or work or hope for the future- has ever been able to replace.

In other words, when the power is exercised in the arbitrary way, the executive becomes thieves of judicial authority and makes the process of the trial a mere rehearsal which may be easily annulled by a stroke of the executive pen. So the modern question is not whether prerogative of mercy should be banished altogether, but how it is to be domesticated in the constitution. The power should be democratized from being a privilege of "grace" to being a function, rational and accountable instrument of administration.

3. The Constitutional and Institutional Matrix of Clemency in Nigeria

3.1 Textual Analysis of Sections 175 and 212 of the 1999 Constitution.

In Nigeria, the basic source of the pardoning power is the Constitution. Section 175(1) provides:

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.

Under subsection (2) of this section, a procedural requirement is added, meaning that the powers held by the President under subsection (1) of this section shall be exercised after consulting with the Council of State. At the sub-national level, Section 212(1) and (2) is word-by-word the same in terms of authority granted, with the exception that the Council of State is replaced by a State Advisory Council on the Prerogative of Mercy.

3.2 The Illusory Guardrails: The Council of State and Advisory Councils

At first glance, it looks as though there is a "meaningful constitutional check" (Council of State or State Advisory Councils). But a deeper study of the constitution shows that these bodies have little teeth in them. The composition of the Council of State²¹ includes the President (Chairman), the Vice-President, all former Presidents and Head of States, all former Chief Justices of Nigeria, the President of the Senate, Speaker of the House of Representatives and all State Governors. It's a very politic, cumbersome and elite body. It lacks the institutional specialism, time and investigative powers to scrutinize the thousands of petitions for clemency that come out of Nigeria's overcrowded correctional facilities. Second and more fundamentally, the jurisprudence of the Constitution of the Federal Republic of Nigeria removes these bodies of any real power because the word "consultation" has been interpreted by the court to mean nothing more than a consultation, thus depriving these bodies of any real power. In *Federal Republic of Nigeria v Dingyadi* ²², and in a long string of precedents²³, the courts had made it abundantly clear that the obligation to consult does not impose an obligation to obey or follow the advice given. The Court of Appeal in this case held that the word "shall" in section 212(2) connotes compulsion and that 'consultation' with the Advisory Council is mandatory before the Governor exercises the power of pardon. The Court explained that the purpose of consultation is to guide and guard the exercise of the power and to protect it from arbitrariness, impunity,

NWLR (Pt 1708) 306 (SC); Friday v Gov, Ondo State (2022) 16 NWLR (Pt 1857) 585; A-G, Abia State v A-G, Fed (2022) 16 NWLR (Pt 1856) 205 (SC).

²¹ See Constitution of the Federal Republic of Nigeria 1999 (as amended), Third Schedule, Part I.

²² FRN v Dingyadi (2018) LPELR-46061 (CA) 33–54.

²³ See FRN v Achida (2018) LPELR-46065 (CA) 98–100; Sanda v COP (2025) LPELR-82714 (SC); PDP v INEC (1999) LPELR-24856 (SC) 37–38.

abuse and political aggrandizement. The consultation must precede the exercise of the power, but compliance with the Council's advice is not mandatory. Therefore, the Council of State is only an advisory body. The President may lawfully call the Council, hear the Counselors and their unanimous disapproval of a proposed pardon, and sign the pardon immediately at the end of the meeting. The constitution provides no requirement that the council's advice be placed in writing or that it be made public or that the President explain his or her reasons for not following the council's advice.

3.3 The Judicial Approach to Executive Mercy in Nigeria

The Nigerian courts have in the past been very deferential to the prerogative of mercy. The general position of the courts is that the use of Sections 175 and 212 is a non-justiciable political issue. In *Falae v Obasanjo*, though the core holding in the case centered on the legal effect of a pardon, the reasonable deduction from the reasoning of the Court of Appeal Justices in the light of surrounding circumstances, is that a bad or self-serving executive motive does not invalidate a lawful constitutional power to grant a pardon since it falls within absolute executive discretion²⁴. Such a hands-off attitude leaves no accountability at all. The absence of a law by the legislature to check it, the lame duck status of the Councils, and the unwillingness of the judiciary to look at it, leaves the prerogative of mercy as a royal prerogative that is unchecked within a constitutional democracy.

4. A Critical Appraisal of Contemporary Abuse of the Pardon Power in Nigeria

The structural vulnerabilities of Sections 175 and 212 are not merely theoretical anxieties; they have manifested in profound, systemic distortions of the Nigerian criminal justice and anti-corruption ecosystems.

4.1 Elite Capture and the Subversion of Anti-Corruption Campaigns

The greatest aberration in the Nigerian pardoning system is the systematic hijacking by politically

exposed persons. Nigeria's biggest governance problem is grand corruption, which the government has supposedly been fighting through its special statutory bodies including the Economic and Financial Crimes Commission (EFCC)²⁵, the Independent Corrupt Practices and Other Related Offences Commission (ICPC)²⁶, etc. The use of the executive's prerogative of mercy to pardon high-profile political figures that have been convicted after spending years fighting court cases that has cost millions of Naira is a direct challenge to the mandate of the state. In April 2022, the federal executive granted pardon to the former governor of Plateau State, Joshua Dariye and his Taraba State counterpart, Jolly Nyame, respectively. The two have been investigated, prosecuted and convicted by their respective state treasuries and their convictions confirmed by the Supreme Court of Nigeria for embezzling billions of naira from their respective treasuries²⁷. The state's argument, which was loosely based on the terms of "ill health" and "age," was criticized by civil society, judges, and international observers. The pardons completely lacked transparency: No public medical boards verified the terminal nature of their illnesses. They were neither provided with an explanation of why they cannot be met within the specialized setting of the Nigerian Correctional Service nor provided with a definition of a specialized facility. None of the reasons given justified that these were the ones chosen for higher importance than thousands of destitute old and terminally ill prisoners who were in pre-trial custody or were incarcerated for minor crimes. This results in a "dual-track justice system" that sets harsh, inflexible punishment for the poor and provides a parallel system of executive grace for those who are politically connected: to protect them from the rigors of the law.

4.2 The Complete Erasure of Victims' Rights

The current system of amnesty in Nigeria is based on a strictly bilateral one, i.e. amnesty is a transaction between the state executive and the convicted individual. In this matrix, the person who is the victim of the crime is completely removed. Unlike the common law, granting a pardon in Nigeria extends a pardon to wipe out the guilt of the offence altogether, bringing the individual back to

²⁴ *Falae v Obasanjo* (No 2) (1999) 4 NWLR (Pt 599) 476.

²⁵ Economic and Financial Crimes Commission (Establishment) Act 2004.

²⁶ Independent Corrupt Practices and Other Related Offences Act 2000, Cap C31, Laws of the Federation of Nigeria 2004.

²⁷ *Dariye v FRN* (2015) 10 NWLR (Pt 1467) 325; *Jolly Tevoru Nyame v FRN* (2011) 6 E-WRN 1 (SC).

the legal status he held before the crime was committed²⁸. The comprehensive erasure takes place without notifying the victims, without setting up restitution mechanisms and without considering the psychological or financial impacts on the victims or their surviving families of the pardon. It is an unilateral erasure, contrary to the basic principles of restorative justice and engenders public cynicism over the state's ability to keep its citizens safe.

5. Comparative Jurisprudence: The Global Shift Toward Regulated Clemency

We need to look at jurisdictions that have a common constitutional heritage with Nigeria but have managed to tame executive discretion in other ways to show that it is not only legally possible, but also would be universally accepted as a good model to emulate.

5.1 South Africa: Rationality and Constitutional Review

South Africa offers perhaps the most innovative (and progressive) model of executive clemency under a constitutional democracy. Section 84(1) and (2)(j) of the Constitution²⁹ provides:

Section 84(1): The President has the powers entrusted by the Constitution and the Legislation including those necessary to perform the functions of Head of State and head of the national executive.
(2) The President is responsible for-
(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures.

It follows that here; the President also has a discretionary power to grant pardons. The text does not make any explicit restriction as in Nigeria. But the South African Constitutional Court has always been unwilling to recognize this power as an act of a sovereign which cannot be reviewed. The Constitutional Court in *President of the Republic of South Africa v Hugo*³⁰, held that the pardon power is an executive prerogative, but it is subject to judicial review to ensure compliance with the Constitution in certain situations. This qualification was expressed in the following words by the court:

We conclude therefore that some aspects of the exercise of Royal Prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case-by-case basis whether the matter in question is reviewable or not.

Concluding, the South African court observed that in contemporary English law, the exercise of a prerogative of power may be reviewed if, and to the extent that, the subject matter thereof is amenable to judicial review.

Supporting the position that the law in South Africa today is that pardon decisions are now subject to judicial review, the Constitutional Court in *Albutt v Centre for the Study of violence and Reconciliation*³¹ takes the view that:

it is by now axiomatic that the exercise of all public power must comply with the constitution, which is the Supreme law, and the doctrine of legality, which is part of the rule of law... More recently, and in the context of Section 84(2)(j), we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application considered and decided upon rationally, in good faith, and in accordance with the principle of legality. It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.

Above all, the court ruled that the participation of the victim is a necessary procedural condition} in the consideration of pardon by the executive in the case of such offences. The executive cannot listen to the one side of the story to make a rational decision on clemency, said the Chief Justice. The pardon cannot include victims of crime, because if it does, it is procedurally irrational, and will be declared unconstitutional by the courts.

5.2 India: Judicial Review of Article 72

The President can pardon, remit, reprieve and respite punishment as per article 72 of the Constitution of India³². The executive has long maintained the absolute nature of this power, which couldn't be challenged by the judiciary. But the Supreme Court of India struck down this assertion in a series of

²⁸ *Falae v Obasanjo* (No 2) (1999) 4 NWLR (Pt 599) 476.

²⁹ Constitution of the Republic of South Africa 1996.

³⁰ *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

³¹ *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC).

³² Constitution of India 1950, art 72(1).

audacious constitutional decisions. In *Epuru Sudhakar v Government of Andhra Pradesh*³³, the court held that the clemency powers vested with the governor and the President under Article 161 and Article 72 respectively fall under the purview of review by the judiciary. And as such the power of the executive authorities cannot be exercised arbitrarily by them. The Supreme Court went further to say that in the exercise of the powers, there should not be any kind of mala fide intentions of the authorities. It concluded by stating that the basis of consideration while granting such a pardon/remission should not be extraneous in nature. In other words, the Supreme Court of India has imposed a rigorous standard of judicial scrutiny on executive clemency under articles 72 and 161. The court enumerates clear tests for the courts below to test the pardon before it can be set aside: When the order is passed without application of mind; When the order is manifestly *mala fide* (in bad faith); When the order is passed on wholly extraneous or irrelevant considerations; When the order is arbitrary. As a matter of fact, in *Epuru Sudhaka v Government of Andhra Pradesh*, the court expressly struck down a pardon granted to a political activist, which it held had been tainted by partisan political motives and that relevant material relating to the convict's past criminal actions had been deliberately excluded from the executive's report. Judicial review is an essential brake on political corruption of the clemency power as evidenced in the Indian model.

5.3 The United States: The Administrative Office of the Pardon Attorney

The US Presidential pardon power in Article II, section 2 is textually wide, and the internal administrative structure of the federal government has been finely engineered to make it difficult to abuse³⁴. However, as a practical matter, the exercise of the power today is subject only to the constraints that each chief executive has chosen or imposed upon himself³⁵. Now, the United States Department of Justice has an Office of the Pardon Attorney (OPA), which is governed by a comprehensive codified set of administrative rules. These rules set forth clear, objective guidelines: A petitioner for a

pardon must wait at least five years after his release from confinement before applying; A comprehensive background investigation is conducted by the Federal Bureau of Investigation (FBI). The OPA, however, uses specific criteria which are set out in writing: The post-conviction conduct, character and reputation of the petitioner; The seriousness of the offence and its relative recency; The extent of responsibility taken and evidence of any genuine rehabilitation by the petitioner. The US President does have ultimate constitutional power to override these requirements (as was the case with controversial late-term presidential pardons³⁶), but the power of the OPA ensures that the vast majority of clemency applications are filtered through an objective, merit-based and highly institutionalized process. This is a departure from Nigeria's convoluted and opaque system.

6. Deconstructing the Reform Agenda

This paper proposes a three-pronged legislative and institutional intervention.

6.1 Legislative Intervention: Act of Parliament on the Prerogative of Mercy

The National Assembly has been constitutionally endowed with an express mandate³⁷ in section 4(2) of the 1999 Constitution to make laws for the peace, order and good government of the Federation. The legislature cannot abrogate the President's final power as stated in section 175, but it can—and must—provide a Prerogative of Mercy (Procedural and Regulatory) Act as a necessary legal pathway that must be followed. This law should establish formally the procedure, the criteria and the responsibilities of the executive for the granting of a pardon to be considered and announced. A parallel bill to control the powers of the State Governors under section 212 should be introduced in all of the 36 State Houses of Assembly. The pathway provided by the Indian Supreme Court in *Epuru Sudhaka v Govt of Andhra Pradesh* is apposite here.

³³ *Epuru Sudhakar v Government of Andhra Pradesh* (2006) 8 SCC 161; see also *Maru Ram v Union of India* AIR 1980 SC 2147.

³⁴ United States Constitution art II, § 2.

³⁵ Daniel T Kobil, 'Quality of Mercy Strained: Wrestling the Pardoning Power from the King' (1991) 69 Tex L Rev 569, 601.

³⁶ See Jonathan Peterson and Lisa Getter, 'Clinton Pardons Raise Questions of Timing, Motive' (Los Angeles Times, 28 January 2001) A1.

³⁷ See Constitution of the Federal Republic of Nigeria 1999 (as amended) s 4(2).

6.2 Institutional Restructuring: An Independent Statutory Advisory Board

What is needed is a permanent, specialist institutional body, rather than the current Council of State. The proposed Act should create the Federal Clemency and Rehabilitation Board. To immunize this board from total executive capture, its composition must be strictly diversified by statute to include: Retired Justices of the Supreme Court or Court of Appeal, representatives from the Nigerian Bar Association (NBA), specialized criminologists and penal experts from academia, item Representatives from the Nigerian Correctional Service, Independent civil society actors specializing in human rights and criminal justice reform\end{itemize} The Board would have its own permanent secretariat. It would be given the authority to consider all rehabilitation and medical incapacitation petitions, to undertake investigations of such claims independently, and to hold public hearings if needed. These recommendations would be made formally and in writing to the President by the Board on the basis of facts.

6.3 Codification of Core Substantive Criteria

The proposed Regulatory Act should eliminate subjectivity by setting out clear and mandatory standards for eligibility to, say, be granted clemency. Minimum Time Served Thresholds should be included in these criteria. There shall be no pardon granted upon petition to the trial court, except in the case of undivided terms of confinement in any jail or prison, when the petitioner has served not less than one-third of the term of imprisonment, (or when the petitioner has served in jail or prison one-third of the time for which he was imprisoned) such exceptions as may be necessary in cases of extraordinary and verifiable emergency.

6.4 Exhaustion of Judicial Remedies

Clemency should never be invoked to interfere with current trials and appeals. An application must not be valid if the convict has not exhausted all the avenues of appeal in the constitution up to the Supreme Court or if the statutory time-limit for appeal has expired.

6.5 Standardized Medical Verification

If requests for clemency are based on ill health or old age, it must be supported by a detailed report from an independent, multi-disciplinary Medical Board

appointed by the Medical and Dental Council of Nigeria (MDCN) and totally outside the executive's entourage of doctors.

6.6 Mandatory Victim Impact Assessments

The Board shall be statutorily required to conduct investigations and formally notify the victim(s) or surviving families of the crime. Those who are harmed should be provided with a mandatory 60-day timeframe within which to provide written statements or be allowed to testify orally about the effects a possible pardon may have on their safety and well-being.

6.7 Publicity and the Obligation to Provide Reasons

All recommendations of the Board and final decisions of the President shall be accompanied by a written statement of reasons which shall be public documents. The statement needs to specify the reasons behind the decision according to the law, morality, or humanitarian principles. The documents should be published systematically in the National Gazette.

6.8 The Role of the Judiciary: Asserting Justiciability

It is the duty of the judiciary in Nigeria to be bold and reform its constitutional jurisprudence. In view of the models and precedents set by South Africa and India, the Supreme Court of Nigeria should expressly rule that the act of granting pardon is an executive act but the way and the process of granting pardon is fully justiciable. The courts are endowed with the power in the Constitution, under section 6(6)(b), to review, invalidate and quash this executive lawlessness, if the executive commits it without following statutory procedures or on the basis of corrupt or fraudulent misrepresentations.

7. Conclusion and Recommendations

The prerogative of mercy is a constitutional need but as it is practiced in Nigeria, it is an autocratic anachronism. Nigeria has made sections 175 and 212 completely unguided by objective law, a situation that has encouraged impunity for the ruling class and forgotten the victim of crime. Nigeria's democratic experience has to keep going further, and it is not an option to have any power of the executive that is absolute and unchallengeable. The prerogative of mercy cannot be tamed by setting out

clear regulatory rules that would not diminish the power of the executive. Instead, it makes mercy fit into the requirements of the modern constitutionalism, whereby reason, justice and the public good are the criteria by which it should be exercised. To this end, the country should strive to achieve institutionalized justice right by updating the existing Criminal Justice Administration laws to provide that the consultation of victims be a condition precedent for executive clemency consideration; and Judicial Overlap. Also, the National Assembly should work towards the actualization of the doctrine of judicial override by introducing the National Clemency and Rehabilitation Board (NCRB) whose members will be experts and independent of the executive branch and which will be given security of tenure, and whose overall duties shall include the implementation of the principle of Judicial override in the consideration of executive clemency. Additionally, there must be complete transparency in that the application for clemency must be promptly digitized and published immediately and made open access all over the country in a separate National Mercy file which must be created.