

An Appraisal of the Power of Pardon under Nigerian Law: Lessons from Other Jurisdictions

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Abstract

The exercise of the presidential pardon power has generated periodic controversies and elicited various reform proposals in Nigeria. The power is often exercised in ways that are clearly at odds with the Nigerian Society's interest, including granting pardons to facilitate narrow partisan interest and other personal ends. Sections 175 and 212 of the Nigerian Constitution, which codifies in Nigeria the sovereign pardon powers available in Britain, worsens the problem and fails to provide guidelines or standards for exercising the power. The need to rationalize and curb pardons has raised significant concerns among legal practitioners as to whether the pardon power is a pre- or post-conviction instrument, with the Nigerian judiciary weighing in on the side of the post-conviction argument as a way of making pardons fit unto a retributive and equitable system of distributing justice to offenders. Using doctrinal research method, this paper examined the total amplitude of the power within the narrow confines of this riposte provoking issue, especially in the light of the text of the Constitution and the justification or otherwise of the position of the Nigerian judiciary. The paper also adopted the comparative approach by critically examining the position obtainable in the U.K. and USA on the pardon powers of the head of state, and concluded that Nigeria must follow the tradition prevalent in these Common Law countries where the full effect of the power is limitless to the pre- or post-conviction stage.

Keywords

Presidential Pardon, Prerogative of Mercy, Amnesty, Conviction, Common Law, Nigeria

1. Introduction

To understand the history of the pardon power in Nigeria, it is essential to review the historical tradition of pardon in ancient Greek and Rome from where the concept derived its roots in the English legal system. The ancient Greeks

used a form of clemency that power rested with the people rather than with the sovereign (Nadagoudar & Gowda, 2014: p. 397). Thus, before obtaining clemency under the Greek process, a petition supported by at least 6000 people in a secret poll was needed (Kumar, 2009: p. 10). Due to the difficulty of obtaining such a large number of supporters, however, the possibility of receiving a pardon was generally reserved for athletes, orators and other influential figures (Kobil, 1991: p. 572).

In ancient Rome on the other hand, clemency power was used for political reasons rather than justice or mercy. The executive would pardon a person to enhance his popularity or appease the people. A well-known example of this is the biblical story of Pontius Pilate pardoning Barabbas instead of Jesus. The lessons learned in Greek and Rome set the framework for the development in England of monarchical pardon powers, which later found its way into the Nigerian legal system, now enshrined in sections 175 and 212 of the Nigerian Constitution. The section provides as follows:

1) The President may:

a) Grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions.

b) Grant to a 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 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 any penalty or forfeiture otherwise due to the state on account of such an offence.

2) The President's powers under subsection (1) of this Section shall be exercised by him after consultation with the Council of State.

3) The President, acting under the advice of the Council of State, may exercise his powers under sub-section (1) of this section about persons concerned with offences against the army, naval or air force law or convicted or sentenced by a court-martial.

The question that arises from this provision of the constitution with respect to the presidential power of pardon is whether the framers of the section intended that the president of Nigeria enjoys the power of pardon both before and after conviction for an offence as it is enjoyed by the sovereign in Britain and the United States of America, or whether the power is only limited to the post-conviction stage. This paper intends to analyze the section of the constitution and take a position as to the true intend of the provision regarding the scope and extent of the presidential power of pardon in Nigeria.

2. Nature and Extent of the Presidential Power of Pardon in Nigeria

The power to pardon, vested in the President under the United States, Britain

and Nigerian systems seem to be similar in nature and extent. According to *Nadagoudar & Gowda (2014: p. 401)* the power of pardon is a discretionary power conferred on the sovereign that must not be exercised arbitrarily. To this end, an ordinary reading of section 175 or 212 of the Nigerian constitution shows that the exercise of the power of pardon is not based on any guidelines or standards. This appears to be deliberate as the power of pardon has historically been like a prerogative (*Grupp, 1963: p. 51*). Thus, the nature and extent of the power conferred on the President under section 175 of the Constitution may be summarized by adopting the position of the American Court in *Ex parte Garland (1866)*. In this case, the court not only held that the pardon power is unlimited and unfettered by legislative control, but also, that the power can be exercised to exonerate for any offence known to law either before legal proceedings are taken or after conviction and judgment.

While Supreme Court of Nigeria seems to lend credence to this plenary nature of the power granted under section 175 in *Olu Falae v. Obasanjo (No. 2) (1999)*, there are contradictory decisions of courts that tend to limit the power to a post-conviction instrument only. These decisions appear to suggest that the power of pardon cannot be exercised before trial or conviction and that the power can only legitimately be utilized at the post-conviction stage. For instance, in *Solola & Anor. v. The State (2005)*¹ the Nigerian Supreme Court said:

It needs to be stressed for future guidance that a person convicted for murder or sentenced to death by a High Court and whose appeal is dismissed by the Court of Appeal is deemed to have lodged a further appeal to this Court and until that appeal is finally determined the Head of State or the Governor of a State cannot under sections 175 or 212 of the 1999 Constitution as the case may be, exercise his power of prerogative of mercy in favour of that person.

The Court of Appeal in the same case (Appeal No. CA/A/77/2001) earlier drove the point home more vividly thus:

...whichever the word is used, it presupposes that the person to be pardoned has done something, which the law presumes to be criminal or has committed an offence or is guilty of a crime. To interpret the power of pardon of a governor of a state to include the pardon of someone whose right to a presumption of innocence is guaranteed and protected by the Constitution, and against whom there cannot be a suggestion of having done something criminal without a pronouncement of guilt by a court of law, will be to bring the provision of Section 212(1)(a) of the 1999 Constitution into direct conflict with the provision of Section 36 (5) of the Constitution.

¹See also *State v. Ilori, 1 (1984) 1 SCNLR 94* and *Solomon Adekunle v. A.G. of Ogun State (2014) LPELR 22569* where the Court held as follows: the prerogative of mercy (Pardon) in this appeal cannot be set in motion unless there is a sentence of a court of competent jurisdiction on a convicted person(s) which the pardon has to act as a panacea by mitigating or waving the punishment.

In the bid to further support the above position of the Court, the Court of Appeal in *FRN v Achida* (2018) argued that the phrase “any person concerned with or convicted of any offence” used in Section 212(1)(a) of the 1999 Constitution cannot be given its literal interpretation because this would create a legal absurdity. According to the court, the phrase “concerned with” does not address the offender but relates to other persons ‘concerned with an offence’ such as the victims of an offence, witnesses to the offence and police officers investigating the offence. The court came to this conclusion in order to limit the interpretation of Section 212(1)(a) of the constitution to post-conviction pardon, denying offenders the right to enjoy pre-trial or pre-conviction pardon (see also *Adeola v. State*, 2017).

Although the reasons for arriving at the decisions in the different cases discussed above seems to be quite genuine, however, these decisions clearly contradicts the literal interpretation of the provisions of sections 175 or 212 of the Constitution of the federal republic of Nigeria as already set out above. Indeed, it is trite that where a constitutional provision is unambiguous, the literal interpretation is preferred (Adangor, 2005: p. 185). This rule of interpretation has received judicial acceptance in Nigeria in the case of *Mobile Oil (Nigeria) Limited v. Federal Board of Inland Revenue* (1977)² where the Supreme Court said:

This Court has stated the general rule for construing a statute in some cases. The rule is where the words of a statute are clear; the Court shall give effect to their literal meaning. Only when the literal meaning may result in ambiguity or injustice, the Court may seek internal aid within the body of the statutes in *pari materia* to resolve the ambiguity or avoid doing injustice.

There is no doubt that the provisions of sections 175 and 212 of the Constitution are clear and unambiguous. Thus, the position of the Court of Appeal that the literal meaning of the phrase “any person concerned with an offence” includes the victims of an offence, witnesses to the offence, police officers investigating the offence etc. is with the utmost respect to the Court, untenable, as it has the effect of stretching logic to its inelastic limit. A person is “concerned with an offence” within the meaning of section 175 or 212 of the Constitution if he or she is suspected of having committed an offence, and the power of pardon can equally stretch to cover such persons. Many scholars agree to this interpretation. According to Adangor (2005: p. 185):

The phrase “concerned with or convicted of any offence created by an Act of the National Assembly” within the contemplation of section 175(1)(a) of the 1999 Constitution implies that the President may exercise the powers

²See also *Adisa v. Oyinwola* (2000) 10 NWLR (Pt. 674) 116 where the Court said: “A court of law is without power to import into the meaning of a word, clause or Section of a statute something that it does not say. In this regard, the point must be stressed that it is a corollary to the general rule of literal construction that nothing is to be added to or taken away from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express”.

conferred on him under the provisions in favour of a person who has not been convicted of an offence created by an Act of the National Assembly but was involved in or had participated in the commission of that offence. Thus, a prior conviction for an offence created by an Act of the National Assembly is not necessary *sine qua non* for the grant of pardon. It is sufficient if the person pardoned was merely involved or engaged in the commission of the offence in question, although no trial or conviction has occurred.

Undoubtedly, the position of the Court of Appeal in *Solola's case* denying the extension of exercise of the power of pardon of a governor of a state to someone who is suspected of having committed an offence, on the pretext that it contradicts the presumption of innocence guaranteed under section 36(5) of the Constitution, is arguable. The point must be made that the exercise of the power of pardon does not form part of the trial proceedings, or even the adjudicatory process. It does not determine the guilt or innocence of a defendant/accused and is not intended primarily to enhance the reliability of the trial process (Harris, 2007). The power is available to the executive branch independent of any direct appeal and collateral relief proceedings and it is discretionary. Thus, it is unnecessary to subject such power to the due process threshold of presumption of innocence guaranteed by the constitution.

Moreover, the intent of section 175 and 212 of the Constitution is to grant prerogative of mercy as a matter of grace, which allows the President or governor of a state to consider a wide range of factors not comprehended in judicial proceedings and sentencing determinations (*Olu Falae v. Obasanjo No. 2, 1999*). Consequently, the Presidential pardon power would cease to be a matter of grace if it were constrained by the sort of procedural requirements that the Supreme Court urges in *Solola v. The State* or predicated upon the constitutional requirement of section 36(5).

The predicament of Nigerian courts on the alleged absence of correlation between section 175 or 212 and section 36(5) of the Constitution is quite understandable. It appears to be a product of some factors. First, the court must have been goaded by the belief, albeit erroneous, that the only just ground for exercising the power of pardon is for the enhancement of justice (Udofa, 2018).³ Closely linked with this is the belief that the power of pardon is only available for the correction of errors noticeable in the criminal justice system. This reasoning indeed, can be gleaned in the case of *Obidike v. the State (2001)* where the Supreme Court said:

It is not proper that a convicted prisoner be granted presidential pardon while his case is pending appeal. Presidential pardon could come after an

³The administration of justice by the courts is not necessarily always wise or considerate of circumstances that may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as monarchies, to vest in some other authorities than the courts the power to ameliorate or avoid particular criminal judgments—See *Ex parte Grossman* 267 U.S., 87 (1925).

appeal has been heard and determined. On the exercise of the prerogative of mercy on a recommendation by the Attorney General, suffice to say that, where the prerogative of mercy is exercised while the convict's case is pending at whatsoever stage, such mercy is nothing short of the back of a duck fowl; it cannot hold water.

Secondly, the risks of abuse in pre-conviction pardons are too much more significant than in a pre-conviction pardon. This must-have weighed heavily in the mind of the Nigerian judiciary in taking the position that section 175 of the Constitution does not envisage a pre-conviction pardon as pre-conviction pardons are capable of opening doors so vast for fraud (Udofa, 2018). Of course, when a suspect makes representation to the Governor or the President as the case may be, for the exercise of pardon power in his or her favour prior to trial, how is the Governor or President to know whether his representations are true or not? Whereas a post-conviction application for the exercise of the power of pardon in favour of an accused applicant would afford the President the opportunity of being seised of facts capable of warranting the exercise of the power in favour of an applicant. Perhaps, this line of reasoning motivated the Supreme Court in *Obidike v. The State* (2001) to hold that it is improper to grant presidential pardon to a convicted person while his case is pending.

Thirdly, pre-conviction pardons also tend to attract less public scrutiny than other pardons, and thus it would be difficult to prevent misuse of the power in those instances. The apprehension of Nigerian Courts to the possible abuse of the pardoning power granted under sections 175 and 212 of the Constitution is quite understandable. As Thomas Hood once put it:

Instead of having been a mantle in the hands of the executive, to be thrown over the innocent or unfortunate to shield and protect them from unmerited suffering... has too frequently been instrumental in rescuing the guilty murderer from that punishment which the malignity of his crime so rightly deserved; that instead of operating in particular cases in mitigation of the rigid rules of law, which must be general in its provisions, and may therefore sometimes be oppressive, it has been instrumental in turning lawless felons lose against society, to commit even more daring outrages. And thus, as I conceive, this vital power has been shockingly perverted and abused (Dinan, 2003: p. 396).

The above apprehension notwithstanding, the long-established legal principle that an unambiguous constitutional provision should be interpreted literally without recourse to any other principle of statutory interpretation must be respected. The point must be made that while justice proceeds by equal law and equal rule, mercy proceeds from sympathy, from kindness, from charity, from those better impulses of the human heart. To this extent, the position of Nigerian courts that the President or Governor may exercise the power of pardon only in favour of a person who has gone through the process of trial and convic-

tion for a crime, is untenable, having regards to the express wordings of sections 175 and 212 of the Constitution. Such a position indeed, is at odds with the pardoning process established in virtually all other jurisdictions that grant the President or governor broad discretion on prerogative of mercy.

The point also needs to be made that the President's pardoning power is not meant to enhance justice alone. Pardon according to John Dinan (2003: p. 396), may be issued in order to serve a vital public interest such as securing a peaceful resolution of a public disturbance. The case of Boko Haram bandits terrorizing Nigeria's political landscape presents a good example of this. If and when the President of Nigeria decides to extend the pardon prerogative to them, it may have the tendency to reverse the imbroglio. This presents a special case where the exercise of the pardoning power before a conviction may be a mighty lever in putting down rebellion and violation of the law, and the return to normalcy.

3. The Extent and Scope of the Pardon Power in Other Common Law Jurisdictions

In order to examine the position of Nigerian courts in the interpretation of sections 175 and 212 of the constitution with respect to the extent and scope of the executive power of pardon in Nigeria, it is proper to understand first the origin of this power in the common law tradition. Thus, an examination of the position of the exercise of power in England and the United States of America will be most appropriate.

3.1. The Pardon Power in England

Blackstone recognized that the roots of the pardon power in England derived from the Roman tradition (Blackstone, 2003: p. 390). He observed that the acts of clemency "endear the sovereign to his subjects and contribute, more than anything to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince" (ibid: 391). At Common Law, the power was absolute, unfettered and not subject to judicial scrutiny (Coke, 2001). There is no time specified to grant pardon; it can be granted before conviction and after it. In sum, by the close of the seventeenth century and the early eighteenth century, the power of pardon was still a special prerogative of the crown but a prerogative that had been encroached upon by both custom and statute. At present, the constitutional Monarch exercises power on the advice of the Home Secretary (Harrison, 1992: p. 107). The Home Secretary's decision can, in some situations, be challenged by judicial review (Nadagoudar & Gowda, 2014: p. 398).

3.2. The Pardon Power in the United States of America

The United States of America, in developing a system of government with popular accountability for both the executive and legislature, had to rethink the powers accorded to each sphere. Therefore, the President was given far more extensive powers to pardon than the British parliaments had generally enjoyed.

Article II Section 2 of the United States Constitution provides that the President “shall have the power to grant reprieves and pardons except in cases of impeachment” (Duker, 1977: p. 475). In interpreting this power, American courts have looked to English jurisprudence, as Justice Wayne (*Ex parte Wells*, 1855) once put it:

At the time of our separation from Great Britain, the king exercised the power as the Chief Executive. Prior to the revolution, the colonies, being in effect under the laws of England, well accustomed to the exercise of it in the various forms, as they may be found in the English law book... At the time of the adoption of the Constitution, American politicians were conversant with the laws of England and familiar with the prerogative exercised by the crown.

In effect, the American Constitution intended to confer on the President of the United States of America the same power of pardon both in nature and effect, as is enjoyed by the sovereign in Great Britain. A pardon may be full, limited or conditional. A full pardon wipes out the offence in the eyes of the law and rescinds the sentence as well as the conviction, and frees the convicted person from serving any uncompleted term of imprisonment or from paying any unpaid fine. A pardon is conditional where it does not become operative until the grantee has performed some specified act, or where it becomes void when some specified event happens (Nadagoudar & Gowda, 2014: p. 400). The pardoning power in America therefore, may be exercised before, during or after trial, as is the case in England. Giving judicial approval to this position, Chief Justice Marshall, in *United States v. Wilson* (1833), said:

As this power has been exercised, from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look unto their books for the rules prescribing how it is to be used by the person who would avail himself of it.

Obviously, the President’s power to grant a pardon under American law is very wide. Justifying the plenary nature of the power under American law, the two most cited defenders of the pardoning power, Alexander Hamilton and James Iredell noted the justice-enhancing aspects of pardon. Hamilton argued that the “benign prerogative of pardoning” should be as unfettered as possible so that exceptions in favour of unfortunate guilt could be made; otherwise “justice would wear a countenance too sanguinary and cruel” (Carannante, 2003: p. 335, 345).

The justice-enhancing argument of Hamilton and Iredell notwithstanding, the two defenders of the plenary nature of the pardoning power devoted much of their arguments to granting the President unlimited power to pardon on justice neutral grounds. Hamilton contended that the principal argument for vesting the power to pardon on the President alone was that in serious insurrection, a

well-timed offer of pardon to the rebels could be essential to preserving the government (ibid). Iredell contemplated that the clemency power could be used to procure the testimony of accomplices of great criminal offenders and to protect that “set of wretches whom all nations despise, but whom all employ”, namely, spies who have proved helpful to the government (ibid).

These explanations clearly support the rationale for the broad powers of pardon conferred on the President or head of state in both the British and American systems, which he can exercise before or after conviction.

4. Conclusion

From our discussion above, there is no doubt that the interpretation given by Nigerian courts to sections 175 and 212 of the Constitution rather constricts the broad constitutional powers of pardon conferred on the President and Governors in Nigeria. Such interpretation has the effect of fettering the hands of the President or Governors in the exercise of the power of pardon, a power broad and plenary by the literal construction of the clear wordings of the sections. Thus, it can safely be argued that while the Nigerian courts’ insular position that section 175 of the Constitution does not apply to pre-conviction pardon may have the effect of preventing certain ill-advised pardons, the position would also certainly serve to prevent the granting of beneficial pardons. It might well be true that justice would be served by permitting all relevant facts to be brought out under oath and permitting baseless accusations to be shown during trial, the point needs to be made that one cannot foresee all the circumstances that might require the pardoning power to be exercised even before conviction. A court that constantly insists on the trial and conviction suspects as precondition for exercise of the power of pardon by an appropriate authority clearly unduly interferes in the prerogative of the sovereign, which is a matter beyond its sphere of review.

It is understood that the court of law lacks power to import into the meaning of a word, clause or statute what was not intended or clearly stated by the drafters. In this regard, the general rule of the literal construction is that nothing must be added or taken away from a statute, unless there are adequate grounds to justify the inference that the legislature intended something it omitted to express. There is clearly no ambiguity in sections 175 and 212 of the Constitution, or adequate grounds to justify the inference that the drafters of the Constitution intended that the power contained in these sections can only be invoked in favour of a suspect who has gone through the process of trial and has been convicted. Therefore, it is our view that the President or Governor may validly exercise the power of pardon contained in the above sections at any time without restrict.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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