

Presidential Pardoning Power, Judicial Review and ‘New Face of Mercy’: An Examination of Pardoning Power in Nigeria and India

Olusola Babatunde Adegbite*

Abstract

The exercise of pardoning power is one constitutional privilege known to have suffered much misuse in recent times. In the last hundred years of the development of constitutional practice, nation’s Chief Executives have exercised this power as a birth-right that can be wielded as they deem fit. Nigeria’s developing constitutional democracy is not left out of this problem. Given the precariousness of this power, its exercise remains the subject of an ongoing debate. Against this background, this paper examines the exercise of presidential pardoning power under the Nigerian Constitution, balancing the same with the system operating in India. Extrapolating from the public outrage and criticism that have trailed the exercise of this power in recent times, this paper argues that the power of pardon is too weighty to be tied to the advice of a ceremonial body like the Council of State, without any further checks. This paper concludes that Nigeria has a lot to learn from India’s constitutional development, particularly as regards the rising role of the judiciary in the pardoning process.

Keywords: Pardon, Power, Presidential, Judicial Review, Constitution, Nigeria, and India

Introduction

In nearly all jurisdictions of the world, the exercise of presidential

* LL. B (Hons.) (*Ife*), LL.M (*Ife*), LL.M, (*Cardozo, Yeshiva University, New York*), B.L., Lecturer, Department of Public Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria, & Ph. D. Candidate, Rhodes University, Grahamstown, Eastern Cape, South Africa.

pardoning power is a key feature of the Constitution, vested exclusively in the President and Commander-in-chief.¹ For instance, in more than two hundred years of the constitutional democracy of the United States (US), this power has remained the exclusive preserve of the President.² Likewise, in more than fifty years of Nigeria’s post-independence constitutional practice, the power of pardon has primarily remained the exclusive preserve of the Executive arm of government. Notwithstanding this rule, certain ancillary powers of pardon are also exercisable by other arms of government i.e. the Legislature and Judiciary, even though such exercises are less likely to attract much controversy.³

Theorising on the concept of pardoning power, Duker posits that this power is not designed to be a show of might, but rather a demonstration of benevolence.⁴ Notwithstanding Duker’s position, the reality, for instance in Nigeria, is that pardoning power continually appears to be a tool of political patronage rather than an instrument of restorative justice. This state of affairs calls for a re-examination of this power, benchmarking it with other constitutional concepts such as judicial review, in order to determine ‘*what the law ought to be*’, as against the present case of ‘*what the law is*’.

¹ In some other jurisdictions, the designation of executive powers may be vested in other titular heads such as the Prime Minister, Premier, or Head of State.

² Under American law, presidential power of pardon is vested in the US President by the United States Constitution in Section 2, Article II which provides that the President, “*shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment*”. See P.S. Ruckman, ‘Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993)’ (1997) 27 *Presidential Studies Quarterly* 251 – 271; R. Nida and R. L. Spiro, ‘The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power’ (1999) 52 *Oklahoma Law Review* 197 – 207.

³ For instance, it is a general practice in Nigeria to see Chief Judges grant pardons to prison inmates and other class of offenders. The powers so exercised in this regard are derived from both Section 11 of the Police Act, CAP P29 Laws of the Federation of Nigeria (LFN) 2010, and Section 1 (1) of the Criminal Justice (Release from Custody) (Special Provisions) Act, Laws of the Federation of Nigeria (LFN) 2010.

⁴ WF Duker, ‘The President’s Power to Pardon: A Constitutional History’ (1977) 18 *William & Mary Law Review* 475.

To attain this goal, this paper will start by examining the character and nature of the concept of pardon. It will then consider the constitutional development of pardoning power in Nigeria and India, how judicial review is conceptualised, and if it can be a tool for addressing the anomalies in the exercise of this power. This paper hopes to complete this examination by drawing lessons from how judicial review has greatly developed India's use of pardoning power and determining if an adaptation of some parts of their framework, can help reform the process in Nigeria.

The Character, Nature, and Scope of 'Pardon'

As with many other phenomena, pardon was the pre-occupation of early thinkers, jurists, and scholars theorising about the philosophy of law. Philosophising in this regard, Kant had the following to say;

The right to pardon a criminal, either by mitigating or by entirely remitting the punishment, is certainly the most slippery of all the rights of the sovereign. By exercising it he can demonstrate the splendour of his majesty and yet thereby wreck injustice to a high degree. With respect to a crime of one subject against another, he absolutely cannot exercise this right, for in such cases exemption from punishment constitutes the greatest injustice toward his subjects.⁵

The development of Pardon is credited to the evolution of the doctrine of royal prerogative under English monarchical practice, the root word 'prerogative', meaning 'discretionary'.⁶ In explaining what prerogative meant Locke defined it as "the power to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it".⁷ One definition that has significantly feathered

⁵ I Kant, *The Metaphysical Elements of Justice*, (John Ladd (trans.), Hackett, 2nd edn., 1999) 144.

⁶ BC Kalt, 'Pardon Me? The Constitutional Case against Presidential Self-Pardons' (1996) 106 *Yale Law Journal* 784.

⁷ J Locke, *Two Treatise of Government* (CreateSpace Independent Publishing Platform 2013) 1 – 174.

the nest of the term is that offered in *Ex parte Wells*⁸ which says that, “a pardon was a work of mercy whereby the king either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical”.⁹ The Nigerian Court of Appeal¹⁰ *per* Musdapher, J.C.A. (as he then was) in *Falae v Obasanjo (No. 2)*,¹¹ had the following to say about pardon;

In Exhibit 11, the Head of State granted Olusegun Obasanjo pardon. The word used under Section 161 (1) and Exhibit 11 is “pardon”, and in this context, pardon may be with or without any conditions. It is clear from Exhibit 11 that the pardon granted to the 1st Respondent was not made subject to any conditions. In my view, under the Nigerian law, a “pardon” and ‘full pardon’ have no distinction.¹²

The Court then defined the term as follows;

A pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and privileges forfeited on account of the offence...The effect of a pardon is to make the offender, a new man (novus homo), to acquit him of all corporal penalties and forfeitures annexed to the offence pardoned. I am of the view, that by virtue of the pardon contained in Exhibit 11, the disqualification the 1st respondent was to suffer because of his conviction, has been wiped out. His full civil rights and liberties are fully restored and

⁸ 59 US (18 How) 307, 311 (1855).

⁹ *Ibid.* See also E. Coke, *The Third Part of the Institutes of the Laws of England* (4th edn, 1669) 233.

¹⁰ It is important to state that the Appeal Court was in this instance sitting as the Presidential Elections Petitions Tribunal pursuant to section 239 (1) (a), Constitution of the Federal Republic of Nigeria, 1999.

¹¹ (1999) 4 N. W. L. R (pt. 599) 476.

¹² *Ibid.*

accordingly he has not been caught by the provisions of section 13(1) (h) of the Decree.¹³

This definition was inspired by the foundation laid by the US Supreme Court in *United States v. Wilson*,¹⁴ the first case where the Court considered the question of pardon.¹⁵ The court in this case defined pardon as “an act of grace, proceeding from the power entrusted with the execution of the laws which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he committed”.¹⁶ It was following the Wilson decision, that the court in *Ex parte Garland*,¹⁷ further reaffirmed the US President’s power to grant pardons. The court has over the years successfully expanded the perimeters of pardoning powers, thereby enriching its exercise.¹⁸

¹³ *Ibid*, 495.

¹⁴ 32 U.S. (7 Pet.) 150 (1833).

¹⁵ At the time of writing the American Constitution, the Framers had frowned at any attempt to insert provisions for pardoning power given that the Americans had fought the English Monarchy to get Self-government. However, following the influence of key framers like A Hamilton, the pardon found its way into the early drafts. See A. Hamilton, *The Federalist No. 74* (Robert Scigliano ed., 2000) 475 – 477.

¹⁶ (n 14).

¹⁷ 71 U.S. (4 Wall.) 333, 370-71 (1866). The decision in this case, arose from the disagreement that followed President Andrew Johnson’s alleged abuse of the pardoning power, where he pardoned thousands of former Confederate officials after the American Civil War, and the question that arose was whether the US Congress could limit the President’s pardoning power.

¹⁸ The following cases have been instructive in this regard - *United States v Padelford*, 76 U.S. (9 Wall.) 531 (1870); *US v Klein*, 80 U.S. 128, 20 L. Ed. 519, 58 S. Ct. 123 (1872); *Osborn v US* 91 U.S. 474 (1875); *Knote v United States*, 95 U.S. 149, 24 L. Ed. 442, 2143 (1877); and *Ex parte Grossman*, 267 U.S. 87, 98 (1925). In properly contextualizing the President’s power of presidential pardon under American law, two divergent opinions of the US Supreme court have helped framed its evolution. First is the opinion of Chief Justice Marshall in *United States v Wilson* (n 14), where he opined quite profoundly, saying “A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed?” However, in another decision of the same court in *Biddle v Percovich*, 274 U.S. 480, 485 (1927), the court per Justice Oliver Wendell Holmes offered a quite different interpretation, contradicting the earlier position stating that the President’s power of pardon is not a personal act of grace, but rather a constitutional responsibility. In *Biddle*, the court opined that a pardon is granted

Earlier under British monarchical practice, the views on the grant of pardons remained divided.¹⁹ While a group felt it was exercised towards establishing the full powers of the crown, another felt that its exercise was to ensure that justice is manifestly done.²⁰ Further development has seen the doctrine exercised for several other reasons, such as where a President feels a person is innocent and has been unjustly punished,²¹ and where he feels that though the offender is guilty the punishment is too harsh.²² Pardon is granted when the commission of an offence and conviction has taken place. This point was stressed by the US Supreme Court in *Young v U.S.*,²³ where the court stated that “the pardon is of the offence, and as between the offender and the offended government, shuts out from sight the offending act. But if there is no offence against the laws of the United States, there can be no pardon by the President”.²⁴ The President also has powers to grant pardon without a need for approval by the Legislative branch.²⁵ It however important to state that in terms of effect, presidential pardon not only wipes out sentence, but also the conviction of the individual concerned, reinstating him/her to his/her position *ab initio* as if such was never convicted.²⁶

when, “*it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed*”.

¹⁹ Z.J. Broughton, “Constitutional Law – I Beg Your Pardon: Ex Parte Garland Overruled; The Presidential Pardon is No Longer Unlimited” (2019) 41 *Western New England Law Review* 183 – 218.

²⁰ *Ibid.*

²¹ M Strasser, ‘The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution’ (2002) 41 *Brandeis Law Journal* 85 – 117.

²² S. T. Morison, ‘The Politics of Grace: On the Moral Justification of Executive Clemency’ (2005) 9 *Buffalo Criminal Law Review* 1 – 13.

²³ 97 U.S. 39, 24 L. Ed. 992, 12 S. Ct. 391 (1878).

²⁴ *Ibid.*

²⁵ *Armstrong v United States*, 80 U.S. (13 Wall.) 154, 156 (1871).

²⁶ SAM Ekwenze, ‘Presidential Pardon and Prerogative of Mercy: A Necessary National Soothing Balm for Social Justice’ <<https://coou.edu.ng/resources/presidential-pardon-and-prerogative-of-mercy.pdf>> accessed 5 August 2019. This position was established by Justice Field in *Ex parte Garland* (n 19), where he said, “*a pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt; so that in the eyes of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon*

The Development of Presidential Pardoning Power in Nigeria and India – An Appraisal

In Nigeria, the concept of pardon is constitutionalised under the broad heading of ‘prerogative of mercy’. With the attainment of self-government on October 1, 1960 and the departure of the British colonial masters, it became a prominent feature of every constitution from the first to the fourth republic.²⁷ For instance, while section 101 provided for the doctrine under the 1963 constitution, the 1979 constitution housed it in section 161. In the same breath, though the doctrine was supposed to become a part of section 173 of the defunct 1989 constitution which never saw the light of day, but later becomes a reality under sections 175 and 212 of the 1999 constitution.²⁸ Under these provisions the exercise of presidential pardon exists as an instrument of power used by the government to unconditionally set free convicted prisoners. It is an instrument of power created by the Legislature but located in the Executive. Though, it may be a consistent argument that pardoning power has become subject to abuse by the Executive, it still remains a potent tool of restitution and restoration.

Any examination of the frameworks in Nigeria and India is bound to be deeply unravelling as the constitution of both countries provide for

conviction from attaching. If granted after conviction it removes the penalties and disabilities and restores to him all his civil rights”. See also *United States v Padelford*, 76 U.S. (9 Wall.) 531, 543 (1869), where the court held that that pardon, “*purged the petitioner of whatever offence against the laws of the United States he had committed . . . and relieved him from any penalty which he might have incurred*”.

²⁷ In Nigeria’s constitutional development, each republic is identified by the country’s attempt towards the making of a new constitution, a move often expected to culminate in a return to Civilian rule. Accordingly, while the first republic spanned between 1960 and 1979 when the 1960 and 1963 Constitutions were enacted, the second republic was between 1979 and 1983 under which the 1979 Constitution held sway. This was followed by the abrupt third republic in which effort were geared towards the making of the 1989 Constitution, but which later failed to see the light of the day. The fourth republic under which the 1999 Constitution was made commenced on May 29, 1999 and remains the current dispensation.

²⁸ This Constitution is cited as, “*Constitution of the Federal Republic of Nigeria (Promulgation) 1999, No.24, CAP 123, Laws of Federation of Nigeria (LFN) 2004*”. It came into force on the 5th of May 1999.

pardoning power in a constitutional context. The comparison in both constitutions is that the power is domiciled in the executive arm and is expected to be exercised in consultation with designated advisory bodies. The contrast however exists in the fact that not only does the advisory body in India enjoy more constitutional power, the entire process can later be subject to judicial review. Therefore, comparing both jurisdictions offers great prospects in advancing knowledge in this area.

Nigeria

Under the 1999 Nigerian Constitution,²⁹ presidential pardoning power is exclusively vested in the President. Under this constitution, presidential pardoning power is unfettered, just as it obtains under the American Constitution.³⁰ Section 175 of the constitution provides that 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 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

²⁹ Constitution of the Federal Republic of Nigeria (Promulgation) 1999, No.24, CAP 123, Laws of Federation of Nigeria (LFN) 2004.

³⁰ The provisions of Article II, Section 2, of the US Constitution which provides that, “*The President shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment, has been a subject of severe criticisms on the grounds that it seeks to take over the powers of the Legislature and Judiciary*”. See S.L. Carter, ‘The Iran-Contra Pardon Mess’ (1992) 29 *Houston Law Review* 884.

penalty or forfeiture otherwise due to the State on account of such an offence.³¹

Also, the powers of the President under subsection (1) of this section shall be exercised by him after consultation with the Council of State.³² The President, acting in accordance with the advice of the Council of State, may exercise his powers under subsection (1) of this section in relation to persons concerned with offences against the army, naval, or air-force law or convicted or sentenced by a court-martial.³³ It is clear from the provision, that the principal power of pardon under the Nigerian constitution with all the discretion thereto, is vested in the President, as the nation's Chief Executive.

In furtherance of this power, Section 153(1)(b) of the Constitution provides for a body known as the "*Council of State*", who is to advise the President in the exercise of his powers with respect to prerogative of mercy (amongst other powers).³⁴ The council, as an organ of the government, is made up of eminent Nigerians considered as the full complement of the nation's leaders.³⁵ Whereas, the powers of the President in this regard are not subject to the approval of the Council of State, the President cannot proceed to act unilaterally.³⁶ This is evident in the use of the word 'shall' in the provision, "The powers of the President under subsection (1) of this section shall be exercised by him after consultation with the Council of State".³⁷ It however remains a source of debate, the exact force in law that the advice of the Council of State carries i.e. whether it should be interpreted as limiting the pardoning

³¹ (n 29) Section 175 (1) (a) (b) (c) & (d). It is noteworthy that the same power is donated to the Governor of a State in Section 212 (1) (a) (b) (c) & (d).

³² Ibid, Section 175(2).

³³ Ibid, Section 175 (3).

³⁴ See Paragraph B, Section 6(a) (ii) and (b) of Part I of the Third Schedule to the Constitution of the Federal Republic of Nigeria, 1999.

³⁵ Ibid. These eminent Nigerians include the President, Vice President, all former Presidents, all former Chief Justice of Nigeria, the Senate President, the Speaker of the House of Representatives, Governors of all the States in the Federation, and the Attorney-General of the Federation.

³⁶ BO Nwabueze, *The Presidential Constitution of Nigeria* (London: C. Hurst & Co. 1982) 144.

³⁷ (n 32).

powers of the President, or whether it is simply a matter of procedure meant to be followed.³⁸ The pardoning process is concluded with the mandatory documentation by the President in the Official Public Notice of the Government of the Federation.³⁹

There are no restrictions on the President as to who he can grant pardon under the Constitution. However, where a person is convicted of certain offences such as the offence of murder, such a person must have exhausted his/her right of appeal in court before he/she can be considered for pardon. This was judicially affirmed by the Supreme Court in *Monsura Solola & Anor v The State*⁴⁰ where the court dismissed the appeal of two convicted murderers. In this case, four people (a father, his two sons and a nephew) had been charged for the 1994 murder of a teenage hunchback, the friend of the younger son. The charges against the younger son were withdrawn and he was used as a state witness. The other three went to trial and were convicted on the evidence presented. All three appealed unsuccessfully to the Court of Appeal and by the time they further appealed to the Supreme Court, the father had been granted pardon. Edozie, J.S.C while delivering the lead judgment made the following remarks concerning the exercise of prerogative of mercy;

It needs to be stressed for future guidance that a person convicted for murder and 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, pursuant to sections 175 (sic) or 212 of the 1999 Constitution, as the case may be, exercise his powers of prerogative of mercy in favour of that person. In the same vein, such person cannot be executed before his appeal is disposed

³⁸ (n 36).

³⁹ J Ogunye, “Legal Implications of Jonathan’s Pardon” *Premium Times Newspaper* (Lagos, 15 March 2013) <<https://www.premiumtimesng.com/opinion/125017-legal-implications-of-jonathans-pardon-by-jiti-ogunye.html>> accessed 5 August 2019.

⁴⁰ (2005) 5 NSCR (Vol. 1).

of. It is hoped that the prison authorities will be guided by this advice.

India

The Constitution of India vests pardoning power in the President, including the power to revoke and reduce sentences.⁴¹ Specifically, Article 72 of the Constitution provides:

(1) The President shall have the power to grant pardons, reprieves, respites or remission of punishment or to suspend remit or commute the sentence of any persons convicted of any offence- (a) in all cases where the punishment or sentence is by a court martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall after the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.⁴²

Similar to what obtains under the Nigerian Constitution, Article 74 of the Indian Constitution provides that the Union Council of Ministers with the Prime Minister at the head, would advise the President in this regard, and he is bound by such advice.⁴³ The difference however is that

⁴¹ P Kumar, “The Executive Power to Pardon: Dilemmas of the Constitutional Discourse” (2009) 2 *NUJS Law Review* 9 – 30.

⁴² Constitution of India.

⁴³ *Ibid*, art. 74(1). See *Samsher v Singh v State of Punjab*, (1974) 2 SCC 831.

the legal status of the Indian Council of Ministers is different from that of the Nigerian Council of State, given that while the latter is more of a ceremonial advisory body, the former is a federal executive body granted decision making powers. Given India's robust federal structure, the same power is granted to State Governors, with the Constitution stating under Article 161 that;

The Governor of a State shall have the power to grant pardons, reprieves, respites, or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.⁴⁴

The Governor is also expected to be advised in this regard by the by the Council of Ministers led by the Chief Minister.⁴⁵ Under the Indian Constitution, the power between the President and Governor appears to have equal potency as a request for pardon can be made to either office.⁴⁶ In exercising his powers in line with advice from the Council of Ministers, the President is supposed to consider the following grounds - (1) Interest of society and the convict; (2) The period of imprisonment undergone and the remaining period; (3) Seriousness and relative recentness of the offence; (4) The age of the prisoner and the reasonable expectation of his longevity; (5) The health of the prisoner; (6) Good prison record; (7) Post conviction conduct, character and reputation; (8) Remorse and atonement; (9) Deference to public opinion. It has been noted that the vesting of pardoning power in both the President and Governor is to make it a constitutional absolute and remove any room for it to be fettered by the Indian Parliament or any other law.⁴⁷

⁴⁴ (n 42).

⁴⁵ Ibid, art. 163(1).

⁴⁶ Ibid, art. 72(3).

⁴⁷ SV Nadagoudar and G.S.S. Gowda, 'Presidential Power to Pardon in India: An Overview' (2015) 2 *International Journal of Law and Legal Jurisprudence* 397 – 405.

Judicial Review and Presidential Pardoning Power

Judicial review is defined as a court's power to review the action of other branches or levels of government, especially the court's power to invalidate legislative and executive actions as being unconstitutional.⁴⁸ It is also a court's review of a lower court's or an administrative body's factual or legal findings. The Foundation for what is today regarded as the doctrine of judicial review was laid in the landmark decision of the US Supreme Court in *Marbury v Madison*,⁴⁹ where it institutionalised the court's power of review as derived from Article 6 of the US Constitution.⁵⁰ The US Chief Justice at that time, John Marshall opined that, "it is emphatically the province and duty of the judicial department to say what the law is", as well as the court's duty to override any legislation passed by congress that was not in accordance with the provisions of the constitution.⁵¹ The court thereby made a new rule in which US Federal Courts could refuse to apply any legislation that was in conflict with the US Constitution.

⁴⁸ Black's Law Dictionary (Minnesota, US: Thomson Reuters, 10th Edn. Bryan A. Garner 2014) 976.

⁴⁹ 5 US (1 Cranch) 137 (1803). This case is regarded as the most important in US Constitutional Law. Prior to the *Marbury rule*, the US Supreme Court had earlier in 1796, had the occasion to examine the constitutionality of the Carriage Act of 1794, a law passed by congress in *Hylton v United States*, 3 U.S. (3 Dall.) 171 (1796). In its judgement, the court held that the Act was constitutional. According to Jack Rakove, "Hylton v. United States was manifestly a case of judicial review of the constitutionality of legislation, in an area of governance and public policy far more sensitive than that exposed by Marbury, and it was a case whose implications observers seemed to grasp". The court in exercise of its power of judicial review, also had occasion to strike down a supremacy legislation in *Ware v Hylton*, 3 U.S. (3 Dall.) 199 (1796) and further examined the implication of a state law when considering it against a state constitution in *Cooper v Telfair*, 4 U.S. (4 Dall.) 14 (1800). See J. Rakove, 'The Origins of Judicial Review: A Plea for New Contexts' 49 *Stanford Law Review* 1039-1041.

⁵⁰ The Court in laying this rule struck down Section 13 of the Judiciary Act of 1789 which expanded the scope of its powers of original jurisdiction and which would have empowered it to grant the writ of mandamus sought by Williams Marbury, as it clashed with Article III, Section 2 of the US Constitution.

⁵¹ SH Kadish, 'Judicial Review in the High Court and United States Supreme Court' (1959) 2 (4) *Melbourne University Law Review* 1 - 34.

The doctrine operates as a dimension of the principle of checks and balances in which the judicial arm seeks to safeguard public interest whenever it clashes headlong with the private interest of those in power.⁵² It has also been argued to be a necessary defence of the principle of federalism.⁵³ The *Marbury decision* enhanced the early development of the doctrine making its application in the US possible even in several other contexts.⁵⁴ Also, within the two leading legal traditions, i.e. the Civil and Common law jurisdictions, the doctrine has evolved differently, while in application its deployment has also been in a variety of forms. Essentially, it has had a long and chequered history,⁵⁵ but notwithstanding this it has been beneficial in terms of how power in democratic society should be organised and managed.⁵⁶

⁵² A Hamilton, J Jay & J Madison, *The Federalist Paper* No. 78 (Indianapolis: Liberty Funds, G. W. Carey and J. McClellan eds., 2001) 1 - 49.

⁵³ SB Prakash and JC Yoo, ‘The Puzzling Persistence of Process-Based Federalism Theories’ (2001) 79 *Texas Law Review* 1459. On deep controversies that have arisen over the justiciability of applying the doctrine in US Federal/State’s contests and criticisms of the Court’s Federalism Jurisprudence, see generally H Wechsler, ‘The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government’ (1954) 54 *Columbia Law Review* 543; JH Choper, ‘The Scope of National Power vis-a-vis the States: The Dispensability of Judicial Review’ (1977) 86 *Yale Law Journal* 1552; C Fried, ‘Foreword: Revolutions?’ (1995) 109 *Harvard Law Review* 13; HP Monaghan, ‘The Sovereign Immunity Exception’ (1996) 110 *Harvard Law Review* 122 - 132; LD Kramer, ‘Putting the Politics Back into the Political Safeguards of Federalism’ (2000) 100 *Columbia Law Review* 215; LA Baker and EA Young, ‘Federalism and the Double Standard of Judicial Review’ (2001) 51 *Duke Law Journal* 75.

⁵⁴ Following the decision in *Marbury*, the position of the court for a number of years on the doctrine was characterized by a sort of ambivalence. For instance, in *Dred Scott v Sandford*, 60 U.S. (19 How.) 393 (1857), it appeared the court had contradicted its earlier position. However, the doctrine gained further momentum in *Fletcher v Peck*, 10 U.S. (6 Cranch) 87 (1810), where a State statute was declared unconstitutional. The Court attained a further height in *Martin v Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), when it held that US Federal Courts, pursuant to Article III of the Constitution, have the powers to hear all cases arising under the Constitution and laws of the United States.

⁵⁵ B Friedman, ‘The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy’ (1998) 73 *New York University Law Review* 333.

⁵⁶ There is a rich body of literature on the historical development and application of the doctrine. For an overview see generally JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press 1980) 87 - 88; CN Tate,

The *Marbury decision* defined the powers of the court to overturn a legislative act or statute as well as any action of the executive arm deemed a violation of the Constitution.⁵⁷ It means that once an act is determined to be unconstitutional, it will be set aside, and may even give rise to a claim for damages.⁵⁸ The whole idea of judicial review is rooted in the concept of a written constitution with limited powers.⁵⁹ In addition to its application to executive and legislative acts, it is also a tool used in examining acts of administrative agencies especially public institutions established by statutes. Since the *Marbury decision*, judicial review has not only come to be regarded as a cornerstone of American Constitutional Jurisprudence,⁶⁰ but it has also quite greatly influenced the development of this doctrine in Nigeria. It is, however, instructive to state that unconstitutionality is the acceptable ground for the application of this doctrine.⁶¹ Where the act in view runs contrary to other legal rules, a different standard would be applied.⁶² It is therefore within this breadth that acts such as the exercise of presidential pardoning power comes under the domain of the judicial arm.

In Nigeria, the doctrine of judicial review has become an integral part of the constitutional framework.⁶³ The courts are empowered to forensically examine the legality or illegality of a governmental or act of a public authority where *ultra vires*,⁶⁴ i.e. beyond the powers given by an

‘Comparative Judicial Review and Public Policy: Concepts and Overview’, in DW Jackson & CN Tate (eds.) *Comparative Judicial Review and Public Policy* (1992) 3-4.

⁵⁷ See *Little v Barreme*, 6 U.S. (2 Cranch) 170 (1804).

⁵⁸ AB Rubin, ‘Judicial Review in the United States’ (1979) 40 *Louisiana Law Review* 67-88.

⁵⁹ EV Rostow, ‘The Democratic Character of Judicial Review’ (1952) 66 *Harvard Law Review* 195.

⁶⁰ In a period spanning over 200 years, the Marbury rule has been applied quite broadly in a large number of United States cases. Top on the list includes *New York v United States*, 505 US 144, 177 (1992); *United States v Lopez*, 514 US 549, 552 (1995); *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*, 527 US 627,630 (1999); *United States v Morrison*, 529 US 598,619 (2000); *Kimel v Florida Board of Regents*, 528 US 62, 67 (2000).

⁶¹ *Satterlee v Matthewson*, 27 U.S. 380 (1829).

⁶² *Ashwander v Tennessee Valley Authority*, 297 U. S. 346-349 (1936).

⁶³ Section 6, Constitution of the Federal Republic of Nigeria, 1999 provides for the judicial powers of the Federation.

⁶⁴ This means beyond the scope of powers granted by a Law.

enabling law, such act will be declared null and void.⁶⁵ The doctrine has however remained limited in its application. Firstly, under Military rule the doctrine was severely limited through the introduction of ‘Ouster Clauses’ that were largely the fad of successive military regimes.⁶⁶ Secondly, the doctrine does not empower the court to examine the merit, morality, ill will, or societal acceptance of the act in question. It is not a voyage of piety but of law. The only business the court has is to determine if the legislative, executive, or administrative power so exercised, has been done in accordance with the enabling law, statute, and the Constitution, and nothing more⁶⁷. This point was noted in *Military Governor of Imo State v Nwauwa*,⁶⁸ where the Supreme Court held that the Appeal Court had exceeded the scope of its powers of judicial review. The court stressed the point that the power of judicial review does not take the place of an appeal and the court has no power to replace the decision of the exercising body with its own judgement.⁶⁹

The doctrine was further undermined in *Fawehinmi v Abacha*,⁷⁰ where the Supreme Court in its judgement agreed of 28th April 2000⁷¹ agreed with the Appeal Court on the enforceability of the African Charter

⁶⁵ *SL Akintola v Sir Adesoji Aderemi & Ors*, (1962) WNLR 185; *Attorney-General of Ogun-State v Aberuagba & Ors*, (1985) 1 NWLR 395; *Iwuji v Federal Commissioner for Establishment* (1985) 1 NWLR 497.

⁶⁶ See Section 5 of Decree No.1 of 1984, which provided that, “No question as to the validity of this or any other decree or any Edict shall be entertained by any Court in Nigeria”. See *Lakanmi & Ors v Attorney General (Western State)*, (1971) 1 KILR 201; *Adamolekun v The Council University of Ibadan*, (1968) NMLR 253.

⁶⁷ This point was stressed by Lionel Brett, J. in *Olawoyin v Commissioner of Police*, (1961) 2 All NLR 203, 215, where he said, “It is not for this Court to inquire whether the section in question would make for the better administration of justice in Northern Nigeria any more than it can inquire whether the Constitution gives effect to what was agreed at the Conferences which led up to its introduction. The function of the Court is to answer the questions referred to it by interpreting the Constitution as it stands”.

⁶⁸ (1997) 2 NWLR (Pt. 490) 675.

⁶⁹ *Ibid*. See also *Egharevba v Eribo*, (2010) 9 NWLR (pt.1199) 411.

⁷⁰ (1996) 9 NWLR (Pt. 475) 710. The is otherwise known as *Gani Fawehinmi v Sani Abacha, A-G Federation, State Security Service & Inspector General of Police*, (1996) 9 NWLR (pt. 475) 710.

⁷¹ *Abacha v Fawehinmi*, (2000) 6 NWLR (Pt.660) 228. This is also otherwise known as *Sani Abacha, A-G Federation, State Security Service & Inspector General of Police v Gani Fawehinmi* (2000) 6 NWLR (Pt. 660) 228.

on Human and People's Rights, but nonetheless held that the penultimate court could not review the extent of the exercise of the *discretionary powers* of the Inspector-General of the Police in relation of Chief Fawehinmi's arrest without warrant and subsequent detention. In other words, the court declared that the powers of the IGP were unfettered and not subject to judicial review.

Notwithstanding the above, the doctrine of judicial review is today a major pillar of Nigeria's constitutional framework, but how much this extends to matters of presidential pardoning power is another matter entirely. Just like the power of the IGP in the *Fawehinmi case*, presidential pardoning power in Nigeria is a power constitutionally provided for but exercised discretionarily. The question is - how benevolently or malevolently has this discretion been dispensed in the exercise of this power? The answer to this question makes it all important to examine the exercise of this power in recent times, particularly in respect of its now notorious breach.

Abuse of Presidential Pardoning Power in Nigeria – Is Judicial Review Sacrosanct or is Moral Opprobrium Enough?

In most constitutional jurisdictions, presidential pardoning power given its executive nature has remained a subject of abuse and Nigeria is not an exception. The most controversial case in Nigeria was the presidential pardon granted the former Governor of Bayelsa State, Chief Diepreye Alamiyeseigha by President Goodluck Jonathan in March 2013. Announcing the pardon, the Presidency stated that inclusive in the list were other personalities such as Lt. General Oladipupo Diya (rtd.), Major-General Shehu Musa Yar'adua (rtd.), Major-General Abdulkarim Adisa (rtd.), former Managing Director of Bank of the North, Mr. Shettima Bulama, and others.⁷² The pardon was trailed by both domestic⁷³ and

⁷² (n 38); I Akinbajo, "Jonathan Stirs Storm over Controversial State Pardon for Alamiyeseigha, Others" *Premium Times Newspaper* (Lagos: 13 March 2013) <<https://www.premiumtimesng.com/news/124407-jonathan-stirs-storm-over-controversial-state-pardon-for-alamiyeseigha-others.html>> accessed 5 August 2019.

⁷³ B Ezeamalu, "Civil Society Groups s Vow to 'Resist' Jonathan's Pardon to Alamiyeseigha", *Premium Times Newspaper* (Lagos: 14 March 2013)

international outrage⁷⁴ as well as a floodgate of criticisms.⁷⁵ Many considered it as an exercise in bad state, even though it was carried out according to laid down constitutional procedures.⁷⁶ It was criticised as an affront on the fundamental responsibility of government as regards its fight against corruption,⁷⁷ a duty provided for in section 15 (5) of the Constitution which states that, “the state shall abolish all corrupt practices and abuse of power”.⁷⁸ This is because Chief Alamiyeseigha had been convicted of corruptly enriching himself while he held office as the Executive Governor of Bayelsa State.

Part of the defence of the Presidency then, was that the constitution does not limit the President in terms of the persons he can grant pardon to at any time. However, when this is considered against the fact that the President occupies his office as a fiduciary, can it not be argued that the President ought to have known that the trust reposed in him should be a restraint on his use of power? Can it not be argued that this must have been the intendment of the framers of the Constitution in designing the process of Section 175 as a collaborative effort between the President and the Council of State? The key challenge however is that the arguments above only push the idea of what ought to be in the operation of the Nigerian constitution. In actual sense, this has not been the case, at least as the Alamiyeseigha’s case has revealed.

<<https://www.premiumtimesng.com/news/124774-civil-society-groups-vow-to-resist-jonathans-pardon-to-alamiyeseigha.html>> accessed 5 August 2019.

⁷⁴ N Ibeh, “US Condemns Pardon for Alamiyeseigha, Bulama” *Premium Times Newspaper*, (Lagos: 15 March 2013) <<https://www.premiumtimesng.com/news/124904-u-s-condemns-pardon-for-alamiyeseigha-bulama.html>> accessed 5 August 2019.

⁷⁵ M Nosike, A Egole, and O Ajayi, “What Nigerians Say About Alamiyeseigha’s Pardon” *Vanguard Newspaper*, (Lagos: 22 March 2013) <<https://www.vanguardngr.com/2013/03/what-nigerians-say-about-alamiyeseighas-pardon>> accessed 5 August 2019.

⁷⁶ E Edukugho, “Alamiyeseigha: Unpardonable Pardon” *Vanguard Newspaper* (Lagos: 23 March 2013) <<https://www.vanguardngr.com/2013/03/alamiyeseigha-unpardonable-pardon>> accessed 5 August 2019; O. Ekeanyanwu, “Group Condemns Presidential Pardon to Alamiyeseigha” *Premium Times Newspaper* (Lagos: 16 March 2013) <<https://www.premiumtimesng.com/news/125113-groups-condemn-presidential-pardon-to-alamiyeseigha.html>> accessed 5 August 2019.

⁷⁷ Ibid.

⁷⁸ (n 29).

The apparent lack of other levels of scrutiny has opened the grant of presidential pardons to arbitrary use. Most often than not, such arbitrariness is followed by an outpouring of public opinion against such grants. Accordingly, in a constitutional democracy like the US for instance, it has been noted that there are only three “limited and rather clumsy checks on the abuse of the pardon power by any president”.⁷⁹ Firstly, the President can be impeached and removed from office for corrupt and fraudulent abuse of pardoning power⁸⁰. Secondly, if a President is still in office and grants a controversial pardon before the Election Day, he/she may be rebuked at the polls and not returned to office.⁸¹ Thirdly, where the President is at the end of his or her term, he/she would be escorted out of office and followed everywhere in life by an unfavourable judgment by history or moral opprobrium.⁸²

One can say that the above submission may have been borne out of the age-long sentiments expressed by James Iredell of North Carolina, who at the Constitutional Convention of 1787,⁸³ said that he doubted that a man honoured by his country with the office of the President would apply the pardoning power in a corrupt fashion and thereby suffer the “damnation of his fame to all future ages.”⁸⁴ The assumption here is that a person concerned about public reprobation must necessarily be troubled

⁷⁹ GC Sisk, “Suspending the Pardon Power during the Twilight of a Presidential Term” (2002) 67 *Missouri Law Review* 13 – 27.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*; This was seen in the aftermath of the pardon granted to President Nixon. President Gerald Ford lost the 1976 presidential election to Jimmy Carter after granting that controversial pardon to his erstwhile boss. In the argument of Prof Tribe, had the same happened during the time of President Clinton, where he had granted those pardons before the November 2000 elections, Vice President Al Gore undoubtedly would have paid a further price in lost votes by virtue of his being Clinton’s former deputy, but both Clinton on this occasion and Bush eight years earlier shrewdly delayed the dubitable grants of pardon, until the presidential elections were safely past.

⁸² *Ibid.*

⁸³ J Iredell, Address at the North Carolina Ratifying Convention July 28, 1788, in 4 *The Founders’ Constitution* 17 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁸⁴ James Iredell in further making his opinion known said, “This power is naturally vested in the President, because it is his duty to watch over the public safety; and as that may frequently require the evidence of accomplices to bring greater offenders to justice, he ought to be entrusted with the most effectual means of procuring it”. See WF Duker (n 4).

by the thought of having his name wrecked by the grant of spurious pardons. Thus, what manner of President would ever want to sacrifice a venerable reputation for the immediate gratification of granting pardons to friends and family or the self-indulgent pleasure of wielding uncontrolled political power according to personal whims, only to do irreparable damage to his reputation? As the sort of public opprobrium expressed above is not present in Nigeria or in India, it therefore becomes imperative that the power in question have additional layers of safeguards.

Given the nature of political power, the expectation that a society like Nigeria with time will operate in the context of the ideal situation intended by the constitution is bound to remain a far cry. What is evident in today's democracies is that the desperation to grab power and the relentless quest to further perpetuate it inevitably beclouds holders of office from weighing the indignity such abuse brings, that once the power sought is captured, all of Iredell's assumptions are flung out of the window. It is in the light of this that judicial review been canvassed as the only way in which the ultimate use of the presidential pardoning power can be properly managed, reined in, and judiciously utilized. It was in this light that Harold Krent postulating about conditional grants, argued that the Judiciary operates as a proper check on such grants, submitting that where they are extreme the judges can intervene to review them.⁸⁵

While section 175 of the Constitution ties the Nigerian President's pardoning powers to the Council of State, it does empower the council to circumscribe this power. One can argue that this flows from the legal status of the council, which is no more than a ceremonial body in the garb of similar advisory bodies. This throws up a fundamental question - For a power as important as the power of pardon, does the council possess the necessary weight in law to operate in its current constitutional position? Answer to this question can be found in the fact that where it comes to the exercise of other constitutionally granted presidential powers, such as for example the power of appointment, such power is not simply subjected to the 'advice' of mere ceremonial bodies, rather the exercise is based on approval or confirmation by a key branch of government, which is the

⁸⁵ H.J. Krent, 'Conditioning the President's Conditional Pardon Power' (2001) 89 *California Law Review* 1666.

Legislature.⁸⁶ Why then should a lesser standard be applied to the power of pardon? This is one major gap that this paper seeks to fill. This argument of this paper is that presidential pardoning power under the Nigerian constitution is too weighty to be tied to the apron strings of the Council of State. This paper argues that there is an important need to put this power in the same bracket as the other powers mentioned above, such that as against the Council of State, its eventual exercise is subject to the imprimatur of a more potent branch of government. It is within this context that this paper canvases for Nigeria, a two-tier process in the exercise of presidential pardoning powers, involving the Executive and the Judiciary. To drive home this argument, an inquisition into the constitutional development in a country with similar jurisdiction, and where the application of judicial review to presidential pardoning power has found fertile ground, becomes apposite.

Judicial Review of Presidential Pardoning Power under the Indian Constitutional Framework – Way Forward for Nigeria

The vexed question on the issue of pardoning power remains whether we are more mindful of the criminals and the extent of the strings they pull to be pardoned, or the bereaved families that they leave in the wake of their heinous crimes? Atop the list of excuses that have been adduced for the vesting of pardoning power in the Executive is the need to stem the tide of abuse. Yet this is the exact reason why at this juncture, there must be a reconsideration of the matter. Today it has become worrisome to see the Executive, both at the Federal and state levels, abuse their power of pardon.⁸⁷ What then is the way forward?

⁸⁶ See for example (n 29) Sections 86 (1), 147 (2) and 154 (1). See O.B. Adegbite, “Limit of Presidential Power of Appointment under the 1999 Constitution (As Amended): An Appraisal of Section 154” (2016) 52 *Journal of Law, Policy, and Globalisation* 195 – 206; O.B. Adegbite, “Constitutional Boundaries of Executive Powers and the Impasse over the Appointment of an EFCC Chairman in Nigeria: Critical Comparative Perspectives from the United States Constitution” (2019) 4 (1) *BiLD Law Journal* 7 – 27.

⁸⁷ I. Osakwe, ‘The Abuse of Prerogative of Mercy’ (*The Sun Newspaper*, 13 January 2017) <<https://www.sunnewsonline.com/the-abuse-of-prerogative-of-mercy>> accessed 5 August 2019.

There is an urgent need for a reform of the current provisions of the constitutional provision governing pardoning power in Nigeria and great insight can be drawn from the paradigmatic example of India’s constitutional development. In India, the Constitution provides for a framework of judicial review of the Indian President’s pardoning power. This position gained ground as early as 1972, when the Indian Supreme Court in *G. Krishna Gouda v State of Andhra Pradesh*,⁸⁸ opined that, “all power however, majestic the dignitary wielding it, shall be exercised in good faith, with intelligent and informed care and honesty for the public wealth”⁸⁹. An interesting case is that of *Guru Venkata Reddy v State of Andhra Pradesh*,⁹⁰ involving the pardon granted to an Indian Activist by the name Gouuru Venkata Reddy, who was sentenced to 10 years imprisonment for killing two people. An appeal filed by the sons of the deceased subsequently came before the Indian Supreme Court and in a landmark ruling, the court overturned the pardon granted by the then Governor of Andhra Pradesh, Sushil Kumar Shinde paving the way for the entrance of judicial review into the Indian pardoning process.⁹¹ While delivering its judgment, the court said;

Rule of Law is the basis for evaluation of all decisions (by the court) ...That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent.⁹²

A member of the Court, Justice Kapadia, while concurring with the lead judgement delivered by Hon. Justice Pasayat, opined thus;

The exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of

⁸⁸ AIR 1974 SC 2192 60.

⁸⁹ Ibid.

⁹⁰ 1985 AIR 724.

⁹¹ Ibid.

⁹² Ibid.

official duty...the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future. An undue exercise of this power is to be deplored.⁹³

The place of judicial review later became a settled law in the Supreme Court of India's decision in *Epuru Sudhakar & Anor v Government of Andhra Pradesh & Ors*,⁹⁴ where the court held that, "clemency is subject to judicial review and it cannot be dispensed as a privilege or act of grace".⁹⁵ The court further stated that;

The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds: (a) that the order has been passed without application of mind; (b) that the order is mala fide; (c) that the order has been passed on extraneous or wholly irrelevant considerations; (d) that relevant materials have been kept out of consideration; (d) that the order suffers from arbitrariness".⁹⁶

Also, in *Kuljit Singh v Lt. Governor of Delhi*,⁹⁷ which was an earlier matter it was held that the Indian President's power under Article 72 will be examined on the facts and circumstances of each case, and the court has the power of judicial review even on a matter which has been vested by the Constitution solely in the Executive.⁹⁸ It is instructive to

⁹³ Ibid.

⁹⁴ (2006) 1 NSC 638 SC.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ (1982) AIR 774, 1982 SCR (3) 58.

⁹⁸ Ibid; A similar reasoning was applied in *in Maru Ram v Union of India*, the Supreme Court while delivering judgement on the validity of 433A of the India Code of Criminal Procedure, said, "*Pardon using this expression in the amplest connotation, ordains fair*

state that a principle that greatly enabled the Indian experience above is the need to protect the fundamental rights of persons subjected to the criminal justice system.⁹⁹ In this regard, the Indian Supreme Court has spoken strongly in support of the right to life and personal liberty as two rights that must be vigilantly protected.¹⁰⁰ Hence, in order to better secure these rights, which are usually at the core of every pardoning process, it is important that the exercise of this power is subject to further approval by another branch of the same standing as the Executive.¹⁰¹

Conclusion

The basis of vesting pardoning power in the hands of a sole individual, usually the President is for the purpose of efficiency and accountability with respect to the exercise thereof.¹⁰² However, it has been established that this notion is grossly misplaced as this privilege has been abused. The Nigerian experience is not different from what has taken place in other presidential systems. It is on this basis that India’s constitutional development in this area, is a veritable example for Nigeria to follow. This paper has critically analysed the huge potentials for abuse in the current

exercise, as we indicated above. Political vendetta or party favouritism cannot but be interlopers in this area. The order which is the product of extraneous or mala fide factors will vitiate the exercise...For example, if the Chief Minister of State releases everyone in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the Constitution to let such madness survive”. See also Kehar Singh v Union of India, (1989) AIR 1989 SC 653; Nine years later, in Swaran Singh v State of Uttar Pradesh, (1998) 4 SCC 75, a similar decision was reached when the Indian Supreme Court reversed an order by the Governor of the State of Uttar Pradesh, and in so doing held that; “We cannot accept the rigid contention of learned counsel for the third respondent that this court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it”.

⁹⁹ S Verma and A Prasad, “Article 72: Pardoning Power not Unbridled” (2018) 4 *International Journal of Law* 277 – 279.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² KH Fowler, ‘Limiting the Federal Pardon Power’ (2008) 83 *Indiana Law Journal* 1652 – 1669.

Nigerian framework, while also positioning side by side the wealth of ideas that can be tapped from the Indian system.

It is sufficient to support the conclusion that though the grant of pardon is final once the President exercises his powers in this regard, for the development of Nigeria's constitutional framework, it is important for persons so affected to challenge such grant in a court of competent jurisdiction asking for a judicial review. This is pre-eminently the time to put the law to test in this area, in order to ensure the proper functioning of the entire pardoning framework.