

## THE PRESIDENTIAL PARDON GRANTED CHIEF D. S. P. ALAMIEYESEIGHA: TIME TO REVISIT THE PRESIDENT'S PARDONING POWER UNDER SECTION 175 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED).

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### ABSTRACT

Pardoning power is recognised and granted in almost every civilised society to the executive arm of government to be exercised in deserving cases. Section 175(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) confers the pardoning power on the President in respect of federal offences and makes him the ultimate judge of the entitlement of any person to be granted pardon. It is argued that although the presidential pardon granted Chief D. S. P. Alamiyeseigha in respect of his conviction for corrupt practices and money laundering does not offend the strict letters of s. 175(1) of the 1999 Constitution (as amended), such exercise could jeopardise the performance by the State of the sacred duty imposed upon it by the self-same 1999 Constitution to abolish corrupt practices and abuse of power. Given the corrosive and disruptive impacts of corruption on Nigeria's economy and the development of her infrastructure, an amendment is proposed to s. 175(1) of the 1999 Constitution to remove the power of the President to grant pardon to any person convicted of corrupt practices. The proposed amendment will enhance the capacity of the State to perform its sacred constitutional duty of abolishing corrupt practices and abuse of power in the federation of Nigeria.

**KEYWORDS:** Presidential Pardon, Prerogative of Mercy, Constitutional Interpretation, Corrupt Practices, and Money Laundering.

### INTRODUCTION

The pardon granted Chief D. S. P. Alamiyeseigha, former Governor of Bayelsa State, by former President Goodluck Jonathan pursuant to s. 175 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)<sup>536</sup>, has continued to elicit sharp reactions from well-meaning Nigerians and interest groups across the federation.<sup>537</sup> Following his impeachment as the Governor of Bayelsa State by the Bayelsa State House of Assembly on 9 December 2005, Chief D. S.P. Alamiyeseigha was arrested by the Economic and Financial Crimes Commission (EFCC) on allegations of corrupt practices and money laundering. The conclusion of investigation by the EFCC led to his arraignment before the Federal High Court Lagos on a six-count charge of corrupt practices and money laundering. He pleaded guilty to the six-count charge and was accordingly convicted and sentenced by the trial court in July 2007 to two years in prison on each count of the charge. Several of his assets were also ordered to be forfeited to the government of Bayelsa State.<sup>538</sup> It was in respect of the said conviction for corrupt practices and money laundering that former President Goodluck Jonathan granted Alamiyeseigha pardon on March 12 2013.

The condemnation of the presidential pardon has been predictably fierce and critics have relied on several grounds to support their outrage. For instance, the former President was accused of abusing the exercise of a sacred constitutional power for the undeserved benefit of his former political boss whom he recently described as his 'political benefactor'.<sup>539</sup> There is also the alleged claim by certain members of the Council of State that they were not availed of the memorandum requesting pardon for Alamiyeseigha until they were seated at the council

<sup>536</sup> Cap. 123 Laws of the Federation of Nigeria, 2004.

<sup>537</sup> Four retired military officers and two other civilians were also granted pardon alongside Alamiyeseigha by President Jonathan, see 'How Pardon was Granted to Alamiyeseigha, Others' *ThisDayLive* (Lagos 14 March 2013) <<http://www.thisdaylive.com/articles/how-pardon-was-granted-to-alamiyeseigha-others/142114/>> accessed 18 June 2013.

<sup>538</sup> Alamiyeseigha was earlier arrested and detained by the London Metropolitan Police in September 2005 over similar allegations of money laundering.

<sup>539</sup> Mike Odiegwu, 'Alamiyeseigha, my political benefactor-Jonathan' *Nigerian Punch* (Lagos 11 December, 2012) <<http://www.punchng.com/news/alamiyeseigha-my-political-benefactor-jonathan/>> accessed 18 June 2013; President Goodluck Jonathan had served as the deputy governor of Bayelsa State during Alamiyeseigha's tenure as governor.

meeting of March 12 2013 and that the presentation of the matter by the former President was ‘done in a manner that left no room for discussion.’<sup>540</sup>

The federal government on its part has attempted to justify the pardon on the ground that Alamiyeseigha has shown sufficient remorse after serving his jail term and deserved reintegration into the society. It was further claimed that Alamiyeseigha has enormous political influence in the Niger delta region which he has deployed and could still deploy in assisting the federal government to stabilise the amnesty programme. According to one of the presidential aides, Alamiyeseigha’s contribution in this regard has ‘impacted positively on the overall economy of the nation, bringing crude oil exports from the abysmally low level of 700,000 bpd to over 2.4million bpd.’<sup>541</sup>

The purpose of this article is to examine whether the exercise of the President’s pardoning powers under s.175 of the 1999 Constitution (as amended) is circumscribed by moral considerations or other extraneous factors not imposed by the constitution itself. Put differently, the central question addressed in this article is whether there is any class of convicts which cannot enjoy the president’s prerogative of mercy under the existing constitutional provisions? Deriving from the conclusion that all classes of offenders including those convicted of corrupt practices could enjoy presidential pardon and given the debilitating impact of corruption on the Nigerian economy, the article argues that it has become necessary to amend s. 175 of the 1999 Constitution (as amended) to remove the power of the President to grant pardons to persons convicted of corrupt practices. The proposed amendment will reposition the State to perform its sacred constitutional duty to abolish all corrupt practices and abuse of power throughout the federation and thereby reverse the retarded economic and infrastructural growth which the country has been experiencing since the end of colonial rule.

The article is divided into five sections. The introductory section summarised the background to the presidential pardon granted to Alamiyeseigha and the controversies it has generated. The nature and effect of a pardon and the history of the exercise of pardoning powers in different jurisdictions are examined in section two while section three treats the scope and ambit of the pardoning power of the President under s. 175 (1)(a) of the 1999 Constitution (as amended). In the light of the discussion in the preceding sections, section four of the article focuses on the constitutionality or otherwise of Alamiyeseigha’s presidential pardon. It is argued that while the pardon accords with the strict letters of s. 175 of the 1999 Constitution (as amended), it could jeopardize the performance by the State of the duty imposed upon it by s. 15(5) of the same constitution to abolish all corrupt practices and abuse of power. In the light of the discussion, the section proposes an amendment to s. 175(1)(a) of the 1999 Constitution. The concluding remarks are contained in section five.

#### **MEANING, NATURE AND LEGAL EFFECT OF A PARDON**

A pardon is a species of clemency. Clemency or leniency denotes varying species of mercy extended by the executive arm of government to persons concerned with or convicted of criminal offences whereby the punishments prescribed by law for the offences in respect of which they are convicted are obliterated, mitigated or suspended. The other species of clemency are amnesty, respite, remission, and commutation.<sup>542</sup>

According to Coke, a ‘pardon is a work of mercy whereby the King either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution. . . temporal or ecclesiastical.’<sup>543</sup> The words of Coke re-echoed in *United States v. Wilson*, where Chief Justice Marshall delivering the opinion of the Supreme Court of the United States of America declared that: “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.”<sup>544</sup> Chief Justice Marshall further declared that a

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<sup>540</sup>ThisDayLive (n2); see also Yemi Adebawale, ‘US Condemns Presidential Pardon for Alamiyeseigha’ ThisDayLive (Lagos 16 March 2013) <<http://www.thisdaylive.com/articles/us-condemns-presidential-pardon-for-alamiyeseigha/142294/>> accessed 18 June 2013; Olusola Fabiyi and Olalekan Adetayo, ‘Outrage over presidential pardon for VIP ex-convicts’ *Nigeria Punch* (Lagos 13 March 2013) <<http://www.punchng.com/news/outrage-over-presidential-pardon-for-vip-ex-convicts/>> accessed 16 June 2013; Mike Ikhariale, ‘The law and politics of a pardon’ *Nigeria Punch* (Lagos 24 March 2013) <<http://www.punchng.com/columnists/trivia-constitutional/alamiyeseigha-the-law-and-politics-of-a-pardon/>> accessed 16 June 2013.

<sup>541</sup> Olusola Fabiyi Chukwudi Akasike and Mike Odiegwu, ‘Ikimi, others blast Jonathan for Alamiyeseigha’s pardon’ *Nigeria Punch* (Lagos 15 March 2013) <<http://www.punchng.com/news/ikimi-others-blast-jonathan-for-alamiyeseigha-s-pardon/>> accessed 16 June 2013.

<sup>542</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 175(1); Daniel T. Kobil, ‘The Quality of Mercy Strained: Wrestling the Pardoning Power from the King’ (1990-91) 69 Tex. L. Rev. 569, 575; sometimes, the term ‘pardon’ is used in its generic sense to refer to the various forms of clemency, see Stanley Grupp, ‘Historical Aspects of the Pardon in England’ (1963) 7 Am. J. Legal Hist. 51.

<sup>543</sup> E. Coke, *The Third Part of the Institutes of the Laws of England* (4<sup>th</sup> edn., London 1669) 233.

<sup>544</sup> 32 U. S. 150 (1833) 161.

pardon was not complete without its acceptance by the convict and that if it was rejected by the convict there was 'no power in a court to force it on him'.<sup>545</sup>

However, in the latter decision of the U. S. Supreme Court in *Biddle v. Perovich*,<sup>546</sup> the court stated that the exercise of the pardoning powers vested in the U. S. President under Article II, §2 of the U. S. Constitution 1787 was not a mere private act of grace, but rather an integral part of the constitutional scheme and that the acceptance of a pardon by the offender was not essential to its validity.<sup>547</sup>

Case law is replete with pronouncements on the effect of a pardon. In *Ex-parte Garland* the U. S. Supreme Court (per Mr. Justice Field) declared the effect of a pardon thus:

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities and restores him to all his rights; it makes him, as it were, a new man and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment.<sup>548</sup>

The law in Nigeria on this point is identical. In *Olu Falae v. Obasanjo (No. 2)*, Musdapher, J. C. A., (as he then was) declared that:

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 1<sup>st</sup> respondent was to suffer because of his conviction, has been wiped out. His full civil rights and liberties are fully restored and accordingly he has not been caught by the provisions of section 13(1) (h) of the Decree.<sup>549</sup>

Clearly, a pardon not only wipes out the legal effect of a conviction but also restores the offender to the same legal status which he had enjoyed prior to the conviction. It vitiates guilt for the offence 'so that in the eye of the law' the offender 'is as innocent as if she had never been charged or convicted'.<sup>550</sup> Indeed a pardon obliterates the existence of the conviction in the eye of the law thus creating the legal fiction that although the conviction to which the pardon relates may still exist in fact, it does not exist in law.<sup>551</sup> Thus, for all practical purposes, a pardoned convict is deemed never to have suffered the conviction to which his pardon relates.

The effect of a pardon on the administration of criminal justice is far reaching. A pardon affords a complete defence in criminal law and may be pleaded in bar to a new charge founded upon the same facts. Thus, s. 36 (10) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that 'No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.' Similarly, s. 221(1)(b) of the Criminal Procedure Act provides that any accused person against whom a charge or information is filed may plead that he has obtained a pardon for his offence.<sup>552</sup> If the plea is proved by the accused to the satisfaction of the trial court through the production of the instrument of pardon, the court must sustain it and dismiss the charge or information and acquit the accused accordingly.<sup>553</sup>

### **HISTORY OF PREROGATIVE OF MERCY**

Pardon has evolved as a royal prerogative and its use in England is deep-rooted in history. It would appear that the first clear evidence of a legislative provision conferring pardoning powers during the Anglo-Saxon era was contained in the laws of King Ine of Wessex, 688-725. Section 6 of that law stated that 'If any one fights in the King's house, let him be liable in all his property, and be it in the King's doom whether he shall or shall not have life.' Section 36 of the same law provided that 'Let him who takes a thief, or to whom one taken is given, and he

<sup>545</sup> Wilson's Case (n9) 162.

<sup>546</sup> 274 U. S. 480, 486 (1927).

<sup>547</sup> Perovich's case (n11) 486.

<sup>548</sup> 71 U. S. 333, 381 (1866).

<sup>549</sup> [1999] 4 N. W. L. R. (Pt. 599) 476, 495.

<sup>550</sup> Kobil (n7) 596.

<sup>551</sup> Ex Parte Garland (n13).

<sup>552</sup> Cap. C41, LFN 2004; see also s. 221(1)(b) of the Criminal Procedure Law, Cap.38 Laws of Rivers State of Nigeria 1999.

<sup>553</sup> *Okongwu v. State* [1986]5 NWLR (Pt.44) 721 @ 740.

then lets him go, or conceals the theft, pay for the thief according to his “wer.” If he be an “ealdorman”, let him forfeit his shire, unless the King is willing to be merciful to him.<sup>554</sup>

Although originally pardoning powers were not exercised exclusively by the King as other authorities including the clergy, the great earls and feudal courts also exercised similar powers, following the seizure of the pardoning powers by King Henry VIII in 1535, Parliament passed an Act granting the King the sole authority to pardon or remit treasons, murders, manslaughters, felonies or outlawries.<sup>555</sup>

Historically, the development of the prerogative of mercy in England was strongly linked with mercy. Mercy is an act of compassion shown by one person to another which relieves the latter of the harsh treatment or punishment that he deserves. Mercy may also be defined as ‘the benevolent treatment of an offender.’<sup>556</sup> Thus, to ‘be merciful is to treat a person less harshly than, given certain rules, one has a right to treat that person.’<sup>557</sup> The essence of mercy is to mitigate the punishment which an offender deserves by committing the offence charged. Therefore in ‘being merciful’ writes Card, ‘we reduce or withhold a penalty which was initially thought to be justified at least in part on the basis of the offender’s desert for having committed an offence.’<sup>558</sup>

Mercy differs from forgiveness in that ‘forgiveness is an attitude’ while ‘mercy is an action.’<sup>559</sup> Given that forgiveness is the foreswearing of resentment, it has been pointed out that only ‘the injured party has the standing to forgive a wrongdoer’s actions.’<sup>560</sup> In other words, while forgiveness flows from the victim of crime and is personal to him, mercy on the other hand, occurs independently of the victim of crime and is dispensed in modern states by the executive arm of government. Mercy also differs from justice because it ‘inheres in individuals while justice is a function of institutions.’<sup>561</sup>

The history of the English legal system shows that as early as the ‘eleventh century, mercy was the prerogative of rightful authorities, most importantly the King, whose chief duty was to keep the peace.’<sup>562</sup> The power of the King to dispense mercy was recognised by Blackstone who stated that: “The King himself condemns no man; that rugged task he leaves to his courts of justice; the great operation of his sceptre is mercy.”<sup>563</sup>

According to Trotter, the power to exercise mercy was viewed as an incident of the King’s power to define and prescribe appropriate punishment for each wrong doing.<sup>564</sup> This power derived from the notion that all criminal offences constituted breaches of the King’s peace and therefore offences against the King. Accordingly, the power to show compassion in appropriate cases inured to the King. Those who were convicted of wrong doings by the Judges of the King’s courts would therefore look upon the King to show them mercy or compassion by mitigating or relieving them of the punishment which the law prescribed. However, the exercise of that power has not gone unchallenged by philosophers.<sup>565</sup> Interestingly, although the King has the unquestionable power to dispense mercy, no offender has a legal right to mercy. As Murphy put it:

Mercy is never owed to any one as a right or a matter of desert or justice. It always transcends the realm of strict moral obligation and is best viewed as a free gift— an act of grace, love or compassion that is beyond the claims of right, duty and obligation.<sup>566</sup>

<sup>554</sup> See B. Thorpe, *Ancient Laws and Institutes of England, The Commissioners on the Public Records of the Kingdom Vol. I* (Printed by Command of King William IV, 1840) 107 cited in Grupp (n7) 53.

<sup>555</sup> 27 Henry VIII c. 24 cited in Grupp (n7) 55-56.

<sup>556</sup> Alwynne Smart, ‘Mercy’ (1968) XLIII *Philosophy* 345, 358.

<sup>557</sup> J. G. Murphy and J. Hampton, *Forgiveness and Mercy* (Cambridge University Press, New York 1988) 21 cited in Gary T. Trotter, ‘Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review’ (2000-2001) 26 *Queens L. J.* 339, 345; see also Paul Whitlock Cobb, Jr., ‘Reviving Mercy in the Structure of Capital Punishment’ (1989) *Yale Law Journal* 389, 390-1.

<sup>558</sup> Claudia Card, ‘On Mercy’ (1972) 81 *Philosophical Review* 182, 183.

<sup>559</sup> N. Walker, *Why Punish?* (OUP, Oxford 1991) 115.

<sup>560</sup> Trotter (n22) 345.

<sup>561</sup> Cobb (n22) 389.

<sup>562</sup> Carla Ann Hage Johnson, ‘Entitled to Clemency: Mercy in the Criminal Law’ (1991) 10 *Law and Philosophy* 109, 111.

<sup>563</sup> William Blackstone, *Commentaries on the Laws of England of Public Wrongs* (Beacon Press, Boston 1962) 466.

<sup>564</sup> Trotter (n22) 349.

<sup>565</sup> For instance Kant had warned that by exercising the power to show mercy, the King can ‘demonstrate the splendour of his majesty and yet thereby wreak injustice [unrecht] to a high degree.’ See I. Kant, *The Metaphysical Elements of Justice* (Bobbs-Merill, Indianapolis 1965) 107-8

<sup>566</sup> Murphy and Hampton (n27) 166; this view is supported by the decision in *de Freitas v. Benny* [1976] A.C. 239, 247 where the court held that ‘Mercy is not the subject of legal rights. It begins where legal rights end.’ Thus, those who desired the King’s mercy could only hope that the King, like God, will be fair and just in dispensing mercy.

It has been argued by Trotter that whether a pardon is based on mercy or not depends on the motivation behind it. The mitigation of punishment is only merciful ‘when the person extending the mercy acts out of pity or compassion for the wrongdoer.’<sup>567</sup> Therefore, if ‘the decision to grant mercy is based on a concern that the conduct of the wrongdoer was justifiable or excusable, this falls outside of the ambit of mercy.’<sup>568</sup> This view is shared by Moore who argued that any motivation other than mercy ‘changes the nature of the act.’<sup>569</sup>

It is submitted that while mercy remains the primary ground for the exercise of the pardoning powers, the validity of a pardon cannot be vitiated on the ground that it was motivated by considerations other than mercy. In other words, apart from mercy, the grant of pardon has been justified on other grounds. There is authority for the view that pardon can be utilised as an instrument of equity ‘in criminal laws, a means of preventing injustice and ensuring fairness for those wrongly convicted or harshly sentenced.’<sup>570</sup>

Secondly, given that no system of administration of criminal justice is insulated from deficiencies, the pardoning power has also been utilised to fill perceived gaps in the criminal law. In *Ex- parte Law*, the court stated that ‘the very nature and necessity of such an authority in every government arises from the infirmities incident to the administration of human justice.’<sup>571</sup>

Thirdly, the pardoning power has been utilised to protect public interest or welfare. This could arise where public interest demands a mitigation of the punishment imposed on an offender who had committed the offence as an act of patriotism.<sup>572</sup> Public interest can also be protected through grant of a pardon to an accomplice who has agreed to give evidence that would incriminate a co-accused person.<sup>573</sup>

Pardons had also been granted in times of war to persons convicted of felonies if they agreed to serve in the King’s army for one year at their own cost. It has been suggested that through this generous use of the pardoning power, the King was able to increase the size of his military force and thereby defended the realm.<sup>574</sup> Successive Presidents of the United States have also granted pardons to convicts on condition of joining the Navy of the United States.<sup>575</sup>

However, the above grounds are not by any means exhaustive. Indeed clemency ‘has long been considered an extraordinary remedy that can be extended for virtually any reason, whenever mercy, expediency or personal whim dictated.’<sup>576</sup> History teaches us that pardons have been granted by political leaders across jurisdictions for a variety of reasons including using them as means of maintaining their grip on political power and/or protecting their loyal servants and associates.<sup>577</sup> Cases of blatant abuse of pardoning powers including sale of pardons have also been recorded.<sup>578</sup>

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<sup>567</sup> Trotter (n22) 346.

<sup>568</sup> Trotter (n22) 346.

<sup>569</sup> K. D. Moore, *Pardons: Justice, Mercy and the Public Interest* (Oxford University Press, New York 1989) 188.

<sup>570</sup> Johnson (n27) 114; see also *In the Matter of Flourney* 1 Ga. 606, 607 (1846); *Ex-parte Grossman* 267 U. S. 87 (1925).

<sup>571</sup> 15 F. Cas. 3 (D. C. Ga. 1866) (No.8126); *State v. Alexander* 76 N. C. 231, 234 (1877); Hamilton had defended the inclusion of the pardoning power in the U. S. Constitution during the Continental Congress at Philadelphia on the ground that the ‘criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.’ See, Alexander Hamilton, ‘The Federalist No. 74’ p.327.

<sup>572</sup> For instance, Horatio who killed her sister on the ground that she grieved over the death of an enemy of Rome to whom she was betrothed, rather than rejoice over the victory of the Roman soldiers was ‘pardoned by the citizenry because of his patriotism.’, see Kobil (n7) 584-5.

<sup>573</sup> Moore (n34) 199-200.

<sup>574</sup> Pike Luke Owen, *History of Crime in England, Volume I* (Smith, Elder & Co. London 1873) 294-5 cited in Grupp (n7) 58.

<sup>575</sup> Kobil (n7) 593.

<sup>576</sup> Kobil (n7) 578.

<sup>577</sup> The most historic instance of the exercise of the pardoning power under Roman law—Pilate’s pardon of Barabas, rather than Jesus epitomises the Romans’ propensity to use pardons ‘often and skilfully for their personal ends.’, see More (n34) 17; In relation to England, Blackstone had observed that acts of mercy ‘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.’ See Blackstone (n28) 398; Coke made precisely the same point when he noted that ‘mercy and truth preserve the King, and by clemency is his throne strengthened.’ See Coke (n8) 233; the grant of pardon by King Charles II of England to Thomas Osborne, the

Arguably, the incident of abuse associated with the exercise of the pardoning powers had necessitated some forms of restriction. The earliest evidence of restraint placed on the King's pardoning powers in England can be found in the Statute of Northampton of 1328 which prescribed a general limitation requiring 'the King not to grant a pardon except where it was consistent with his oath.'<sup>579</sup>

Furthermore the constitutional crisis generated by the grant of pardon to Thomas Osborne by King Charles II of England had emboldened Parliament to enact several Acts limiting the scope of the King's royal prerogative of mercy. First, the Habeas Corpus Act 1679 prohibited the grant of pardon to any person convicted of causing other persons to be imprisoned outside England and thereby depriving them of the protection guaranteed by the Habeas Corpus Act.<sup>580</sup> Secondly, by the Act of Settlement of 1701, Parliament successfully removed pardon as a bar to impeachment thus making it legally impossible for the King to grant pardon primarily for the purpose of aborting impeachment proceedings in Parliament. Finally, in 1721, Parliament granted to itself the power to grant pardon by legislative act.<sup>581</sup>

The result is that the royal prerogative of mercy now exercised by the Crown on the advice of the Home Secretary in cases from England and Wales and, in cases from Scotland, by the Scottish Ministers, has been considerably whittled down. The current practice in Britain is that a 'pardon is granted only after conviction when there is some special reasons a sentence should not be carried out or why the effects of a conviction should be expunged.'<sup>582</sup>

Although the exercise of the pardoning power in the United States of America has also been motivated by justice-enhancing and justice-neutral considerations, attempts by the U. S. Congress to restrict the ambit of the President's pardoning powers under Article II, §2 of the U. S. Constitution 1787 has been largely unsuccessful due to the liberal interpretation adopted by the U. S. Supreme Court. In *Ex parte Grossman* where the sole issue raised on the pleadings was the power of the President to grant pardon in respect of a conviction for criminal contempt not being an offence created by an Act of Congress, the Supreme Court held that there was nothing in the U. S. Constitution to support a restrictive interpretation of the powers of the American President to pardon a conviction for criminal contempt. The Court rejected the contention that the exercise of such powers would violate the constitutional principle of separation of powers and the independence of the federal courts.<sup>583</sup>

This liberal approach to the interpretation of the pardoning prerogative of the U. S. President was maintained by the U. S. Supreme Court in *Ex-parte Garland*, where Justice Field declared that:

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.<sup>584</sup>

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Lord High Treasurer of England in order to frustrate Osborne's impeachment by parliament demonstrated how the power could be used to protect the King's servants.

<sup>578</sup> King Richard II of England was known to have granted pardons to willing recipients in consideration of payment of large sums of money and the King reserved the power to revoke such pardons at his pleasure in order to extort more money from the recipients, see Grupp (n7) 59; similar cases of blatant abuse of pardoning powers have also been recorded in the United States where Governor J. C. Walton of the State of Oklahoma was impeached for selling pardons. See generally, The Attorney General's Survey of Release Proceedings, Pardons, Volume III (United States Government Printing Office, Washington, D. C. 1939) 150-3.

<sup>579</sup> 2 Edward III, c. 2, (1328).

<sup>580</sup> 31Car. 2, ch. 2, s.11; Grupp (n7) 57.

<sup>581</sup> Geo. 1, ch. 29, (1720) cited in Grupp (n7) 57.

<sup>582</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (Pearson Education Limited, Edinburgh 2007) 415.

<sup>583</sup> *Grossman's Case* (n35).

<sup>584</sup> *Ex- parte Garland* (n13) 380; see also *Schick v. Reed* 49 U. S. 256, 266 (1974).

It is clear from the foregoing pronouncements of the U. S. Supreme Court that the pardoning prerogative of the President can be exercised conditionally or unconditionally in respect of all offences except impeachment, either before or after conviction and for any reason. The pardoning power is thus placed beyond any form of legislative control by the U. S. Congress. However, the only extra-constitutional limitation to the operation of the pardoning power recognised in the *Garland's case* is that a pardon 'does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment.'<sup>585</sup>

A related issue which has arisen in the U. S. is whether the courts could limit the exercise of the President's pardoning powers by way of judicial review in the event of a blatant abuse by the President. This issue was addressed by the U. S. Supreme Court in *Ex-parte Grossman* where Chief Justice Taft after expressing the view that the constitution conferred the pardoning power on the President 'in confidence that he will not abuse it', declared that if the power were abused, the remedy would be 'resort to impeachment rather than to a narrow and strained construction of the general powers of the President.'<sup>586</sup>

However, this is not to say that the courts will decline to exercise the power of judicial review in appropriate cases. For instance, it would appear that in granting a conditional pardon, the President cannot attach a condition which blatantly offends the provisions of the constitution. This limitation can be gleaned from the judgment in *Schick v. Reed* where the court observed that the executive is free to attach any condition to the pardon 'which does not otherwise offend the Constitution.'<sup>587</sup> This reasoning finds support in the case of *Burdick v. United States*<sup>588</sup> where the Supreme Court upheld the plaintiff's right to refuse a presidential pardon granted for the sole purpose of compelling the plaintiff to testify in a case in which he had asserted his right against self-incrimination. According to the court, since both the pardoning power and the right against self-incrimination under the Fifth Amendment 'have sanctions in the Constitution' it should be 'the anxiety of the law to preserve both — to leave to each its proper place.'<sup>589</sup>

The power of judicial review of the President's pardoning power by the courts is fairly established in Indian public law.<sup>590</sup> The rationale for judicial review of the pardoning power derives from the principle that all public power, including constitutional power 'shall never be exercisable arbitrarily or *mala fide*' and that 'guidelines for their fair and equal execution are the guarantors of the valid play of power.'<sup>591</sup> Thus, the Indian courts take the view that since the mercy power vested in the executive is derived from the Indian Constitution 1950 and other relevant criminal legislation, its exercise cannot escape the scrutiny of the courts at the instance of an aggrieved party.

In *Swaran Singh v. State of Uttar Pradesh*,<sup>592</sup> the Constitution Bench of the Indian Supreme Court in quashing the order of remission granted by the Governor of Uttar Pradesh 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.<sup>593</sup>

The varying circumstances which may justify judicial review of pardoning power have been articulated in decisions of the Indian Supreme Court. In *Saipal & Anor v. State of Haryana & Ors*,<sup>594</sup> the Court held that the power of granting pardon under Article 161 of the Indian Constitution 1950 being a constitutional power is amenable to judicial review if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is *mala fide* one or the Governor has passed the order on some extraneous considerations.

In *Epuru Sudhakar v. Government of Andhra Pradesh*,<sup>595</sup> the court defined the scope of its power of judicial review over exercise of pardoning powers as follows:

<sup>585</sup> *Ex-parte Garland* (n13) 381; see also *Knote v. United States* 95 U. S. 149, 154 (1877).

<sup>586</sup> *Grossman* (n35) 121.

<sup>587</sup> *Schick's Case* (n49) 266.

<sup>588</sup> 236 U. S. 79 (1915).

<sup>589</sup> *Burdick* (n53) 93-4.

<sup>590</sup> Articles 72 and 161 of the Indian Constitution 1950 confer clemency powers on the President and State Governors respectively.

<sup>591</sup> *Maru Ram v. Union of India* [1981 (1) SCC 107]; see also *Kehar Singh v. Union of India* [1989 (1) SCC 204].

<sup>592</sup> [1998] (4) SCC 75.

<sup>593</sup> *Singh* (n57) 90.

<sup>594</sup> [2000 (5) SCC 170].

<sup>595</sup> Writ of petition (crl.) 284-285 of 2005, judgment delivered on 11/10/2006.

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; (e) that the order suffers from arbitrariness.<sup>596</sup>

It is submitted that the grounds for judicial review formulated in the above cited decisions of the Indian Supreme Court are by no means exhaustive. Each case will depend on its own peculiar facts and circumstances. Thus, as new circumstances are presented in individual cases as grounds for impugning clemency granted by the executive, the court will examine such exercise with a view to ascertaining whether the condition precedent was satisfied or whether it is consistent with public interest or welfare, the reformation of the offender and/or justice for the victim of the offence concerned.

It has also been decided by the English Court in *R v. Secretary of State for Home Department; Ex-parte Bentley*<sup>597</sup> that since the exercise of the prerogative power was an important feature of the criminal justice system, any exercise thereof which was infected with legal errors would not be immune from judicial review. A similar pronouncement was made by the New Zealand Court in *Burt v. Governor-General*<sup>598</sup> where Cooke P, observed that the need for judicial review of the exercise of prerogative power derived from the fact that the prerogative of mercy is not 'an arbitrary monarchical right' but 'an integral element in the criminal justice system; a constitutional safeguard against mistakes.'<sup>599</sup>

It can be concluded that judicial review of the exercise of the pardoning powers may be justified where there is a breach of relevant constitutional or statutory provisions or where the grant of pardon by the President relates to a conviction entered in respect of an offence created by state law or the condition attached to a pardon is palpably unconstitutional.

#### **SCOPE OF THE PRESIDENT'S PARDONING POWERS UNDER S. 175 OF THE 1999 CONSTITUTION (AS AMENDED)**

The powers of the President of the Federal Republic of Nigeria to grant pardon are derived from s. 175 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides as follows:

Section 175 - (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 any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;
- (c) substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or
- (d) remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.

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

(3) The President, acting in accordance with the advice of the Council of State, may exercise his 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.<sup>600</sup>

It is submitted that the above quoted provisions of s. 175(1) (a) which deal with the grant of pardon read together with s. 175(2) of the 1999 Constitution are clear and unambiguous. The provisions should therefore be interpreted literally without recourse to any of the known principles of statutory interpretation which are merely presumptions in cases of ambiguity in the body of the statute under consideration.<sup>601</sup> In other words, it is settled law that once the words of a statute (including the constitution) are clear and unambiguous, they ought to be

<sup>596</sup> Eperu's case (n60).

<sup>597</sup> (1993) 4 All E. R. 442.

<sup>598</sup> [1992] 3 NZLR 672.

<sup>599</sup> Burt's case (n63) 678.

<sup>600</sup> Similar provisions were contained in s. 94 of the Constitution of the Federation of Nigeria 1960; s. 101 of the Constitution of the Federation of Nigeria 1963; and s. 161 of the Constitution of the Federal Republic of Nigeria 1979.

<sup>601</sup> *National Bank of Nigeria Ltd v. Weide & Co. (Nig.) Ltd.* [1996]8 NWLR (Pt. 465) 150 @ 165.



accorded their simple grammatical meaning.<sup>602</sup> In *Mobil Oil (Nigeria) Limited v. Federal Board of Inland Revenue*<sup>603</sup> the Supreme Court, per Bello, J.S.C. (as he then was) stated the principle thus:

The general rule for construing a statute has been stated by this court in a number of cases. The rule is: where the words of a statute are clear the court shall give effect to their literal meaning. It is only when the literal meaning may result in ambiguity or injustice that the court may seek internal aid within the body of the statute itself or external aid from statutes *in pari materia* in order to resolve the ambiguity or avoid doing injustice...<sup>604</sup>

It is my considered view that a literal construction of the provisions under reference clearly supports the following interpretations:

First, the President has the express constitutional powers to grant pardon and other forms of clemency.

Second, the President may grant pardon only to persons either concerned with or convicted of an offence created by an Act of the National Assembly. The President therefore has no power to grant pardon to persons concerned with or convicted of an offence created by a State law. Such power is exercisable only by the Governor of a State pursuant to s. 212 of the 1999 Constitution (as amended);

Third, the phrase 'concerned with or convicted of any offence created by an Act of the National Assembly' within the contemplation of s. 175(1)(a) of the 1999 Constitution implies that the President may exercise the powers 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.<sup>605</sup> Thus, prior conviction for an offence created by an Act of the National Assembly is not necessarily a *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 taken place;

Fourth, the powers of the President to grant pardon extend to all offences created under federal laws without exception. Put differently, there is no class of offences that is beyond or excluded from the President's pardoning powers however socially reprehensible it might be. By the same token, all classes of offenders may benefit from the President's prerogative of mercy as a matter of constitutional grace. Thus, moral considerations cannot be relied upon to restrict the ambit of the pardoning powers conferred on the President. It is submitted that if the Framers of the 1999 Constitution (as amended) had intended to exclude any class of offences or offenders from the ambit of the President's pardoning powers, they would have stated so expressly just as Article 2, §. 2 cl. 1 of the U. S. Constitution expressly prohibits the President from exercising his prerogative of mercy in impeachment cases.

Fifth, the foregoing interpretation of the scope of the President's pardoning powers is consistent with the settled principle of law that where the language of the constitution or statute is unambiguous, the court cannot in the exercise of its interpretative jurisdiction add to or subtract therefrom in order to make it conform with the Judge's own views of sound social policy. This principle has been restated by the Supreme Court of Nigeria in several of its decisions.<sup>606</sup> In *Buhari v. Yusuf*,<sup>607</sup> Tobi, J. S. C., expressed the principle lucidly thus: A court of law, in the exercise of its interpretative jurisdiction, must stop where the statute stops. A court of law has no jurisdiction to go beyond a clear and unambiguous provision by adding what the statute does not provide or intend to provide.<sup>608</sup>

The principle was restated by Iguh, J. S. C. in *Adisa v. Oyinwola*<sup>609</sup> as follows:

[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

<sup>602</sup> *Ogaga v. Umukoro* [2011] 18 NWLR (Pt. 1279)924 @ 949; *Elelu-Habeeb v. A.-G., Federation* [2012] 12 N. W. L. R. (Pt. 1318) 423 @ 491.

<sup>603</sup> [1977]3 SC 53.

<sup>604</sup> *Mobil Oil (Nigeria) Limited* (n68) 74; see also *Abubakar v. A.-G., of the Federation* [2007]3 NWLR (Pt. 1022)601 @ 636-637.

<sup>605</sup> See Y. V. Chandrachud (ed), *P. Ramanatha Aiyar's Advanced Law Lexicon* (3<sup>rd</sup> edition Lexis Nexis Butterworths Wadhwa Nagpur, New Delhi 2009)943 for the view that the equivalent phrase 'concerned in' is not a legal term but rather a colloquial expression, equivalent to "being engaged in, or taking part in" an activity; see also Dakas C. J. Dakas, 'Impunity, Necessary Evil or Strategic Imperative? The Question of Amnesty for Perpetrators of Kidnapping (and other crimes) in Nigeria's Niger Delta Region' (2011)7 Nigerian Bar Journal 184, 196.

<sup>606</sup> See *Abioye v. Yakubu* [1991]5 NWLR (Pt. 190) 130 @233; *Imah v. Okogbe* [1993]9NWLR 159 @195; *Jamal Steel Structures Ltd. v. African Continental Bank Ltd.* (1973) 11 S. C. 77 @ 85; *Board of Customs and Excise v. Barau* (1982) 10 S. C. 48 @ 130.

<sup>607</sup> [2003] 14 NWLR (Pt. 841) 446.

<sup>608</sup> *Buhari's case* (n72) 535-6.

<sup>609</sup> [2000] 10 NWLR (Pt. 674) 116.

it is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.<sup>610</sup>

It is submitted therefore that given the unambiguous language of s. 175(1)(a) of the 1999 Constitution (as amended) and the duty of the court to give the provision its ordinary and literal meaning, it can be concluded that no offence or offender is excluded from the reach of the President's mercy powers.

Sixth, the President may grant a pardon either free (unconditionally) or subject to lawful conditions. Arguably, the question whether a pardon was granted unconditionally or subject to lawful conditions is to be determined by reference to the instrument embodying it.<sup>611</sup> It is submitted that the reference to 'lawful conditions' within the meaning of s. 175(1) (a) of the 1999 Constitution (as amended) implies that the President cannot attach conditions to a pardon which derogate from other provisions of the self-same constitution as to make them unconstitutional.<sup>612</sup> For instance, if the President purports to grant a pardon to X on condition that X shall renounce his religious belief, such condition can be attacked as unconstitutional on the ground that it violates X's fundamental right to freedom of thought, conscience and religion guaranteed under s. 38 of the 1999 Constitution (as amended). Thus, for any condition attached to a pardon to be 'lawful', it must not violate any provisions of the 1999 Constitution (as amended) except such violation can be saved under s. 45(1) of the constitution.

Seventh, it is clear from s. 175(2) of the 1999 Constitution (as amended) that the powers conferred on the President under subsection (1) of the section, shall be exercised by him after consultation with the Council of State.<sup>613</sup> It is very arguable that the intendment of the Framers of the Constitution in subjecting the exercise of the President's pardoning powers to prior consultation with the Council of State is to place some restraints on the President's powers.<sup>614</sup> Clearly, the President cannot exercise his powers under s. 175(1) of the Constitution unilaterally without reference to the Council of State. In other words, there is a clear constitutional duty imposed on the President to consult the Council of State before exercising his pardoning powers under s. 175(1)(a) of the 1999 Constitution.

The peremptory character of the duty imposed on the President to consult the Council of State is conveyed by the use of the word 'shall' in s. 175(2) of the 1999 Constitution. It is trite law that the word 'shall' when used in a statute connotes peremptory duty or mandate which does not admit of any discretion by the party on whom the duty is imposed.<sup>615</sup> The law was well stated by Bello, JSC (as he then was) in his concurring judgment in *Ifezue v. Mbadugha* that 'Whenever a statute declares that a thing "shall" be done, the natural and proper meaning is that a peremptory mandate is enjoined.'<sup>616</sup> Although it is recognised in case law that the word 'shall' may also imply futurity, direction or permission,<sup>617</sup> it is submitted that having regard to the fact that the powers conferred on the President under s. 175 (1) of the 1999 Constitution are for the public good, a permissive interpretation of the duty imposed on the President to consult the Council of State will destroy the clear intendment of the Framers of the Constitution to limit or restrain the President's pardoning powers by means of consultation with the Council of State.

The precise role of the Council of State in the exercise of the President's pardoning powers will depend on the meaning to be placed on the phrase 'after consultation with the Council of State' which appears in s. 175(2) of the 1999 Constitution (as amended). Writing on the limitations placed on presidential action under the repealed Constitution of the Federal Republic of Nigeria 1979, Nwabueze had submitted that consultation with or advice by various executive bodies was a 'conspicuous device instituted by the Constitution for restraining presidential action.'<sup>618</sup> On the precise signification of the duty of the President to consult under the constitution, Nwabueze stated thus:

Consultation goes beyond merely giving information or announcing a decision already taken. It implies that an opportunity must be given to the person or body consulted to

<sup>610</sup> *Adisa's case* (n74) 203-4; see also *Thompson v. Goold & Co.* (1910) A. C. 409 @ 420.

<sup>611</sup> *Falae v. Obasanjo* (No. 2) (n14) 501.

<sup>612</sup> *cff Burdick v. United States* (n53).

<sup>613</sup> The Council of State is one of the federal executive bodies established under s. 153 (1) of the 1999 Constitution and its powers are spelt out in part 1 of the Third Schedule to the Constitution.

<sup>614</sup> See *Reports of the Constitution Drafting Committee Volume II* (Federal Ministry of Information, Lagos 1976)70.

<sup>615</sup> See *Ifezue v. Mbadugha* (1984) 5 S. C. 79 @ 88; *Mokelu v. Federal Commissioner for works & Housing* [1976] ANLR (1990 Reprint) 224 @ 228.

<sup>616</sup> *Ifezue's case* (n80) 88.

<sup>617</sup> *Amadi v. N. N. P. C.* [2000] 10 N. W. L. R. (Pt. 674) 76 @97; *Olaniyani v. Oyewole* [2008] 5 N. W. L. R. (Pt. 1079) 114 @ 137.

<sup>618</sup> Nwabueze, B. O., *The Presidential Constitution of Nigeria* (C. Hurst & Company, London 1981)144.

exercise an opinion, to criticise any proposal brought forward by the president and to offer an advice; and that the opinion, criticism or advice so offered should genuinely be taken into consideration by the president in arriving at a decision. Having done that, the president is free to decide as seems best to him, whether in accordance with or contrary to the advice. No obligation is cast on him to accept it.<sup>619</sup>

It is submitted that the above juristic opinion represents sound legal reasoning. Clearly the obligation to consult imposes a duty on the President not only to provide sufficient information to members of the Council of State to enable them reach an informed opinion on any application for presidential pardon but also to grant them the opportunity to convey such opinion to the President. However, since the President is not bound by any advice proffered by the council, the decision to grant or refuse an application for presidential pardon remains ultimately that of the President.

Finally, it is very arguable that the powers conferred on the President under s. 175(1) of the 1999 Constitution (as amended) is not subject to any form of legislative control by the National Assembly. Being a power conferred by the express provisions of the 1999 Constitution, it is submitted that the National Assembly cannot restrict, modify, abridge or diminish it except through the process of constitutional amendment.

It is intended in the next section to examine the legality of the presidential pardon granted to D. S. P. Alamiyeseigha against the background of the foregoing analyses of the scope of the president's pardoning powers. The section will also examine whether the said pardon is consistent with the constitutional duty imposed on the State to abolish all corrupt practices and abuse of power.

#### **IS D. S. P. ALAMIEYESEIGHA'S PARDON LIABLE TO BE IMPUGNED?**

It is obvious from the foregoing analyses of the scope of the President's pardoning powers under s. 175(1)(a) of the 1999 Constitution of Nigeria 1999 (as amended), that the President may lawfully grant a pardon to any person concerned with or convicted of the offence of corrupt practices by a court of competent jurisdiction. As already argued, there is nothing in s. 175(1)(a) of the 1999 Constitution (as amended) that prohibits the President from exercising his pardoning powers in respect of any particular offence including the offences of corrupt practices and money laundering. Put baldly, the President is not prohibited under s. 175(1)(a) of the 1999 Constitution (as amended) or any other provisions of the said constitution from granting pardon to any person concerned with or convicted of the offence of corrupt practices or money laundering. Clearly, the 1999 Constitution (as amended) does not draw any line between offences in relation to which the President may exercise his pardoning powers.

Furthermore, jurisdictionally, the offences of corrupt practices and money laundering in respect of which D. S. P. Alayemieseigha was convicted are federal offences created by Acts of the National Assembly.<sup>620</sup> The constitutional competence to grant pardon to persons concerned with or convicted of federal offences including offences of corrupt practices and money laundering is vested in the President by the unambiguous provisions of s. 175(1)(a) of the 1999 Constitution (as amended). This is irrespective of the fact that the misappropriation or embezzlement of funds which constituted the offence was committed in relation to funds of the government of a State of the federation, rather than those of the government of the federation. Therefore, on these grounds, it is very arguable that the presidential pardon granted to D.S.P Alayemieseigha has not violated the strict letters of the relevant provisions of the 1999 Constitution (as amended).

There is a further ground on which the pardon in question may be justified. As the federal government has argued, the pardon granted to D. S. P. Alamiyeseigha will encourage him to work more assiduously towards minimising the militancy in the Niger delta and stabilising the oil production which is the mainstay of the Nigerian economy. Thus, the position of the federal government is that the pardon conduces to public welfare and that public interest would be better protected by it. It is very arguable that the use of pardon to protect public interest and welfare remains one of its legitimate objects as seen across different jurisdictions. This position was well stated by the learned authors of *Corpus Juris Secundum* thus: "The pardoning power is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the

<sup>619</sup> Nwabueze (n83) 145; see also *Rollo v. Minister of Town and Country Planning* [1948] 1 All E. R. 13 (per Buchnill L. J.) where it was held that 'Consultation with any local authorities' within s. 1(1) of the New Towns Act 1946 (c. 68) means that, 'on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice.'

<sup>620</sup> See The Corrupt Practices and Other Related Offences Act 2003; Economic and Financial Crimes Commission (Establishment) Act Cap E1, LFN 2004; Money Laundering (Prohibition) Act, 2004; A.-G., *Ondo State v. A.-G., Federation* [2002]9 N. W. L. R. (Pt. 772) 222 @ 306, 391-392, 417.

legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence.”<sup>621</sup>

However, there are also grounds on which Alamiyeseigha’s pardon may be questioned. First, the allegation that members of the Council of State were not availed of any information relating to Alamiyeseigha’s application for pardon until the meeting of March 12, 2013 and that the presentation of the matter by the President was ‘done in a manner that left no room for discussion’,<sup>622</sup> if established, raises serious question of the constitutionality of the pardon.

Considering that the President is bound to consult the Council of State before exercising his pardoning powers as already discussed, it is very arguable that any act which deprives members of the Council of State of sufficient information necessary to enable them form an informed opinion on any particular application for pardon and/or the opportunity to express their opinion runs contrary to the intendment of s. 175(2) of the 1999 Constitution (as amended). Although as seen earlier, the President is not bound by the opinion or advice of the Council of State, it is not the intention of the Framers of the Constitution that the President should deny himself the restraining or moderating influence which the opinion of the Council of State could have on the exercise of his sacred powers under the provisions. It is submitted that such act by the President fringes on arbitrariness and could constitute a valid ground for judicial review of the exercise of the President’s powers by the courts.<sup>623</sup>

Secondly, it is very arguable that the presidential pardon in question has the tendency to retard the efforts of government to curb the menace of corruption in the country. Chapter II (sections 13- 24) of the 1999 Constitution (as amended) deals with Fundamental Objectives and Directive Principles of State Policy. Section 15(5) specifically enjoins the State to ‘abolish all corrupt practices and abuse of power.’ Although the entire Chapter II of the 1999 Constitution (as amended) including s. 15(5) thereof is non-justiciable by virtue of s. 6(6)(c) of the constitution, it cannot be disputed that it is in the public interest that the duty imposed on the State to fight and abolish corrupt practices should be discharged with utmost seriousness and honesty by governments at all levels. Anything short of this approach will compromise public peace, public order and public welfare because corruption has continued to retard the economic growth of the country and undermined her infrastructural development.<sup>624</sup>

Although s. 15(5) of the 1999 Constitution has been made largely justiciable through the enactment of the Corrupt Practices and Other Related Offences Act 2003 and the EFCC Act 2003, these efforts have proved inadequate in dealing with the menace of corrupt practices. Clearly, the enforcement of anti-corruption laws alone cannot curb corrupt practices. Sensitization of members of the public across all strata of society through public campaign on the corrosive impacts of corruption on the Nigerian society represents a viable option that must be explored. In this regard, governments at all levels could collaborate with civil society groups and Non-Governmental Organizations (NGOs) in raising public awareness about the menace of corruption.

Arguably, the efficacy of any sensitization campaign will depend largely on the capacity of governments at all levels to build public trust that they are genuinely committed to fighting and curbing corrupt practices. However, such public trust would prove practically impossible to build where government at any level embarks on acts that strongly suggest that it is actively encouraging or condoning corrupt practices. This is the moral burden that has tainted the pardon granted to DSP Alayemiyeigha! By pardoning DSP Alayemiyeigha who was convicted of corrupt practices and money laundering, the President would appear to have destroyed the public trust that the federal government is genuinely committed to fighting corruption. It is not unlikely that this breach of public trust could compromise the enforcement of existing legislation on corrupt practices besides, weakening the readiness of international agencies to collaborate with the government in developing programmes aimed at curbing corruption and strengthening our anti-corruption agencies.

Having regard therefore to the fact that the constitution as a charter of government must be a ‘resilient instrument capable of adaptation to changing circumstances’<sup>625</sup>, it is submitted that the enormity of the danger posed to the Nigerian society by corrupt practices demands an immediate amendment to the provisions of s. 175(1) of the 1999 Constitution (as amended) by prohibiting the President from exercising the pardoning powers in respect of any person concerned with or convicted of corrupt practices. It is very arguable that the proposed amendment to s. 175(1) of the 1999 Constitution (as amended) will make it impossible for the President to jeopardise the fight against corrupt practices through unrestrained exercise of his pardoning powers in favour of persons concerned with or convicted of corrupt practices and related offences.

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<sup>621</sup> Vol. 67, pp.16-17.

<sup>622</sup> ThisDay (n2).

<sup>623</sup> See *Swaran v. Singh* (n57)

<sup>624</sup> *A.-G. Ondo State v. A.-G., Federation* (n85) 385-388.

<sup>625</sup> *Re Anti-Inflation Act* [1976] 2 S. C. R. 373 @ 412.

## CONCLUDING REMARKS

This article has attempted to examine the constitutional issues thrown up by the presidential pardon granted D. S. P. Alayemieseigha. Pardoning power is recognized and granted in almost every civilised society to the executive arm of government to be exercised as an act of grace in deserving cases. It has been suggested that without it, the country 'would be most imperfect and deficient in its political morality and in that attribute of Deity whose judgments are always tempered with mercy.'<sup>626</sup>

The development of clemency as a royal prerogative has meant that historically it was exercised at the absolute discretion of the King. However, the abuse of this sacred power had necessitated some forms of restraint. This development has encouraged judicial review by the courts in some jurisdictions in order to avoid patent abuses.

While the presidential pardon granted to DSP Alamiyeseigha by the President *ex facie* does not appear to have breached any provisions of the 1999 Constitution (as amended), it would appear that unrestrained use of the pardoning powers conferred on the President by the Constitution could jeopardise the performance of the duty placed on the State to abolish all corrupt practices and abuse of power under s. 15(5) of the same constitution. It seems impermissible to employ the pardoning powers conferred on the President by the 1999 Constitution to defeat the performance of a duty imposed on the State by the same constitution. In *Attorney-General, Bendel State v. Attorney-General, Federation*,<sup>627</sup> the Supreme Court (per Obaseki, JSC.) laid down twelve guidelines to be observed in the interpretation of the constitution one of which is that a constitutional power cannot be used by way of condition to attain an unconstitutional result.<sup>628</sup> Therefore, a power granted by the constitution should not be employed to attain an unconstitutional result by defeating the performance of a duty imposed by the self-same constitution.

The need to confront the menace of corrupt practices frontally demands a total exclusion of corrupt practices and other related offences from the scope of the President's pardoning power. It is hoped that the introduction of such exclusion by way of an amendment to s. 175(1) of the 1999 Constitution (as amended) will serve to give new impetus to the fight against corruption in Nigeria.

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<sup>626</sup>Am. Jur. 2d (American Jurisprudence, 2<sup>nd</sup> edition, Lawyers Cooperative Publishing 1962) cited in *Eperu Sudhakar v. Government of A. P. & Ors* (n60).

<sup>627</sup>[1982] 3 NCLR 1 @ 77-8.

<sup>628</sup>This principle has been restated in other decisions of the apex court including *Ishola v. Ajiboye* [1994]6 N. W. L. R. (Pt. 352) 506, 559; *Elelu-Habeeb v. A-G, Federation* [2012] 13 NWLR (Pt. 1318) 423.

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