

# Executive Clemency

## Comparative and Empirical Perspectives

Edited by  
**Daniel Pascoe and Andrew Novak**

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# 3 Separation of Powers and Executive Clemency in the Civil Law World

## A Comparative Study

*Sonsoles Arias and Antonios Kouroutakis*

### Introduction

Executive clemency, sometimes known as the power to pardon or the prerogative of mercy, occupies an ever-present place in modern constitutional documents around the world. However, executive clemency, which is a legal mechanism to totally or partially abrogate criminal convictions or prison sentences, or to commute fines and corresponding burdens levied on convicts, has been woven into our legal civilization since the earliest appearance of coherent legal structures. Pardon is recorded in Mosaic Law, in Greek Law, and in Roman Law.<sup>1</sup>

During the Middle Ages, clemency was an absolute prerogative of autocratic rulers. Nowadays, since the establishment of the principle of separation of powers, only individual pardon typically falls within the constitutional competence of the executive. General pardon, also known amnesty, typically falls within the competence of the legislature.<sup>2</sup>

What is the impact of the separation of powers model, another constitutional staple, on the executive clemency mechanism? Is there a correlation between different models of separation of powers (presidential, parliamentary, or semi-presidential) and executive clemency's specific institutional settings? Or, to put it differently, does the power to grant clemency carry any special weight within the balance of powers, or do different clemency models

1 William F Duker, 'The President's Power to Pardon: A Constitutional History' (1977) 18(3) William & Mary LR 475, 476.

2 See Leslie Sebba and Richard S Frase 'Amnesty and Pardon' in *Encyclopedia of Crime and Justice* (The Gale Group Inc. 2002) <<https://www.encyclopedia.com/law/legal-and-political-magazines/amnesty-and-pardon>> accessed 8 November 2018:

The term pardon is first found in early French law and derives from the late Latin *perdonare* ('to grant freely'), suggesting a gift bestowed by the sovereign. It has thus come to be associated with a somewhat personal concession by a head of state to the perpetrator of an offence, in mitigation or remission of the full punishment that he has merited. Amnesty, on the other hand, derives from the Greek *amnestia* ('forgetting'), and has come to be used to describe measures of a more general nature, directed to offences whose criminality is considered better forgotten.

executive ought to exercise complete discretion on matters of prerogative, whereas the courts may not review the administrative process either on formal or on substantive grounds.

### **Conclusions**

The modern power to grant clemency falls within executive competence. This has precipitated criticism, as clemency is, in its very nature, a judicial function. However, in reality, commutations and pardons reflect the exercise of a quasi-judicial and quasi-executive power. Social and political factors, rather than judicial criteria, are often taken into account as part of the executive's decision-making.

This chapter has addressed two questions: first, whether the clemency power falls within the absolute control of the executive branch (i.e. the president) or whether it is a function shared with other executive, legislative, or judicial institutions (i.e. Cabinet ministers, parliamentary committees, or judicial bodies, respectively); and second, the chapter has tested the following assumption—that the role of the executive decision-maker in exercising the clemency power reflects the actual institutional power of that executive institution within the general model of the separation of powers.

An analysis of the constitutional framework of a number of countries belonging to the civil law legal tradition has revealed the following: in parliamentary systems where the popular legitimacy of the head of state is limited, the pardon power is more often shared between different institutions, such as the Cabinet, the judiciary, or even a specially constituted clemency committee. Sharing the clemency power between different democratic institutions adds to its democratic legitimacy.

On the other hand, in presidential and semi-presidential systems, where the legitimacy of the head of state is greater due to popular vote, the head of state's role in the pardon process is absolute. Here, an executive organ with a significant role in the constitutional separation of powers possesses the most powerful role in the clemency process vis-à-vis other governmental organs.

These are the authors' preliminary observations regarding the prevailing trends in executive clemency provisions in different civil law countries. Further comparative analysis may test these ideas over a more exhaustive list of civil law countries in the future.