

# ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

## JUDICIAL CLEMENCY AND CORRUPTION

### QUERY

How do judicial pardons, clemencies and commutation of sentences in corruption cases impact the effects of corruption? What does the international experience teach us about this? Are there alternative regimes or best practices for corruption crimes?

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### SUMMARY

Judicial clemency is an essential part of many judicial systems around the world aimed to provide an executive check on judicial power, mitigate harsh sentences and correct systemic issues in judicial sentencing.

Nevertheless, there are major integrity and corruption challenges associated with judicial clemency, ranging from risks of fuelling impunity, state capture and human rights abuses. There are examples of abuses by governments worldwide of clemency powers in corruption-related crimes.

Regardless of the risks, many states have undertaken reforms and introduced restrictions on the way clemency powers are considered and implemented, and which crimes are eligible for clemency and which are not.

## 1. OVERVIEW OF JUDICIAL CLEMENCY

### Background

Judicial clemency refers to extra-judicial constitutional actions taken to reduce or eliminate the punishment or charge upon a person or persons already adjudicated by a judicial authority (Cooper & Gough 2014; Drinan 2012). The power to grant judicial clemency tends to be conferred on a wielding authority by a constitution or by law. Clemency can be either “antigrade”, meaning they are conferred upon a person before a formal sentence is passed, or “post sententiam”, where it is conferred after a sentence has been passed (Díaz Guevara 2016). While different countries have different justifications for the institution of clemency, they usually exist to counteract legal rigidity, to overturn harsh sentences, to correct systematic injustice towards certain groups, or as a reconciliation or peace-making tool.

The concept of clemency originates in the ancient world, but it is a feature of many modern democracies worldwide. Judicial clemency and pardons can take many forms, but generally fall into four categories (Nowak 2016; Menilove 2009):

- pardons: the absolution of a person, or persons for a crime committed
- commutations of sentences: the reduction or modifications of the penal punishment for a crime committed
- remission of fines or forfeiture: elimination or reduction of financial penalties for a crime committed
- respite or stay of execution: a temporary postponement of the sentence

Amnesties and orders of non-enforcement are common forms of clemency as well. Amnesties grant groups of people, or offenders of a certain crime, general absolutions of crimes committed, or the state chooses not to prosecute the crimes related to certain periods or groups of people. An illustrative example of amnesty are the series of amnesties granted by Latin American governments during the 1980s and 1990s to members of military dictatorships and to members of insurgent groups (Roht-Arriaza 2014).

Non-enforcement orders are decisions taken by law enforcement or the executive branch to stop

prosecuting certain crimes or reduce the harshness of offences by prosecutors. An example of non-enforcement is the order given by Barack Obama in 2012 to not prosecute children of first generation immigrants living since childhood in the US for immigration related crimes (Barrow 2015).

An important caveat to establish when discussing pardons or clemencies is the fact that they are extra-judicial, or undertaken outside of the formal judicial process. This means that appeals and absolutions of crimes by higher courts or appeals courts are not considered judicial clemency or pardons, because, though a sentence may have been passed, the absolution happened within the confines of the legal process.

The reasons why these mechanisms are initiated vary, but generally, judicial clemencies and pardons are meant to act as checks and balances on judicial power from authorities outside of the judiciary to balance strict law adherence and contemporary popular opinions on certain matters (Frei 2013). These clemencies and pardons can be invoked to mitigate the effects of overtly harsh laws or judicial rulings on cases, which the authority granting the pardon considers antiquated, obsolete, unjust or that it goes against their ideological or party position (Madden 1993). There are many examples of judicial pardons and clemencies being applied to establish public order or promote peaceful integration of losing factions or previous governments in periods of transition or nation-building.

### *Clemency powers in the executive branch*

Clemency power wielded by the executive branch of government is the most common type of judicial clemency. Most countries adopted these mechanisms to emulate the discretionary pardon power of former monarchs or authoritarian leaders (Frei 2013). The United States, for example, established the royal clemency framework from the British monarchy into the office of the presidency.

Clemency powers in the executive branch can rest with the head of state or head of government as is the case in the United States, Russia, Spain and Nigeria. It can also be vested in the ministerial cabinet with final word going to the head of government, as is the case in Zimbabwe, Malta and Singapore (Nowak 2016).

Clemency powers can also be relegated to an institution or specialised office within the executive branch. For example, in the United Kingdom, the Home Office wields this power, with a similar situation in South Africa (Nowak 2016). Even when clemency powers are wielded directly by the head of state or government, special offices or attorneys exist to advise or recommend clemency procedures. This is the case, for example, in the United States with the Office of the Pardons Attorney (OPA) and in Russia where a 15-member council composed of jurists as well as prominent artists and writers, called the Presidential Pardon Commission (PPC), reviews and submits clemency pleas to the president (Baumgartner & Morris 2001).

#### *Clemency powers in the legislative branch*

Clemency powers initiated by the legislative branch are a growing trend in many countries. They aim to curb the discretionary power of the executive branch of government and are a feature of many legislatures worldwide. Pardons and clemencies granted by the legislative branch, where allowed, are presented as bills introduced in the legislature which are to be approved by a certain margin. In countries where the right is solely held by parliament, such is the case of Switzerland (Nieva Fenoll, 2013), parliamentary commissions exist which vet applicants and provide the legislature with legal commentary regarding the case, advancing worthy or potential pardon applicants to the legislature.

In countries that allow both clemency powers to the executive and legislative branch, distinctions exist that demarcate which sentences can be absolved by each body. For example, in Russia (Baumgartner & Morris, 2001), Brazil (Council of Hemispheric Affairs 2012), and the United States (Jorgensen 1993), congress can issue general amnesties for certain offences to large groups, but cannot (or customarily does not) issue clemency for specific cases.

#### *Clemency powers in independent commissions*

Some countries have implemented special commissions or institutions charged with the systematic review of clemency pleas and conferment of clemency. These commissions tend to have allocated resources and can be composed of a variety of actors, such as government officials or civil society.

These commissions can serve as a review mechanism of the judiciary, as is the case in Lesotho and the Seychelles (Nowak 2016). Commissions can also be appointed to delegate executive powers, as is the case in the United States, where nine states, including Alabama, Idaho, Minnesota, Colorado, Connecticut and Utah, have independent clemency commissions. In the case of the Gambia and the US state of Georgia, the members of these commissions are approved by the legislative branch.

## 2. CORRUPTION RISKS OF JUDICIAL CLEMENCY

Judicial clemency or pardons on corruption crimes present serious challenges for anti-corruption practitioners if these mechanisms are abused. Clemency powers that are too broad "create a precedent and are likely to undermine deterrence and the rule of law, fostering a culture of impunity where potential offenders simply assume that malpractice will eventually be ignored or amnesty" (Chêne 2007)

In many countries, clemency and pardons have very few conditions placed on the organism granting them and tend to be approved after the fact, and in most cases, with very little transparency. The main deterrence to abusing clemency powers is the reputational damage that the elected officials may suffer which can affect their results in the polls (Menilove 2009) if any abuses are committed. These safeguards, however, provide very few disincentives to abuse the clemency powers by public officials with no hope of re-election or who do not care about their reputation being tarnished. This presents a serious problem when the crime being pardoned is a crime related to corruption.

Clemency powers can be used to absolve persons guilty of corruption from serving out their full punishments. When heads of government absolve civil servants of their own government or members of their own parties of corruption crimes, it is a serious blow for accountability and fuels impunity. The costs and risks associated with committing corrupt acts become significantly lower if a government or government party can guarantee any punishment for those crimes will be forfeited. Pardons and clemency may also demotivate or deter future legal actions from being initiated for similar crimes.

There are numerous examples, all over the world, of people who have been absolved for corruption crimes:

- Nigeria: President Goodluck Jonathan granted a pardon to ex-Bayelsa state governor and former ally, Diepreye Alamieyeseigha, who was convicted of stealing millions of dollars during his time in office. Alamieyeseigha was subsequently permitted to stand for re-election and returned some of the properties seized during the trial (Agbiboa 2013).
- France: in 1988, the French parliament voted a general amnesty on financing irregularities in presidential and legislative campaigns, thereby excusing many people from prosecution for campaign finance irregularities (Mény 1990).
- Mongolia: a 2015 Law passed by the Mongolian congress grants amnesty to 45 out of the 55 cases that the Independent Agency against Corruption in Mongolia (IAAC) investigates. The alleged crimes involve more than 32 billion Mongolian togrog (US\$16.2 million) (Zeldin 2015).
- United States: there are numerous cases of misuse of clemency powers by US presidents, including “lame duck president” protections by Jimmy Carter and George HW Bush to protect their predecessors from prosecution for the Watergate and Iran-Contra Scandal, respectively. Also, Bill Clinton and George W Bush used clemencies to pardon members of their parties’ staff charged with misuse of funds and corruption (Menilove 2009).
- Romania: a decree was passed in 2017 that granted a general amnesty for corruption crimes valued lower than €34,400.00. A series of mass demonstrations led to the decree eventually being repealed (Oliphant 2017).
- Poland: Polish President Andrzej Duda absolved the charges of abuse of power against a former head of the polish anti-corruption agency, who allegedly bribed land zoning officials to reveal a land zoning corruption scheme in 2007. The Supreme Court of Poland questioned the absolution of charges, considering the clemency power of the president to be applicable post sententiam (Radio Poland 2017; Inside Poland 2017).
- Tunisia: a 2015 law passed by the Tunisian parliament effectively granted amnesty from prosecution for corruption crimes to members and supporters of the Ben Ali regime who disclosed the amount they had stolen from the state to a special

commission and returned that amount to the state. However, the law does not contemplate further investigations to verify that the amount returned to the state is the total amount stolen, nor does it establish ways to counteract or prevent future fraud (Transparency International 2015).

- Pakistan: in 2010, Pakistani President Asif Ali Zardari issued a pardon for the country's former interior minister, Rehman Malik, who was convicted of corruption in 2004 (BBC News 2010).

Abuses of clemency powers can have deeply negative effects on governance in a country. For more detailed examples international experiences of abuses of amnesty powers as they relate to human rights and corruption, please see Chêne (2007).

### Impunity for corruption

Impunity, or the lack of appropriate punishment, is doubtless an important effect of pardons and clemency for crimes related to corruption. The lack of appropriate punishment for corruption can lower confidence in the justice system or the state in general (Zubieta et al. 2015). Impunity for corruption lowers the cost for future acts of corruption. If civil servants know that they can be post facto absolved of any punishment, they have more incentives to commit these acts of corruption in the future. Systemic impunity can have a catalysing effect for corruption and crime in a country.

Impunity may also contribute to a rise in social tension, especially within fragile states or states in democratic transition and, according to the International Criminal Court, it “prevents peaceful co-existence between national communities, and constitutes a major obstacle to the evolution of democracy” (Dieng 2002). Roht-Arriaza notes that amnesties given to human rights abusers in Latin America following the transition to democracy reduced public confidence in the state and legal system at a moment where the legitimacy of these systems was being questioned on a mass scale (2014). A study by Lessa et al. analysed 63 amnesties granted for human rights abuses in transitional democracies and found that the backlash for these cases usually resulted in difficult changes in government or, at least, changes to amnesty laws (2014).

Furthermore, impunity can have a negative psychological effect on the victims of human rights violations and, in some cases, as noted by Rauchfuss and Schmolze (2008), economic crimes resulting in death.

## Due legal process and judicial independence

Clemency may have a negative effect on judicial processes and judicial independence. A systemic use of pardons to absolve corruption crimes may lead to a devaluing of judicial rulings making enforcement of past or future sentences more difficult or contested. General amnesties for corruption crimes decreed by the executive branch, for example, bypass both the legislative process that established the legal framework, and the judicial system charged with determining appropriate punishment (Frei 2013).

An excessive use of pardons for corruption crimes may demotivate or deter prosecutors from investigating corruption cases. Knowing that these investigations will not end in appropriate punishment lowers the chances of advancing similar cases in the future (Santana Vega 2016). If these pardons are directed at a specific law court or a specific prosecutor, this might be considered direct encroachment upon the independence of the judicial system.

Furthermore, clemency powers may hinder judicial activities surrounding those charged with corruption, especially in the case of asset recovery. As many asset recovery operations are directly linked to formal criminal prosecutions (Chêne 2007), recovering the money stolen by corrupt officials may be harder to achieve.

## Human and civil rights

If pardons and clemency of corruption crimes become too frequent or are arbitrarily issued towards the governing party, this may represent a form of state capture by the part of a ruling party and could endanger basic human and civil rights within a country. If a ruling party has the power to absolve its members or representatives from being persecuted for corruption or abuse of power on a systematic basis, this arbitrary use of clemencies may be used to avoid accountability and apply the justice system unfairly to

political opponents. This is especially true if non-state actors decide to “punish” or get revenge on anti-corruption practitioners or prosecutors and are then absolved by ruling state actors. This complicity between criminal elements and state officials to preserve a status quo of impunity and corruption may have further consequences for the protection of other human rights through the same system.

An argument could also be made that the redetermination of punishments by political actors, and not judicial actors, can lead to longer lasting or more severe punishment. Krent (2001) argues, for example, that clemency powers may be used to circumvent legal protections or controls offered by the penal system in exchange for more arbitrary punishments. He uses the example of US president Bill Clinton's pardon of Fuerzas Armadas de Liberación Nacional (FALN) members, where a decade-long jail sentence was commuted, but the accused were obliged to meet several conditions which violated their freedom of expression and mobility for life, under pain of returning to jail to serve the full length of their prison term. This is especially significant in the United States where pardons cannot be rejected by those sentenced (Cooper & Gough, 2014). Another case that illustrates this problem is the case of Teodoro Obiang, president of Equatorial Guinea, who issued “birthday pardons” under the condition that jailed political opponents sign declarations of approval of the government (Amnesty International 2012).

## 3. ALTERNATIVES AND BEST PRACTICES TO MITIGATE AND CONTROL JUDICIAL PARDONS

### Overview

While, the irresponsible use of pardons and clemency has potentially devastating effects on governance in general, the issue of whether to abolish pardons and clemencies outright, or to simply reform the current systems is still being debated. Pardons and clemency can still play significant roles in mitigating harsh punishments in draconian or antiquated laws, correcting race-based biases, mistrials or abuses by lower-level judges (Madden 1993; Drinan 2012; Ridolfi 1998; Rosenzweig 2012). They can even serve as a safeguard for the legal prosecution of anti-corruption practitioners and whistleblowers, as in the case of

commutation of sentence for the whistleblower Chelsea Manning in the United States (Savage 2017).

Furthermore, clemency or amnesties as applied to corruption crimes may be incorporated as part of a broader anti-corruption strategy. The use of clemency powers on past corruption crimes may establish a point of departure for a zero-tolerance policy on corruption, thus freeing judges from the prosecution of past crimes to focus on new ones (Chêne 2007). In the same way, pardoning offences may be a key element in encouraging lower-level actors in corruption schemes to come forward and cooperate with authorities. Using clemency in exchange for disclosure of syphoned assets may also have a positive impact on recovering assets (UNODC 2004).

Several reforms have been proposed to improve pardon and clemency mechanisms worldwide: some aim to increase the number of actors that participate in pardon and clemency decisions; other reforms aim to limit pardoning and clemency power; while some reforms aim to add transparency and accountability to existing systems.

## Clemency boards

Clemency boards are official boards that aim to decrease the discretion of one person over matters of clemency. In practice, clemency boards can either provide non-binding advice or recommendations to the executive or legislative branch (Menilove 2009), or can be entrusted to make decisions regarding clemency. This is the case in Lesotho, the Gambia and the Seychelles. Solomon Islands maintain the executive branch's clemency powers, but can only approve recommendations that have been elevated by a special clemency board (Nowak 2016).

In some US states, clemency boards are composed of partisan elected officials appointed by the president (Menilove 2009). The goal is to maintain the governor's partisan policies regarding pardons while providing a deterrent to abuses that might damage the party's chances in elections. At the other end of the scale, Uganda, Kenya, Malaysia, Guyana and Lesotho have special rules about clemency boards that prohibit the participation of members of parliament, civil servants and prosecution lawyers (Nowak 2016).

Clemency boards should be independent from the government, and should have enough technical and resource capacity to be able to undertake their task. Cooper and Gough (2014) caution the integration of governors and cabinet members in clemency boards, as in some US states, to avoid conflicts of interest regarding pardoning corruption crimes.

Clemency boards and commissions with adequate resources can lead to increased access to clemency procedures, especially when it applies to cases that have not received media attention or cases that are not known to the executive. Through a clemency board, relatively unknown cases can apply for clemency in the same way that a highly publicised case can or one that is known to the head of government, and may have the same chances of receiving clemency. Otherwise, as Cooper and Gough (2014) state, there is a chance that only cases that favour a head of government politically, or the friends or acquaintances of the president can benefit from clemency. Guidelines for applying for clemency should be provided and records should be kept of applicants in order to provide increased accountability regarding who received clemency and who did not (Love 2007; Cooper & Gough 2014)

## Multi-branch clemency review

Multi-branch clemency reviews refer to official checks and balances conducted by multiple branches of government to officially ratify clemency decisions. Introducing a multi-branch approval process introduces considerably more accountability and transparency to granting clemencies as the executive branch, for example, must justify to the other branches of government why they chose to pardon a person or group. This justification, made before an official legislative assembly, also increases the level of transparency clemency decisions receive.

In Uganda and Botswana, for example, the executive must present annual "mercy reports" to parliament that detail the use of their clemency powers, including justifications for the pardons. Sierra Leone goes a step further. When clemency is granted for health reasons, for example, the executive has to present medical reports to parliament (Nowak 2016). Canada's parole and clemency decisions are proposed by the Parole Board of Canada and approved by the governor general, but are systematically reviewed by the

Commission of Public Safety, which presents annual reports to parliament (Canada Parole Board 2017). In these cases, the consequences of an unpopular clemency do not fall to a president or prime minister. Instead, the electoral or political backlash is conferred upon all represented parties if they make an unpopular decision.

The judiciary can also participate in reviewing clemency powers. The Indian judicial system actively follows up on clemency procedures and provides commentary on clemency pleas and processes, and has even been known to prohibit or annul clemency grants (Nowak 2016). While not going as far, most countries allow the supreme court to review pardon powers.

### Increase transparency

There are major transparency challenges associated with clemency powers and processes. Cooper and Gough (2014), using the United States and other common law countries as a basis, find that the decision-making process to grant clemency, as well as the justifications for granting clemency, tend not to be public. They note that most US states apply due process confidentiality rules to pardon cases, thus making information about the cases hard to come by in official pardon documents. Baumgartner and Morris (2001) note that justifications for use of clemency powers in the US and Russia tend to be selectively public, based on the degree of attention that a case receives in the media, but are not mandated.

According to Nowak (2016), “transparency in the clemency process can prevent arbitrariness, discrimination, and political favouritism by allowing added public scrutiny and allowing applicants to challenge deficiencies”. Increasing transparency around clemency decisions can also increase the level of government accountability to the electorate. In many of the countries with executive clemency laws, the publication of approved clemency applications tends to be published after their approval, thus informing the public of the decisions taken. There could be increased transparency around the decision-making process, especially by publishing lists of potential recipients of clemency grants. Simply publishing official justifications for clemency decisions can increase accountability in clemency decisions.

Cardenal Montraveta (2017) argues that in Spain, detailed information of what he calls “proven facts” related to a crime (for example, the court has already proven the embezzlement of US\$10 million) should be included in official statements related to clemency, to guarantee that the public has all the information related to the crimes being absolved. Spain publishes “basic facts” about clemency in their state bulletin (name, gender, crime being commuted or absolved), as does Tuvalu, Belize and Zimbabwe. As mentioned previously, Uganda, Botswana and Sierra Leone must include justifications for any clemency grant to parliament.

### Limits on clemency powers

Limits on clemency powers can also positively modify the conditions which lead to systemic abuses of clemencies and pardons. Kenya, for example, prohibits the issuing of pardons and clemency during the final days in office or if the official cannot stand for re-election (Nowak 2016). These limits aim to hinder the use of pardons when there is no expected electoral backlash to the official in power (Sisk 2002). Malaysia, for example, has a special process to consider clemency pleas from elected officials or their family members, to allow for less discretion and more transparency and to deter abuse (Nowak 2016).

In Spain, a reform of the clemency law established a minimum amount of jail time that must be served or a minimum percentage of a fine to be paid before an official pardon can be issued (Madrid Pérez 2014). This ensures that every person who is found guilty of a crime will receive a minimum punishment, regardless if they are later absolved of their crimes. Spanish law also states that, regardless of any clemency granted, persons convicted of corruption may not serve as civil servants (Díaz Guevara 2016). In Spain, proposals have been made to limit the issuing of pardons to persons who have already previously received a pardon (Doval País et al. 2012). Both actions aim to reduce the abuse of the clemency system by public officials.

Finally, limits on clemency powers can be established to limit or prohibit absolving persons of certain corruption crimes. This ensures that crimes related to corruption can only be overturned by the judicial system. Liberia, Tonga and Malawi explicitly prohibit pardons for corruption, impeachment or abuse of

office, while Nigeria prohibits clemency on corruption crimes handed down by the code of conduct tribunal, though not all are corruption crimes (Nowak 2016).

## Increase public participation

While many judicial systems deter public participation in decision making to avoid the “democratisation of law”, citizen participation can be incorporated into clemency processes to provide more accountability for certain actions. The governance challenge in incorporating public participation is to avoid clemency from becoming an electoral tool in which clemencies are promised in exchange for votes (Madden 1993; Freed & Chanenson 2001). One practice, adopted by the US state of Utah, establishes that any pardon which is formally considered must go through a three-stage process, where it is first published, the state congress is informed, then public hearings are held to outline the justifications for granting the pardon. Only then can the governor approve or disapprove of the action (Cooper & Gough 2014). This ensures that, while the final approval of clemency rests with the state, the citizenry can express their concerns over candidates for clemency.

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