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# CRIMINOLOGY

## THE PARDONING POWER—A WORLD SURVEY

LESLIE SEBBA\*

The resilience of the power to pardon offenders is a remarkable phenomenon, in view of some seemingly powerful reasons for the disappearance of this institution. These reasons are both ideological and practical in character.

The ideological grounds derive from the fact that the pardoning power appears to be an archaic survival of an earlier era, during which the State was governed by an omnipotent ruler, who might have an occasional urge to demonstrate his benevolent disposition. This seems something of an anomaly in a twentieth century constitutional democracy having a commitment—at least in principle—to a delicate separation of powers designed to ensure the independence of the judiciary. This independence would appear to be threatened by vesting in a non-judicial authority the power to pardon offenders duly convicted and sentenced in the course of a judicial process. It is no coincidence that the ideological controversy regarding the desirability of the pardoning power reached its peak during the eighteenth century,<sup>1</sup> when the groundwork of much of our prevailing political theory was being laid. Thus while Montesquieu<sup>2</sup> believed that there was room—at least under a monarchical system—for the institution of clemency, Beccaria<sup>3</sup> advocated the total

abolition of this institution, a path which was followed in France for a number of years in the wake of the revolution of 1789.

If the ideological reasons for doing away with the pardoning power are rooted in constitutional theory, the practical reasons are related to the development of modern penal systems. The pardoning power has historically served a number of functions, most of which are adequately provided for today by other legal institutions which have been developed to meet these needs. For example, the avoidance of imposing criminal liability on persons lacking in mental capacity or acting in self-defense is now governed by the penal code itself. The need to assuage doubts regarding the possibility of a miscarriage of justice is now commonly met by a system of appeals and rehearings before the courts. The individualization of punishment is provided for within the framework of the sentencing discretion now generally bestowed upon the courts, and subsequent developments can be taken into consideration by parole boards. Even the most dramatic use of clemency powers, viz., the commutation of capital sentences, has lost much of its importance in view of the sparse use of the death penalty in contemporary times. Finally, the use of pardons to secure rehabilitation, by removing the stigma of a criminal conviction, has widely been superseded by special laws providing for judicial or statutory rehabilitation, or for the expungement of the criminal record.<sup>4</sup>

It is not the intention of this survey to arrive at any conclusions as to the desirability or usefulness of the clemency power in the contemporary world; this is an issue which the writer has considered elsewhere.<sup>5</sup> The main objectives of

Eden and Colquhoun, concentrated their attacks on the abuses evident in the exercise of the pardoning power, rather than its very existence. See Sebba, *supra* note 1.

<sup>4</sup> See text accompanying notes 42–70 *infra*.

<sup>5</sup> Sebba, *supra* note 1.

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<sup>1</sup> See, Sebba, *Clemency in Perspective*, in *ESSAYS IN HONOR OF ISRAEL DRAPKIN* (S. Landau & L. Sebba eds., forthcoming) [hereinafter cited as Sebba].

<sup>2</sup> *DE L'ESPRIT DES LOIS* (G. Truc ed. 1944).

<sup>3</sup> Let the laws, therefore, be inexorable, and inexorable their executors in particular cases . . . As punishments become more mild, clemency and pardon becomes less necessary. Happy the nation in which they might some day be considered pernicious.

C. BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 58–59 (H. Paolucci trans. 1963). Beccaria's fellow critics included Filangieri and the philosopher Immanuel Kant. English critics, such as Fielding,

this comparative survey of clemency provisions throughout the world were to discover (1) the extent to which the institution of clemency is a universal feature of contemporary legal systems; (2) which bodies are formally invested with decision-making authority to grant pardons; (3) whether those or other bodies hold the reality of power in this respect; and (4) to determine the main types and functions of clemency under the various systems.

#### METHOD & SOURCES

The survey was conducted in the following way: in 1970 a circular letter was sent by Professor Israel Drapkin, then Director of the Institute of Criminology in the Law Faculty of the Hebrew University of Jerusalem, to some sixty different countries around the world. The requests were directed both to professional contacts in those countries, and also, with the assistance of the Israel Ministry for Foreign Affairs, to official agencies. By this means information was received from about fifty countries. This information was later supplemented by a study of the constitutions of these and other countries, using material available from such compendia as Peaslee's *Constitutions of Nations*<sup>6</sup> and Blaustein's *Constitutions of the Countries of the World*.<sup>7</sup> These sources were reexamined in 1976 to allow for subsequent developments, recent political events having been cross-checked with *The Statesman's Yearbook 1975-1976*.<sup>8</sup> The material compiled here is thus subject to the following reservations: (a) the use of nonconstitutional sources—primarily the codes of substantive and procedural penal laws of the respective countries—is selective, and is largely confined to the countries from which responses to the circular were received; (b) it may be that some recent constitutional changes (especially in the more politically volatile jurisdictions), have not yet appeared in the above-mentioned compendia, and thus will not be reflected in the analysis; (c) the nonconstitutional provisions generally reflect the state of the law in 1970. These provisions, however, being nonpolitical in character, are less prone to rapid change than the constitutions themselves.

<sup>6</sup> A. PEASLEE, *CONSTITUTIONS OF NATIONS* (3d ed. 1965) [hereinafter cited as PEASLEE].

<sup>7</sup> *CONSTITUTIONS OF COUNTRIES OF THE WORLD* (A. Blaustein & G. Flanz eds. 1971).

<sup>8</sup> *THE STATESMAN'S YEARBOOK 1975-1976* (J. Paxton ed. 1975).

#### THE COMPARATIVE TABLE

The schedule appearing below presents the information obtained in a systematic fashion in the form of a table containing data relating to one hundred jurisdictions. The table is confined to those items on which information was most forthcoming, namely: the legal source of the pardoning authority; the mechanism whereby pardoning decisions are made; categories of offences or penalties which are excluded from the pardoning power or for which special provisions are made; and the types of pardon available in the jurisdiction concerned. Certain points of clarification, as well as additional information of interest, such as statistical data, are presented in the right-hand column.

The salient features of the survey, as well as certain areas of interest not appearing in the table (such as the relationship between the pardoning power and amnesties) are discussed in the following text.

#### THE EXISTENCE OF A PARDONING POWER

Responses to the circular revealed that a power to pardon offenders existed in all the jurisdictions from which responses were obtained. Moreover, the original library survey of constitutions produced a similar result for other countries, and in only one recently adopted constitution was no reference to clemency found. The 1975 constitution of the People's Democratic Republic of China is somewhat skeletal in form and provides minimal information on the functions of the various governmental bodies. The Standing Committee of the National People's Congress, to which the pardoning power was entrusted under the previous constitution, has the power to "enact decrees . . . and exercise such other functions and powers as are vested in it by the National People's Congress,"<sup>9</sup> which is "the highest organ of State power under the leadership of the Communist Party of China."<sup>10</sup> Whether the pardoning power has been deliberately and finally omitted from the state fabric is thus as yet unclear.

Subject to this exception, the overall picture which emerges is that neither ideological nor practical objections to the clemency power as a legal institution in the modern age have re-

<sup>9</sup> Constitution of the People's Democratic Republic of China, art. 18, (adopted 1954, repealed 1975).

<sup>10</sup> *Id.*, art. 16.

## SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS

Note: An asterisk indicates that the constitutional source has recently been repealed or suspended, but that no new provisions have been introduced or that such provisions were not available when the table was drawn up. Clarifications will be found in the "Comments" column. For additional explanations, see foregoing text.

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Afghanistan	Constitution of King 1964,* art. 9 (17)					"Remits and pardons sentences"	Monarch overthrown in 1973 and Republic established; Constitution repealed but not replaced (rule is by Presidential decree)
Albania	Constitution of 1950, art. 58 (7)	Presidium of the People's Assembly	"In conformity with the provisions of the law."				
Algeria	Constitution of 1963, art. 46	President of the Republic	Upon advice of Supreme Council of the Judiciary				
Australia	Prerogative	Governor (power delegated from Crown)	Minister of Justice & Executive Council of State				
New South Wales	Crimes Act, 1900, §§ 459-465, 475			Follows inquiry under Crimes Act or Royal Commission Act	Governor or Supreme Court		Since 1930, three such inquiries
				Judge directs Justice of Peace to conduct inquiry			

\*\* Under the Instrument of Government, 1974, ch. 11 ("Judicial and General Administration"), art. 13: "The Government may, by granting pardon, remit or reduce any criminal sanction or other legal consequence of a criminal act, and may remit or reduce any other similar encroachment concerning a private subject's person or property, made by public authority."

"Where exceptional reasons so warrant, the Government may order that no further measures for the purpose of investigating or prosecuting a criminal act shall be taken."

In the matter of consultation, ch. 7 ("The Business of the Government"), art. 2 provides as follows:

"In preparation of Government matters, the authorities concerned shall be consulted with a view to obtaining the necessary information and opinions . . ."

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Queensland	Royal Commission Act, 1923			General statutory power conferred on Governor in Council			Two recent uses: (a) convicted murderer had sentence commuted; (b) offenders convicted of gambling offences received free pardons
	Prerogative; Letters Patent, 1925, para. VII; Royal Instructions, 1925, para. VIII; Justices Acts 1886-1968, §177; Prisons Act, 1958-1969, §14	Governor, on behalf of Crown (under Prisons Act, Governor in Council)	Must receive advice of at least one minister, and in capital cases of executive council		In case of political offences only, pardon may be conditional on banishment	(a) free or unconditional pardons (b) respite of execution (c) remission of fines, penalties, and costs even if payable to person other than Crown	If punishment or reprieve might directly affect another jurisdiction Government nor shall take those interests specially into his own personal consideration (Royal Instructions)
Austria	Federal Constitutional Law of 1955, art. 65	Federal President	Art. 67 of Constitutional Law provides that President acts on proposal of Federal Government or Minister empowered, with countersignature by Chancellor or appropriate Minister				
Belgium	Constitution of 1831, art. 73; § 87 of Penal Code	King ("except in regard to what has been laid down for the ministers"—Constitution)	Countersignature of Minister of Justice		Ministers convicted by Cour de Cassation can only be pardoned on request of one of Chambers (art. 91 of	(a) remits or reduces penalties (b) remits incapacities attached by judge or law to certain convictions (c) pardon after test period	About 5-6,000 applications for pardon submitted annually of which approximately $\frac{1}{3}$ are granted in whole or part. Death penalty always com-

	Constitu- tion)	Grant pardons and commute sentences	mitted except in cases of treat- son
Brazil	Constitution of President (as amended in 1969), art. 81 (XXII)	May delegate this power to minister of state or other au- thority. Under art. 85, ministers "have power . . . to countersign the acts & decrees" of Presi- dent	"after hear- ing the recom- menda- tions of the organs in- stituted by law, if nec- essary"
Bulgaria	Constitution of State Council 1971, art. 93 (21)		Under 1947 Con- stitution the power be- longed to the President of the National Assembly
Burma	Constitution of Council of State 1973/4, art. 73 (o)	Pardons and am- nesties	Pardoning power was previously exercised by President on advice of gov- ernment
Burundi	Constitution of King 1962,* art. 65	Acts of King take ef- fect only on coun- tersignature by Minister (art. 56 of Constitution)	Constitution sus- pended in 1966; King killed in 1972 and republic established
Byelorussia	Constitution of 1937, art. 19	"The highest ex- ecutive and administrative organs"	
Central African Republic Chad	Constitution of President 1966, art. 3 Constitutional Law of 1962,* art. 64 (modi- fied 1967)	May delegate powers	In 1975, there was a military coup and the President was assassinated
Chile	Constitution of President 1925,* art. 72 (12)	Orders of President must be counter- signed by minister	Officials im- peached by Cham- ber
		"Private pardons" (as distinct from general pardon)	In 1973 the mili- tary junta an- nounced its in-

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
	Regulation on Pardon, 1959		who is rendered responsible		<p>ber of Deputies and tried by Senate can be pardoned by Congress only</p> <p>pardons and amnesties which under art. 44 (13) may be passed only by law; regs. provide for remissions, commutations and reductions of penalty</p>	<p>tention to introduce a new constitution and published its fundamental aims</p>	
China (People's Republic)	Constitution of 1954,* art. 35	Standing Committee of National People's Congress					<p>In 1975 a new short constitution of 30 articles was adopted. It appears to make no reference to pardons; but the National People's Congress may vest any processes or functions in either its Standing Committee or the State Council</p> <p>Constitution specifies that third party rights are unaffected</p>
Colombia	Constitution of 1886, art. 119 (4)	President	"In accordance with the laws regulating the exercise of this power"		Pardon available only for political offences		
Congo	Constitution of 1969, arts. 45, 43	President	"Under the conditions determined by law"; but exempted from need for countersignature				
Costa Rica	Constitution of 1949, art. 147 Penal Code, §§ 156-157	Council of Government	"in the manner specified by law"			Individual pardons applying to named individuals (general)	

eral pardons, like amnesties, are legislative and only apply to political offences)

Cyprus	Constitution of 1960,* art. 53	President or Vice-President	On unanimous recommendation of Attorney General and Deputy Attorney General	Death penalty commuted by President or Vice-President without recommendation for members of own community. If offender and victim of different communities — by agreement both. If no agreement vote for clemency prevails	Under the Constitution the President is always Greek, the Vice-President Turkish, and the Attorney General & Deputy Attorney General belong to different communities. In 1975 the Turkish community leader declared a Turkish-Cyprus State
Czechoslovakia	Constitution of 1960, art. 62	President		Pardon; mitigate sentence; cancel or suspend criminal proceedings	Coup of 1972 not known to have affected Constitutional provisions
Dahomey (Benin)	Charter of Presidential Council, 1970 art. 24	Presidential Council	High Council of Judiciary examines petitions and transmits with reasoned opinions (art. 48)		
Denmark	Constitution of 1953, art. 24	Queen	Pardon of Ministers	Pardon & Amnesty. Under	<i>Kriminalistik</i> 1967 indicates only



SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Dominican Republic	Constitution of 1966, art. 55 (27)	President	"in accordance with law"		in respect of sentences of High Court only with consent of Folketing	§ 97c of Penal Code consequences of conviction can also be pardoned.	20 pardons in that year
Federal Republic of Germany	Basic Law of 1949, art. 60 (2)	President	Order & decrees of Fed. President require countersignature of Federal Chancellor or appropriate Minister			Full or partial pardons, absolute or conditional to be granted on Feb. 27, Aug. 16 & Dec. 23 of each year "In individual cases"	By way of example: President Balaguer granted a pardon on Feb. 27, 1970, to 7 individuals in 7 different prisons
Finland	Constitution of 1919, art. 29; Law of High Court of Impeachment, art. 2	President		Supreme Court	Pardon of sentences by High Court of Impeachment only on proposition of that Court		
France	Constitution of 1958, arts. 17, 65; Organic Law, 1958 §§ 16-17	President	Must be countersigned by Prime Minister and any other appropriate minister	High Council of Judiciary may be consulted	High Council of Judiciary must be consulted in capital cases		
Gabon	Constitution of 1961, art. 15	President	"law shall establish rules concerning . . . amnesty & the right to pardon"				"President may delegate his powers to the members of the

		(art. 77)		Government" (art. 24)	
German Democratic Republic	Constitution of 1974, art. 74 (2)	Council of State		Amnesty and pardon	
Ghana	National Redemption Council (Establishment) Proclamation 1972*	National Redemption Council			Constitution of 1969 suspended in 1972. National Redemption Council reconstituted in 1975
Great Britain	Royal Prerogative	Queen	Acts on advice of Home Secretary		Free and conditional pardons; remissions; reprieves
Greece	Constitution of 1975, art. 47	President	On recommendation of Minister of Justice President's acts must be countersigned by competent Minister thereby rendered responsible	Pardon of impeached Minister only with consent of Parliament	Grant pardons; commute and reduce sentences; revoke all consequences of law of sentences inflicted & served
Hungary	Constitution of 1949, art. 20 (1)	Presidential Council of the People's Republic			
Iceland	Constitution of 1944, art. 29	President	Countersignature of Minister required to validate "act of Government"	Minister cannot be absolved from prosecution before or sentenced by Court of Impeachment without consent of Althing	In addition to pardon and amnesty President may order withdrawal of prosecution for "urgent reasons"
India	Constitution of 1949, arts. 72 & 61; Criminal Procedure Code, §§ 401-401A; Indian Penal Code,	President & Governor of State	May require opinion from presiding judge of trial court	President's power restricted to following cases: (i) offences within	Pardon, reprieve or remission of punishment; suspension, remission or commutation of sentence
					Condition of suspension or remission of sentence may be condition to be fulfilled by offender or "in-

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
	§ 54				province of executive power of Union; (ii) sentence of death imposed; (iii) punishment or sentence by court-martial	(may be conditional). Provisions apply to any order of criminal court restricting liberty or imposing liability on person or property	dependent of his will"
Irish Republic	Constitution of 1937, art. 13	President	Powers exercisable only on advice of Government			Pardon, commutation, remission	Power to commute or remit may, except in capital cases, also be conferred by laws on other authorities
Israel	Basic Law: The President of the State 1964, § 11(2)	President	Countersignature of Minister of Justice required (Minister of Defense in military cases)	Background information gathered in Ministry of Justice; Minister makes recommendation		Pardon offenders; mitigate penalties by their reduction & commutation. Supreme Court has held that pardon may be conditional, but doubted whether includes power to grant respite	In 1970/71, a fairly representative year, there were 728 petitions; 28 full pardons & 167 reductions of penalty were granted
Italy	Constitution of 1947, arts. 87, 89	President	Acts of President countersigned by Minister			Grants pardons and commutes court sentences	
Ivory Coast	Constitution of 1960, art. 20; Presidential Decree, 1961	President	Opinion of High Court of Pardon-Prince of Supreme Court and 3	Prison governor, physician, social	In death penalty cases opinion re-		

		worker, in charge of execution of penalties. In case of monetary penalty, inquiry into finances	ceived from President of trial court and prosecutor		
		or 4 Ministers; may be majority opinion			
Japan	Constitution of Emperor 1946, art. 7; Amnesty Law, 1947; Amnesty Law Enforcement Regulations, 1957; Offenders' Rehabilitation Law, 1949	Cabinet advises & approves; Emperor countersigns	National Offenders Rehabilitation Commission recommends Minister of Justice to file case with Cabinet where appropriate	(a) Special Amnesty—sets aside effects of conviction; (b) Commutation—mitigates sentence or its execution; (c) Remission of execution—outstanding penalty remitted; (d) Restoration of rights	Four preceding types of pardon as well as general amnesty dealt with by Amnesty Law. Number of applications vary e.g. 245 in 1968, 983 in 1969. Numbers granted in 1969; 410 of type (a); 170 type (b); 106 type (c); 166 type (d)
Jordan	Constitution of King 1951-2, arts. 38, 39	Irada (decree) signed by Prime Minister & Minister concerned, King countersigns		Every death sentence requires confirmation by King after receiving opinion of Council of Ministers	Special pardon or remission of sentence
Kenya	Constitution of President 1969, arts. 27-29 (consolidated amendments to 1963 Constitution)	President may consult with Advisory Committee on the Prerogative Mercy but "he shall not be obliged to act in accordance with the advice of the committee"	Advisory Committee consists of Attorney General & 3-5 other members appointed by President	Where death penalty imposed (other than by court-martial), a written report of the	(a) pardon, free or conditional (b) respite of execution for indefinite or specified period (c) substitution of less severe punishment

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Khmer Republic	Constitution of 1972, art. 42	President		Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
				dent, of whom one shall be a Minister and one a qualified physician	trial judge & other relevant information shall be considered by the Advisory Committee, but the President shall then decide "in his own judgment" whether to exercise powers	ment (d) remission of whole or part of punishment or any penalty or forfeiture due to Republic on account of offence	
Kuwait	Constitution of 1962, arts. 75, 55	Amir	"The Amir shall exercise his powers through his Ministers"			Pardon and commutation of sentences	No apparent difference here from King's powers under Cambodian Constitution of 1947
Lebanon	Constitution of 1926, arts. 51, 54	President	Decisions countersigned by minister concerned			Pardon or commutation of sentence	
Liberia	Constitution of 1847, art. 3	President			Impeachment accepted	Remission of forfeitures and penalties; reprieves & pardons for public offences	Constitution specifies "after conviction"
Libya	Constitutional Proclamation of 1969, art.	Revolutionary Command Council				Annulment or reduction of sentences	

Liechtenstein	<sup>32</sup> Constitution of Prince 1921, art. 12	-		Remission or mitigation in respect of member of government on account of official act only at the instigation of the Diet	Remission, mitigation, commutation of sentences; quashing of prosecutions
Luxembourg	Constitution of 1868, arts. 38, 45, 83	Grand Duke	Orders of Grand Duke countersigned by responsible Counselor of Crown	Members of government may only be pardoned at request of Chamber of Deputies	Remissions, reduction of penalties
Madagascar	Constitution of 1959, arts. 11, 46	President		May consult High Council of Institutions	
Malawi	Constitution of 1966, arts. 60, 61	President	President <i>may</i> refer question to Advisory Committee, appointed by him	All capital cases to be considered by Advisory Committee	(a) Pardon, free or conditional; (b) respite of execution of punishment for indefinite or specified period; (c) substitution of less severe form of punishment; (d) remission of whole or part of punishment, penalty or forfeiture due to Government on account of offence
Malaysia	Federal Constitution of 1957, art. 42 Criminal-	(i) The Yang di-Pertuan Agong (Head Ruler or Governor advised by Pardons Board, comprising	Where suspension or remission	Yang di-Pertuan Agong has	(a) pardons, (b) reprieves, (c) respites, in re-

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
	National Procedure Code, §§ 300–301	of Federation) in special categories; (ii) Ruler or Governor of individual state	of Attorney General of Federation, Chief Minister of State & up to 3 others appointed by Governor or Ruler— who himself presides over Board; Attorney General may delegate his functions	sought as provided under Criminal Procedure Code, convicting judge may be required to state opinion	power in respect of (a) offences tried by court martial; (b) sentences imposed by Muslim religious courts in Malacca or Penang	spect of all offences; (d) remissions, (e) suspensions, (f) commutations where power conferred by federal or state law. Under Criminal Procedure Code sentences of death or imprisonment may be commuted without consent of offender	
Malta	Constitution of 1964, arts. 86, 94	Governor-General (in Her Majesty's name & on her Majesty's behalf)	Acts in accordance with advice of Cabinet or Minister under general authority of Cabinet		In capital cases written report of trial judge (or President of court-martial) to minister responsible for justice who reports to Cabinet. Cabinet advises Governor-General whether he should grant pardon or respite	(a) pardon, free or conditional; (b) respite of execution for indefinite or specified period; (c) substitution of lesser form of punishment; (d) remission of whole or part of sentence or any penalty or forfeiture due to State on account of offence	"Cases of individual pardon very rare . . . mainly take place if the prison medical officer certifies that prison life may affect the mental or general health of the prisoner" (personal communication)

Mauritania	Constitution of President 1961, arts. 23, 19	Acts of President countersigned "where appropriate" by ministers in charge of their execution	President's power applies to offenders convicted of any crimes within jurisdiction of Federal Courts or common crimes in the Federal District and territories	Penal & Procedure Codes distinguish "of pardons" "of grace" which may be conditional or unconditional where the petitioner has performed important services for his country or such pardon is expedient in the interests of peace & security of the state & (b) pardons "of necessity" where there has been a miscarriage of justice indicated by (i) perjury at the trial (ii) the appearance of new documents (iii) evidence of the "victim" of homicide is alive or (iv) another person has been found guilty of the crime
Mexico	Constitution of President 1917, art. 89; Penal Code §§ 96-97; Procedure Code §§ 611-614	"according to law"		
Monaco	Constitution of Prince 1962, art. 15	Consults with Council of Crown		
Mongolia	Constitution of Presidium of the Great National Hural 1960, art. 34 (j)			
Nepal	Constitution of King 1962, art. 84	May, if thinks appropriate, consult Raj Sabha (Advising Council)		Grant pardons; remit, suspend or commute any sentence



SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Netherlands	Constitution of 1815, art. 77; Regulations of 1877	King		Having ascertained the opinion of the judge designated for this purpose by administrative measure		Pardon in respect of penalties inflicted by judicial sentence	
Netherland Antilles	Constitution, art. 16	Governor	Certain types of pardon, e.g. general or abrogation require King's prior or (in urgent cases) subsequent assent	Opinion obtained from judge who pronounced sentence; Attorney General informed by court, presumably expresses opinion			
New Zealand	Royal Prerogative, Letters Patent, 1917, Clause 8, and Royal Instructions, Clause 7; Crimes Act, 1961, §§ 406-407	Governor-General, in name of and on behalf of Crown	No pardon or reprieve by Governor-General without advice of at least one of his Ministers		No pardon or reprieve in capital cases without advice of Executive Council; no banishment as condition of pardon or remission "except where the offence has	Pardon to accomplice for information leading to conviction of principal; pardon free or conditional to any convicted offender; remission of sentence; respite of execution of sentence; remission of fines, penalties & forfeitures	

Nicaragua	Constitution of 1950, arts. 148 (22) & (23), 149(6), 191 (11) & (12), 193(3); § 522 of Code of Criminal Procedure	(a) Congress, in separate chambers; (b) President (special categories only)	Congress grants pardons, reductions & commutations for common offences "on the basis of a favorable recommendation by the Supreme Court of Justice"	Congress acts on initiative of executive; President has constitutional duty "to propose pardons, reductions or commutations of punishment." In practice Minister of Justice raises matter before Congress	been of a political nature undertaken by any other crime"	(a) Congress may, without executive initiative: (i) grant amnesties & pardons for political offences; (ii) commute the death penalty "to the immediate lesser punishment"; (b) The President may: (i) during adjournments of Congress, grant amnesties & pardons for political offences; (ii) suspend, if he deems it appropriate, execution of the death penalty	Pardons, reductions, & commutations of punishment; suspension of execution of death penalty	Petition for suspension of death penalty must be made on behalf of guilty party & accompanied by copy of petition for commutation submitted to Congress. Criminal Procedure Code states that an offender can not receive pardons or commutations more than once	Constitution suspended in 1974 following coup
Niger	Constitution of 1960, art. 20	President	Minister of Justice "gives opinion"	Director of Prisons, prosecutor, Minister of Interior					

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Nigeria	Federal Constitution, arts. 101-102 (since 1966 partly suspended)	President or Regional Governor	Powers to be exercised in accordance with advice of Chairman of Advisory Council on Prerogative of Mercy, who is a Minister (was Defense Minister). Other Members of Council (Attorney General—if he is not Chairman— & between 5-7 others, including a physician) consulted mainly in capital cases	Advice of Chairman of Advisory Council based on report of Ministry of Justice, which takes into account recommendations of judge and report of probation officers.		(a) pardon, free or conditional, of person concerned in or convicted of offence; (b) respite of execution for indefinite or specified period; (c) substitution of less severe form of punishment; (d) remission of whole or part of punishment for offence or of penalty or forfeiture otherwise due to State on account of offence.	
North Korea	Constitution (Suspension & Modification) Decree, 1966, suspended above provisions except for arts. 101 (1) & 101 (4) (b); also suspended regional constitutions	Supreme Military Council & State Governors	Exercised <i>de facto</i> on advice of Chairman of Advisory Council of Prerogative of Mercy, who is Attorney General, & Commissioner of Justice (Advisory Council is now administrative & not a constitutional body)				Under 1948/1962 Constitution, power invested in Presidium of Supreme People's Assembly
	Constitution of 1972, art. 95	President					

(North) Viet Nam	Constitution of 1959, arts. 5, 63	President	Standing Committee of National Assembly			Constitution specifies that offender may choose whether to accept pardon or submit to punishment
Norway	Constitution of 1814, art. 20	King in Council (regarded as prerogative of government)	Minister of Justice makes recommendation	In cases of impeachment for political offence, only commutation of death penalty may be granted	May grant pardon, reprieve or respite & may remit, suspend or commute any sentence passed by any court, tribunal or other authority	
Pakistan	Constitution of 1973, art. 45	President				
Panama	Constitution of 1972, art. 163(6)	President	Power "exercised by the President of the Republic alone"	Grants full pardon for <i>political</i> offences only	Reduces penalties & grants parole to persons convicted of common offences	
Paraguay	Constitution of 1967, art. 180(9); § 109 of Penal Code	President	"in accordance with law"; ministers authenticate acts of President & become responsible for them	President acts "upon the report of the Supreme Court of Justice"	(a) <i>pardon</i> —may be total or partial, may be general (e.g. because of a national or religious celebration) or individual (e.g. in recognition of good conduct or service to State); (b) <i>commutation</i> —substitution of penalty of lesser seriousness	

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Philippines	Constitution of 1971/1973, art. 10	Prime Minister			Impeachment exempted. No pardon of sentence for violation of election law without recommendation of Commission of Elections	Reprieves, commutations, pardons, remissions of fines & forfeiture after final conviction	The law has united the role of President & Prime Minister by conferring both titles on President Marcos
Poland	Constitution of 1952, art. 25	Council of State					
Rhodesia	Constitution of 1970, art. 60; Criminal Procedure & Evidence Act §§ 391-396	President	Acts on advice of Executive Council		President may declare that conviction <i>outside</i> Rhodesia shall not be regarded as conviction under Rhodesian law	(a) Pardon to person concerned in or convicted of offence; (b) respite from execution of sentence for indefinite or specified period; (c) substitution of less severe form of punishment; (d) remit whole or part of sentence or any penalty or forfeiture imposed on account of offence (Const.). May remit or commute High Court sentence; release prisoner on re-	The clemency provisions are substantially the same as those under the 1960 Constitution except for the provision relating to offences outside Rhodesia



SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Somalia	Constitution of 1960, art. 75(1)	President				sentenced person accepts (Crim. Proc. Code); President may commute without consent of person sentenced one of the following for any mentioned after it: (i) death (ii) imprisonment (iii) fine	
						Grants pardons & commutes sentences	Constitution suspended after Military Coup in 1969
South Africa	Republic of South Africa Constitutional Act, 1961, §§7(3), 16, 19; Criminal Procedure Act, 1955, § 232 & Ch. 21; Prisons Act, 1959, §§ 68-69	President	Acts on advice of Executive Council; every instrument signed by him countersigned by a minister			Pardon or relieve unconditionally or subject to conditions he may deem fit; remit fines, penalties or forfeitures. Remission of imprisonment may be conditional on recognition. President may authorize release of any prisoner unconditionally or on probation or parole if it appears expedient to him. May commute	

South Korea	Constitution of 1972, art. 66(10)	State Council	death penalty to any punishment provided by law without consent of offender	Under previous Constitution, power was President's
Spain	Organic Law of the State, 1966, art. 68	Head of State	Amnesty, commutation and rehabilitation	
Sri Lanka	Constitution of 1972 arts. 22, 27	President	<p>In capital cases President shall ask trial judge to make report to be sent with Attorney General's advice to advisory minister</p> <p>(1) May pardon accomplice who shall give information leading to conviction of principal; (2) in respect of convicted offenders (a) grant pardon free or conditional; (b) respite of execution of sentence; (c) substitute less severe sentence; (d) remit whole or part of punishment, penalty or forfeiture</p>	Similar in substance to provisions obtaining under Royal Prerogative
Sweden	Constitution of 1809, * art. 26	King in Council of State; power cannot be delegated	<p>Grant pardons (includes total waiver of penalty, reduction &amp; substitution &amp; suspension of execution); commute death penalty; restore honors; return property</p> <p>Supreme Court consulted in about 1/3 of cases; its recommendations to grant pardon usually follow</p>	<p>(a) offender has option to accept pardon or suffer punishment imposed (b) Ministry of Justice deals with 2,000 applications a year, about 20% of which</p>



SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
				lowed; the Courts need not be consulted if no apparent grounds for pardon		erty forfeited to Crown	are granted
	Instrument of Government, 1974, Ch.11, art. 13; replaces above provisions. For full text see foot of table**	Government		"The authorities concerned" (See Ch. 7, art. 2).		(See text at foot of table)	
Switzerland	Federal Constitution of 1874, arts. 85(7), 92	Federal Assembly, comprising the National Council & the Council of States (see "Comments")					Right to pardon exercised by both Councils meeting in joint session, decisions being reached by a majority of the members of the two Councils voting
Taiwan	Constitution of 1946, art. 40	President				Pardons; amnesties; remission of sentences	
Tanzania	Constitution of 1965, art. 22	President				Pardon, free or subject to lawful conditions, to any person convicted of any offence	
Tunisia	Constitution of 1959, art. 50	President					
Turkey	Constitution of 1961, arts. 64, 97; Criminal	Grand National Assembly; also limited	Decrees of President require signatures of Prime Minister &		Constitution specifically confers on	Pardon sets aside, reduces or changes pun-	

	Code, §§ 97-101	power to President	other relevant ministers	Assembly to decide upon execution of death penalty	ishment. President may commute or pardon on grounds of chronic illness, infirmity or old age, the sentences of convicted offenders
Uganda	Constitution of 1967, arts. 73-75	President	Advisory Committee on Prerogative of Mercy advises President as to whether should exercise powers; Committee consists of Attorney General & 6-9 others, not members of legislative body, appointed by President	In all capital cases Attorney General brings trial judge's report & other information before Committee	(a) Pardon, free or conditional, to any person concerned in or convicted of offence; (b) respite of execution for indefinite or specified period; (c) substitute less severe punishment; (d) remit whole or part of punishment in imposed for offence or penalty or forfeiture or otherwise due to Government on account of offence
Ukraine	Constitution of 1937, arts. 19, 30	Presidium of the Supreme Soviet			Citizens sentenced by judicial organs of Ukrainian S.S.R.
U.S.S.R.	Constitution of 1936, arts. 49, 60	(a) President of Supreme Soviet of U.S.S.R.; (b) Supreme Soviet of Union Republics			President has power to pardon; Supreme Soviet has "right of amnesty & pardon of citizens sentenced by the judicial bodies of the Union Republic"

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—*Continued*

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
United States	Constitution of 1787, art. 2(2)	President (Federal Offences Only)	In practice advised by Pardons Attorney (but no Constitutional or other statutory basis)		Impeachment excluded	Reprives & pardons (Const.); case law distinguishes full pardons, conditional pardons and commutations	
Upper Volta	Constitution of 1970, arts. 34, 93	President	Higher council of Judiciary examines petitions & transmits to President with reasoned opinion				Constitution suspended in Feb. 1974
Uruguay	Constitution of art. 85(14)	(a) General Assembly, by 2/3's vote at joint session of both Chambers (b) High Court			(a) "Indulto" granted by legislature;		"Indulto" in practice never granted
	Penal Code, § 109				(b) "gracia" granted by High Court (c) "gracia" in respect of military offences granted by President of Republic		
	Military Penal Code, § 33	(c) President					
Vatican	Fundamental Laws, 1929, art. 18	Sovereign Pontiff	Requests transmitted through General Counsellor of State			Pardons, dispensations and abatements	
Venezuela	Constitution of 1961, art. 190 (21)	President	The pardoning power is <i>not</i> included among acts to be exercised in Council of Ministers; it must, however, "be countersigned by	In practice restricted to petitions emanating from prisons in Ministry of	Petitions considered only when (i) prisoner served 2/3 of sentence (or	Total or partial pardon	Annual figures for pardons fluctuate between 150-350 for a prison population of 12-13,000;

	the appropriate Minister in order to be valid"	Justice	1/2 if mitigating circumstances) (ii) exemplary conduct indicated; (iii) prognosis is favorable; (iv) social information favorable; (v) no recidivism	10%-25% of those pardoned had been convicted of political offences
Western Samoa	Constitution of 1960, art. 110	Head of State	Acts in his discretion but consults with minister designated by Prime Minister	Pardons, re-prieves & res-pites; suspension, or commutation of any sentence
Yugoslavia	Constitution of 1974, art. 315(a)	Presidency	"In accordance with federal statute"	Presidency is composite body distinct from President of Republic, who had pardoning power under previous Constitution
Zaire	Constitution of 1967, art. 30	President	High Council of Judiciary to be consulted on all questions of pardon in accordance with organic law	Consultation provisions based on 1964 Constitution
			(i) May only pardon a member of central or provincial government with agreement of High Court of Judiciary; (ii) death penalty not carried out until application for pardon rejected	Remits, reduces or commutes sentences

SCHEDULE: TABULAR COMPARISON OF PROVISIONS RELATING TO PARDONING POWERS—Continued

Name of Country	Legal Source	Formal Decision-making Body	Recommending or Countersigning Body	Other Advisory Bodies	Special Categories of Offence, Offender or Penalty	Types of Pardons	Comments
Zambia	Constitution of 1973, arts. 53, 60, 61	President	President acts "in his own deliberate judgment & shall not be obliged to follow the advice tendered by any other person or authority"	Advisory Committee on the Pardon of Mercy appointed by President who presides over committee to which he may refer any question as to the exercise of his powers	In capital cases, President is obliged to refer question of exercise of prerogative powers to Advisory Committee	(a) Pardon, either free or subject to lawful conditions to any person convicted of any offence; (b) respite of execution of any punishment for either indefinite or specified period; (c) substitution of less severe form of punishment; (d) remission of whole or part of punishment, penalty, forfeiture or confiscation	

sulted in its omission from the constitutional scheme. The institution of clemency, having survived the ideological attacks launched against it by eighteenth century political theorists, seems to have been no more intimidated by the encroachment of competing institutions developed by twentieth century penal systems. Thus Beccaria's vision of a clemency-free millennium does not seem to have drawn perceptibly nearer.

#### THE LEGAL SOURCES OF THE PARDONING POWER

The basic provisions for a pardoning power are nearly always found in the state constitution, the main departures being "basic" or "organic" laws, which in effect take the place of a constitution. Great Britain continues to rely on the royal prerogative, a recognized feature of her unwritten constitution, and this same prerogative, as delegated, also obtains in certain jurisdictions of the British Commonwealth, such as in Australia and New Zealand. It should also be observed that in countries with a federal structure, basic provisions may be found both at the federal level and within the constitutions of the individual provinces or states.<sup>11</sup> The jurisdiction of the federal pardoning authority is not, however, necessarily coextensive with the jurisdiction of federal courts and laws (as in the United States). Thus, for example, in India the President may commute the death penalty even where state laws are involved.<sup>12</sup>

#### THE PARDONING AUTHORITY

A perusal of the comparative table below reveals that in the overwhelming majority of countries, clemency powers are vested in the

<sup>11</sup> With the exception of Australia the present survey was confined to the federal or national level. For a somewhat outdated study of the clemency power in the individual states of the United States, see Neal & Hager, *Summary of the Provisions of the Constitution and Statutes of the Several States Relating to Pardons*, 20 J. CRIM. L. & C. 364 (1929). For a more recent analysis, see Weihofen, *Pardon and other Forms of Clemency*, in *THE LAW OF CRIMINAL CORRECTIONS* 569 (S. Rubin ed. 1963).

<sup>12</sup> Cf. The jurisdiction of the federal authority in Malaysia, where the Head of Federation's power to pardon is confined to certain special cases and the ruler or governor of the individual state retains such power in respect of all other offences. See comparative table, *infra*.

head of states, be it the president<sup>13</sup> or the monarch.<sup>14</sup> The vesting of the clemency powers in the head of state is consistent with the popular view of the pardon as a discretionary power entrusted to the most elevated personage in the land. Indeed, in this respect there appears to be a degree of historical continuity with the powers of the formerly autocratic monarch having been transferred to his constitutional successor, who remains the ultimate font of mercy vis-a-vis his erring subjects. Superimposed on this image is an image which attributes the pardoning power to the executive arm of government, which retains the discretion to refrain in extreme cases from absolute enforcement of the laws of the land. This dual image depends upon an identity of functions of head of state and chief executive.

That the above picture is over-simplistic is revealed by a study of the development of clemency powers over the past two centuries and by a close examination of the comparative table. The historical point may be made by reference to the constitutional histories of France and the United States. In post-revolutionary France, the acceptance of the need for a pardoning power did not entirely dispel reservations about the wisdom of concentrating the decision-making power solely in the hands of the head of state in his capacity as chief executive. The 1802 constitution provided for the establishment of an advisory council in which all three branches of government were represented.<sup>15</sup> Similarly, the 1848 constitution provided for mandatory consultation with the *Conseil d'Etat*, and in serious cases (*i.e.*, convictions in the High Court) the right to pardon was reserved to the National Assembly. Finally, under the constitution of the Fourth Republic, the power was vested in the President sitting in the High Council of the Judiciary, an indication that the power was not

<sup>13</sup> The Cyprus constitution provides for a distribution of power between President and Vice-President, reflecting the respective community affiliations of the holders of these offices.

<sup>14</sup> The King or Queen (Belgium, the British Commonwealth, Denmark, Nepal, the Netherlands, and Norway); the Prince (Monaco and Liechtenstein); the Emperor (Japan); the Grand-Duke (Luxembourg); the Amir (Kuwait) or the Yang di Pertuan Agong (Malaysia).

<sup>15</sup> J. MONTEIL, *LA GRÂCE EN DROIT FRANCAIS MODERNE* 22 (1959) [hereinafter cited as MONTEIL].

to be regarded as purely executive in nature.<sup>16</sup>

In the United States the theory prevailed that the power to grant clemency, like all other powers, ultimately resided with the people, who were consequently able to delegate it to whichever body they chose.<sup>17</sup> The identity of the preferred body tended to vary from era to era. During the pre-Independence period there were three models for the institution of clemency: (a) vesting the power in the governor; (b) vesting the power in the governor acting only with the consent of the Executive Council; (c) vesting the power in the legislature. During the period 1790–1860 there was a revival in public trust in the executive, and twenty-one states adopted model (a), while four preferred model (b). Since 1860, in keeping with the increasing professionalization of the pardoning power, the majority of state constitutions have provided for some sort of autonomous board of pardons having either formal decision-making power or at least an advisory role in this respect.

An analysis of the comparative table confirms that attribution of the pardoning power to the head of state-cum-chief executive is not universal. Under some constitutions the power is vested in a collective body rather than in an individual: the State Council in Bulgaria, the German Democratic Republic, Poland, Romania and South Korea; the Praesidium of the legislative assembly in Albania, Mongolia and the Ukraine; the Presidential Council in Dahomey and Hungary, the Revolutionary Command Council in Libya. Most of these bodies, as their names sometimes indicate, perform tasks akin to those of a president.<sup>18</sup>

<sup>16</sup> Under an earlier proposal the decision would have belonged to the High Council of the Judiciary, presided over by the President who would have had equal voting rights. The proposed constitution containing these provisions, however, was rejected by the French people. See MONTEIL, *supra* note 15, at 33–34.

<sup>17</sup> THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, VOL. III: PARDON 87–88 (1939) [hereinafter cited as 1939 SURVEY].

<sup>18</sup> In the U.S.S.R. the Praesidium of the Supreme Soviet "is the highest permanent functioning organ of the State. . . . It performs all sorts of functions, and defies the theory of Separation of Powers . . . It performs functions, executive in character, which in other countries are the prerogative of the Chief Executive, Head of the State, King, or President." S. PATEL, *World CONSTITUTIONAL LAW AND PRACTICE* 185–86 (1970). Similarly, the State Council in Poland fulfills the function of a collective head of state. See PEASLEE, *supra* note 6, at 708.

Under the new Swedish constitution, on the other hand, the pardoning power is vested in the government as such. In Sweden, the executive body does not play the additional role of head of state, a function still fulfilled by the monarchy, now apparently deprived of any substantial power.<sup>19</sup>

Finally, in a few countries the power to pardon offenders is reserved exclusively to the legislature.<sup>20</sup> This is the situation under the constitutions of Switzerland, Uruguay and, for some purposes, Turkey. In Nicaragua the power is vested primarily in the legislature, but supplementary powers are also granted to the President and the judiciary.

It is thus evident that the clemency power is not universally regarded as the sole prerogative of the head of state. Indeed, the only clear feature emerging from an analysis of the constitutions included in the present survey is that in no case is this power vested primarily<sup>21</sup> in a judicial authority. Nor does the model of the head of state acting within the framework of a judicial body<sup>22</sup> appear to be prevalent today.

Since the role of the head of state is at times ambiguous, the fact that the head of state may be the sole repository of the clemency power does not in itself unequivocally determine the constitutional nature of the power. In historic times, the sovereign ruler generally combined the functions of all three branches of government—executive, legislative and judicial—and even as these functions became differentiated, he continued to play a pivotal role in all three branches. Thus the British Crown formally re-

<sup>19</sup> The Instrument of Government of 1974 refers to the duties and the functions of the monarch, but does not specify what they are. The intention of depriving the monarchy of its powers, however, was evidenced by a provision specifying that the articles of the constitution relating to the monarchy would become effective only upon the death of the then-reigning monarch.

<sup>20</sup> It may be that in some jurisdictions vesting the pardoning power in the executive or other body does not deprive the legislature of an equivalent power. In this connection see Weihofen, *Legislative Pardons*, 27 CAL. L. REV. 371 (1939); Radin, *Legislative Pardons: Another View*, 27 CAL. L. REV. 387 (1939) [hereinafter cited as Radin].

<sup>21</sup> For a discussion of the bodies playing a *secondary* role in the clemency decision, see text accompanying notes 32–40 *infra*.

<sup>22</sup> Under the constitution of France's Fifth Republic, the President no longer sits on the High Council of the Judiciary when it issues clemency decisions. He may, however, consult with the High Council.

tains this threefold capacity today; and while recent tradition identifies the prerogative of mercy with the executive arm,<sup>23</sup> the historical justification for this is not entirely clear. In an earlier day, this prerogative was linked with the Crown's control of criminal procedure:<sup>24</sup> the King was, in Hume's view, "the fountain of grace and mercy, as he is of justice."<sup>25</sup> There is at least some ground here for identifying the pardoning power with the *judicial* arm of government.<sup>26</sup>

Similarly in the republics, the prevailing model under which the power to pardon is vested in the president does not obviate doubts as to the character of this power,<sup>27</sup> because the role of president varies considerably from state to state.<sup>28</sup> Thus, while the President of the

<sup>23</sup> The widespread use of the expression "executive clemency" reflects this notion. The control of the prerogative of mercy in modern times by the Home Secretary (see text accompanying note 36 *infra*) has reinforced the association with the executive aim. However see note 26 *infra*.

<sup>24</sup> W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 415 (1938), following Blackstone. The Crown's role in the matter of clemency has also been described as the "waiver of royal rights conceived as rights of property." Radin, *supra* note 20, at 391.

<sup>25</sup> Cited in 1 L. RADZINOWICZ, A HISTORY OF THE CRIMINAL LAW 130, n. 73 (1948) [hereinafter cited as RADZINOWICZ].

<sup>26</sup> The English case of *Hanratty v. Lord Butler of Saffron Walden*, 115 Sol. J. 386 (1971), compared the Home Secretary's immunity in respect of the pardoning power with that of judges and advocates. Characterization of the source of the pardoning power as executive or otherwise (the "organic" criterion) should, however, be differentiated from the characterization of the exercise of this power (the "functional" criterion). Applying the functional criterion, many governmental acts are of a mixed character and cannot readily be denominated as either "legislative," "executive," or "judicial." KLINGHOFFER, ADMINISTRATIVE LAW (1957). In Israel, as in the United States, the attorney general's discretionary power in the matter of prosecution has been labeled by the courts as "quasi-judicial."

<sup>27</sup> In France, the immunity of the exercise of the clemency powers from judicial review had always been attributed to its classification as an "act of state." In 1947, however, the *Conseil d'Etat* concluded that immunity from judicial review derived from the judicial character of the pardon. MONTEIL, *supra* note 15 at 56-57.

<sup>28</sup> Constitutions may be differentiated according to the degree to which the executive is subject to the control of the legislature, distinguishing the "presidential-executive" model from the "parliamentary-executive" model. L. WOLF-PHILLIPS, CONSTITUTIONS OF MODERN STATES xix (1968). In states following the latter model, the head of state is less likely to have substantial political power.

United States serves simultaneously as head of state and as the sole chief executive,<sup>29</sup> the presidents of the Federal German Republic and of Israel are for the most part symbolic figures, the effective political power being wielded by the Federal Chancellor and Prime Minister, respectively. The French presidency fulfills a role somewhere between these extremes, for although the office of Prime Minister also exists under the French constitution, substantial executive power is retained by the President.<sup>30</sup>

This variance in the nature of the presidential role seems to add strength to the view that the dominant tradition is essentially one of vesting clemency powers in the head of state *as such*, and not specifically in his capacity as chief executive. Thus, the Communist states which entrust these powers to a presidential or state council, rather than to the Council of Ministers, are substantially in keeping with this tradition. The main exceptions remain those few jurisdictions which seem reluctant to confide a power to interfere with the judicial process in any body other than the legislative assembly, which in most systems is regarded as the ultimate sovereign authority.<sup>31</sup>

The preceding analysis has been confined to a discussion of the formal vesting of the clemency powers as reflected in basic constitutional provisions. There are two reasons, however, why the designated body may not necessarily wield substantial power. First, the constitution may expressly provide that the power is to be exercised on the advice of some other body. Secondly, even without such express provision, the constitutional norms or practice of the individual country may require that the acts of the formal authority, especially those of a symbolic head of state, require the sanction of a more actively political figure. These situations will be considered in the next section.

#### THE INVOLVEMENT OF OTHER BODIES IN THE CLEMENCY DECISION

In most jurisdictions the clemency process involves more than a petition from the offender

<sup>29</sup> See also art. 5 of the Chad Constitution of 1962, which specifies that "the President of the Republic shall be the Head of State and of the Government."

<sup>30</sup> But with regard to his clemency powers, see note 27 *supra*.

<sup>31</sup> In this respect, the legislature may be seen to wear the mantle of the erstwhile monarch, whose pardoning power was regarded as simply an incident of his sovereignty. See 1939 SURVEY, *supra* note 17, at



directly to the pardoning body, followed by the latter's decision. A more complex procedure is usually adopted, involving the examination of the petition and the issuing of an opinion on the part of some other body. The question arises as to the nature of such "secondary" bodies and their power vis-a-vis the "primary" decision-making body.

Under some systems it is explicitly stated that the ultimate decision belongs to the primary body alone.<sup>32</sup> Other systems, on the other hand, specify that the primary pardoning authority is not entitled to exercise this function of his own accord, but is dependent on the initiative or recommendation of another. This may be provided for by the constitutional or other statutory provisions<sup>33</sup> relating to clemency. Alternatively, the accepted constitutional practice of the state (whether on a written or conventional basis) may require that the powers of the primary authority—especially where this authority is no more than a political figurehead—be exercised only in accordance with the wishes of the government or its appointee.<sup>34</sup>

It is, indeed, most frequently the executive arm which is designated as the "recommending" body. This is the case under the constitutions of Austria, Greece, the Irish Republic, Japan, New Zealand, Niger, Rhodesia, Singapore, South Africa and Sri Lanka. In these cases it seems clear that the "secondary" authority has been granted the effective decision-making power.<sup>35</sup> In Great Britain, on the other hand, it is the constitutional convention which has transferred effective power from the Crown to the Home Secretary.<sup>36</sup>

Under many constitutions no such advisory role is explicitly attributed to the government or its representatives. The same result is

achieved in practice, however, by the device of ministerial countersignature. These constitutions specify that decisions emanating from the primary authority require the countersignature of the prime minister, or the minister responsible for the matter to which the decision relates, or both. Such a requirement appears, *inter alia*, in the constitutions of Belgium, Burundi, Italy, Lebanon, Luxembourg, Mauritania, Spain and Turkey. It also appears in some constitutions (Austria, Greece and South Africa) in which another governmental authority is designated as enjoying a "recommending" capacity, further emphasizing the role of this authority in the clemency process.

It is sometimes specified,<sup>37</sup> and nearly always implied, that the absence of the required countersignature would render the clemency decision nugatory. Further, since the effect of such countersignature is to render the countersigning minister or ministers responsible for the decision,<sup>38</sup> the view is generally held by the governments or ministers concerned that even if no "advisory" role is imputed to them by the constitution, they are nevertheless entitled to an effective and perhaps decisive say in the pardoning decision. The French Minister of Justice, M. Pierre-Henri Teitgen, once stated that his obligation to countersign presidential clemency orders did not depend upon his concurring with their content, which remained within the exclusive prerogative of the President.<sup>39</sup> A happier solution, in this writer's view, is that obtaining in the Congo (and formerly

87. The modern trend, however, is to attribute sovereignty to the people. See, e.g., art. 4 of the Constitution of Uruguay.

<sup>32</sup> The Zambian Constitution provides that the President acts "in his own deliberate judgement and shall not be obliged to follow the advice tendered by any other person or authority."

<sup>33</sup> The constitutional provisions themselves frequently state that the constitutional powers will be exercised "in accordance with the law."

<sup>34</sup> See, e.g., art. 67 of the Austrian constitution.

<sup>35</sup> Except, perhaps, in the case of Niger, where the language is somewhat equivocal.

<sup>36</sup> The development of this convention during the course of the past two centuries is described in F. BRESLER, *REPRIEVE* (1965).

<sup>37</sup> Art. 75 of the Chilean constitution specifies that all orders of the President of the Republic must be signed by the minister of the respective department, and "shall not be obeyed without this essential requirement."

<sup>38</sup> Such responsibility is generally understood to be political, but under some systems may also connote legal responsibility. J. Laferrière, *Le Contresigne Ministériel*, in *LA REVUE GÉNÉRALE D'ADMINISTRATION* 39 (1908).

<sup>39</sup> See MONTEIL, *supra* note 15, at 46-47. The situation in Israel in this respect has been analyzed in L. Sebba, *Pardon and Amnesty—Juridical and Penological Aspects* (1975) (unpublished doctoral thesis, University of Jerusalem) [hereinafter cited as Sebba, 1975], where it was concluded that the intention of the basic law was to vest effective decision-making power in the President despite the requirement of a ministerial countersignature. A "middle" view, advocated by Professor Klinghoffer, regards the clemency decision as an example of a "composite act." See also H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 95-96 (1945).

also in Dahomey), where the requirement of a ministerial countersignature for acts performed by the President is dispensed within the exercise of the pardoning power. Just as the requirement of the countersignature is often waived for the appointment or dismissal of ministers, so too, a distinction could be made between purely formal duties of state, where the requirement would apply, and functions involving a genuine exercise of presidential prerogative powers, where it would not.

Recommendations do not emanate exclusively from executive sources. They also may issue from bodies of a judicial, quasi-judicial or legislative character. Some constitutions (Algeria, Upper Volta, Zaire) follow the French model and bestow an advisory role on the High Council of the Judiciary. In Chad such a role is granted to the Supreme Court itself. In Vietnam, on the other hand, a special committee of the National Assembly exists for this purpose. Finally, some constitutions provide for the establishment of an Advisory Committee on the Prerogative of Mercy (Kenya, Nigeria, Uganda, Zambia), a Pardons Board (Malaysia), a High Council of Pardons (Ivory Coast) or other consultative council (Greece). The body designated by the constitution for an advisory role may thus be associated with any of the three branches of government, or it may constitute an ad hoc combination.

It should be again emphasized that the actual power of these "secondary" bodies in the decision-making process may vary considerably.<sup>40</sup> The formulation of the constitutional provisions may not be decisive in this respect.

Finally, it should be pointed out that under most systems there will exist some machinery for investigating the circumstances of the individual petitions. Such investigation may be required of a particular body, perhaps judicial, whose purpose is less to advise than to gather or sift the information on the basis of which a decision can subsequently be made. The role of these investigative bodies—a few of which appear in the fifth column of the table below—will rarely be mentioned in the constitutional provisions, and their status may best be labeled "tertiary."

<sup>40</sup> The role of the consultative council in Greece is clearly subsidiary to that of the Minister of Justice. Even though consultation with the council is mandatory, it should rather be classified as a "tertiary" body.

#### SPECIAL CATEGORIES

The constitutional provisions relating to pardon are usually stated in general terms, which do not indicate the precise scope of the pardoning power. Questions as to the applicability of pardons to disciplinary offences or to administrative penalties are left to supplementary legislation or judicial interpretation. On the other hand, in at least two special areas, it is not unusual to find express reference to certain categories of offence, offender or penalty.

The first area is that of political crimes. Here the special provisions may apply to political offences in general, but often relate specifically to proceedings of impeachment involving members of the government. In such cases, restrictions are imposed upon the exercise of the pardoning power. Clearly a system which provides for impeachment proceedings as a means of exercising legislative control over the executive would be frustrated if the executive could simply void the proceedings at will by granting pardons. For this reason the application of the pardoning power to impeachment proceedings is often made dependent upon the initiative or the consent of the legislative body. Such is the case in Belgium, Denmark, Greece, Iceland, Liechtenstein and Luxembourg. In Finland the initiative must come from the High Court of Impeachment. Under the Chilean constitution, the pardoning power is itself reserved to Congress in such cases. In Norway the only form of clemency which may be exercised in cases of impeachment is the commutation of the death penalty.<sup>41</sup>

As to the application of the pardoning power to political offences in general, the philosophy expressed in the constitutional provisions is far from uniform. For while Liberia excludes all political offences from the President's power to pardon, in Colombia and Panama a power to pardon is granted to the President *only* in relation to political offences. In Nicaragua the pardoning power is exercised with greater facility in these cases. The Congress can pardon political offenders without the initiative on the part of the executive required in other cases, and the President may also grant such pardons when the Congress is adjourned. Finally, in New Zealand and Queensland it is provided

<sup>41</sup> Other forms of restriction are found in Zaire and the Philippines.

that the pardoning of political offenders may be made conditional on their banishment.

The other area in which special provisions are frequently found is that of the death penalty. The most usual type of provision mandates that capital punishment cases be reviewed by the body or bodies whose task it is to consider applications for pardon. This applies, for example, to the Advisory Committees on the Prerogative of Mercy in Kenya, Malawi, Uganda and Zambia, as well as to the appropriate authorities in Malta, Singapore and Sri Lanka. In Jordan all death sentences require the confirmation of the King. The object of all these provisions is clearly to ensure that, where the ultimate penalty is to be inflicted, no case deserving of consideration by the clemency authorities will be overlooked as the result of a failure on the part of the defendant to submit a petition, or for want of adequate investigation.

On the other hand are the provisions obtaining in New Zealand, where the death penalty can be commuted only by a decision of the Executive Council and in Turkey, where the decision must be made by the legislative assembly. These models appear to indicate a harsher policy towards capital cases, since the decision-making power has been vested in a more formal body.

#### TYPES OF PARDON

As indicated in the introductory section, the institution of pardon is an ancient one, and throughout history it has served a number of functions, according to the needs of particular legal systems at particular times. It is not therefore surprising that a multitude of terms were applied to the clemency function and that their usage has not always been consistent. Thus, in the English language alone, the following terms are encountered: free pardon, full pardon, conditional pardon, commutation, remission, reprieve, respite, amnesty, clemency, mercy.

By way of illustrating the problematic nature of the terminology, a comparative observation may be made regarding the laws prevailing in the United States, England and Israel respectively. The United States Constitution followed the English jurists in providing for *reprieves* and *pardons*.<sup>42</sup> The term pardon is used in a generic sense, and apparently includes both reduction or remission of sentence as well as commuta-

tion, but not reprieves, which are specified independently. In England, on the other hand, the term "commutation" was never generally adopted. The substitution of one penalty for another was included in the rubric of the "conditional pardon." It was thus not surprising that the Israeli Supreme Court, faced with a law providing for "pardons and reductions of sentences,"<sup>43</sup> examined both English and American sources, but was unable to reach unanimity on the question as to whether commutations were included.<sup>44</sup>

The majority of constitutions do not directly address these questions. Instead, the precise forms which the clemency power may take are left to regular or even subsidiary legislation, or to judicial interpretation. It was the practice in British colonial legislation, however, to specify the various forms of clemency, and this model can still be found in the basic provisions of Kenya, Malaysia, Malta, New Zealand, Nigeria, Singapore, Sri Lanka, Uganda and Zambia. The forms commonly specified in these jurisdictions are (a) pardon, free or conditional; (b) respite of execution for a specified or indeterminate period; (c) substitution of a less severe form of punishment (commutation);<sup>45</sup> (d) remission of the whole or part of the punishment. The last type usually specifies that remission may apply to any penalty or forfeiture incurred for any offence, and this would appear to include sanctions incurred by way of administrative proceedings.

The legal provisions which describe the various types of pardon rarely specify the objective for which each type is intended.<sup>46</sup> In this respect the fourfold typology mentioned in the last paragraph is consistent with the impression created by the clemency provisions of most legal systems, namely that they are designed to

<sup>42</sup> Section 6 of the Transition Law (1949).

<sup>43</sup> F.H.13/60, Attorney General v. Matarra, 16 P.D.430. Agranat, J., took the view that the commutation of sentences fell within the President's pardoning power, but that reprieves did not. The court settled the issue by construing the case before it as a *conditional pardon*. The issue was ultimately resolved by the legislature, which redefined the President's powers to include commutation. See § 11(b) of the Basic Law: President of the State (1964).

<sup>45</sup> This type is not specified in the provisions of New Zealand and Singapore. As mentioned above, however, commutation was traditionally achieved in England by means of the conditional pardon.

<sup>46</sup> One notable exception relates to the pardon of accomplices; see text accompanying notes 52-54 *infra*.

<sup>42</sup> U.S. CONST. art. II, Sec. 2.

facilitate a post-convictional modification of judgment, usually because of changes in the offender's personal conduct or circumstances, or possibly because of doubts relating to the propriety of his conviction. The last consideration is more evident in jurisdictions influenced by the common law, since a "free pardon" implies some form of corrective to the conviction itself.<sup>47</sup> The French *grâce*, on the other hand, is concerned exclusively with the punishment. The main reason for this difference between the two systems is that the French legal system developed a separate remedy for suspected miscarriages of justice: *révision*, or retrial. This is a special form of court proceeding which may be instigated for specified reasons.<sup>48</sup> This institution is generally foreign to the common-law countries,<sup>49</sup> which rely on the pardoning power to accomplish this purpose.<sup>50</sup> In this connection it may be mentioned that the Mexican constitution has adopted a middle road and distinguishes pardons "of necessity," which will be automatically granted on proof of miscarriage of justice, from pardons "of grace," which are discretionarily granted for outstanding services to the state.<sup>51</sup> In the former case, specified grounds of application are laid down which are almost identical with the grounds for applying for revision under French law.

Another objective of the pardon reflected in the clemency provisions of some countries relates to the role of criminal accomplices. The clemency provisions of New Zealand, Singapore and Sri Lanka state that an accomplice

<sup>47</sup> The extent to which a pardon serves to eliminate all the adverse effects of a conviction has been a topic of considerable debate in Anglo-American jurisprudence. See, e.g., Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 697 (1915); Weihofen, *The Effect of a Pardon*, 88 U. PA. L. REV. 177 (1939).

<sup>48</sup> In brief, these reasons include: (a) the live appearance of the "victim" of a homicide; (b) the conviction of another defendant for the same offence, revealing an inconsistency; (c) the conviction for perjury of one of the witnesses at the original trial; (d) the emergence of new evidence indicating the accused's innocence.

<sup>49</sup> Israel has attempted to merge both legal traditions in this area; see, Courts Law § 9 (1957).

<sup>50</sup> The manner in which the clemency powers have been exercised to remedy miscarriages of justice has been the subject of concern in recent years. See JUSTICE, HOME OFFICE REVIEWS OF CRIMINAL CONVICTIONS (1968).

<sup>51</sup> Compare the old English distinction between "pardons of course and right," and "pardons of grace"; M. HALE, PLEAS OF THE CROWN 250 (1678).

who provides information leading to the conviction of the principal offender may be pardoned. This type of pardon appears to be confined exclusively to countries influenced by the common law. It reflects a practice which was considered the mainstay of the English criminal justice system during the end of the eighteenth and the beginning of the nineteenth centuries.<sup>52</sup> It was thought that only by making such an offer to the accomplice could the principal be apprehended and convicted.<sup>53</sup> This practice, however, was the subject of much controversy and has since fallen into desuetude. The modern system of "turning King's (State's) evidence" is no longer conditional on the grant of a pardon. Nevertheless, as noted, many hitherto colonial jurisdictions still retain this form of pardon, at least formally.

As a concluding note on this topic, it should be observed that this type of pardon, apart from being controversial as a matter of policy, also has an unusual feature from the formal point of view. It is the only form of pardon designed specifically for offenders—or rather for suspects—who have not yet been convicted by the courts. Most other jurisdictions preclude any exercise of clemency prior to conviction;<sup>54</sup> and even some jurisdictions providing for the pardon of accomplices (e.g., New Zealand) do not allow for pre-convictional pardon in any other case.

Another purpose of the pardoning power in some jurisdictions is to remove the stigma of past convictions. Here the clemency power is usually invoked a considerable period of time after the sentence has been served, and the offender has had an opportunity to prove that he has earned his reinstatement as a first-class citizen. In recent years, the increasing sensitiv-

<sup>52</sup> See Radzinowicz, *supra* note 25, Vol. II at 53.

<sup>53</sup> *Id.* It was even thought necessary to offer a financial reward as further inducement to the accomplice.

<sup>54</sup> The provisions themselves may specify application to "convicted offenders" or "penalties"; or the traditional interpretation of the clemency institution, as in the case of the French *grâce*, may be so limited. The U.S. Constitution, on the other hand, which refers only to "offences," is thought to permit pre-convictional pardons, as illustrated by the Nixon case. Czechoslovakia and Liechtenstein also provide for the suspension or cancellation of criminal proceedings as part of the clemency power, while in Iceland the President may order the withdrawal of a prosecution "for cogent reasons." See also the new Swedish constitution.

ity to the need for removing the stigma attached to the ex-offender has given rise to a number of attempts to produce a comprehensive solution to this problem. Included among these attempts are expunging the criminal record;<sup>55</sup> providing for its non-disclosure after a specified period of time has passed since the conviction was imposed or the sentence served;<sup>56</sup> or the use of special evidentiary rules based on similar considerations.<sup>57</sup> The French system, and those which it has influenced, have long maintained a special institution for this purpose, *la réhabilitation*, where rights can be restored either by judicial decision or, in minor cases, by automatic operation of law. Other systems, however, including some which are only now adopting one of the alternative solutions indicated above, have used the pardoning power to this end. In some cases, such as Belgium and Japan, this objective is prominently mentioned in the statutory provisions relating to the pardoning power.<sup>58</sup> In the last instance at least, "legal" rehabilitation can be regarded not as an incidental consequence of pardon, but as one of its major forms.

Consideration of the types of pardon existing under various systems around the world cannot be concluded without some reference to amnesties. The current survey does not purport to deal with the subject of amnesties, since amnesties are analytically distinct from pardons from a juridical point of view and are so dominated by their political connotations that they seem to have little in common with other forms of clemency. The relationship of amnesty to these forms of clemency, however, must be clarified here.

The term "amnesty" generally connotes an institution differentiated from pardon in the following respects: (a) it is general, in that it applies to categories of offenders and not to named individuals; (b) it removes the effects of the conviction and not merely of the sentence;

and (c) it applies primarily to political offences.<sup>59</sup> As a result of these differences, many constitutions exclude the power to grant amnesty from the clemency power vested in the head of state or chief executive, and grant it instead to the legislature. This has almost become an additional identifying characteristic of an amnesty. Typical examples of constitutions reserving the right of amnesty to the legislature, while vesting the power to pardon in the head of state, are Finland, Jordan, the Netherlands and Panama. Other constitutions, however, such as those of Burma and the German Democratic Republic, recognize the distinction between pardons and amnesties, but vest both powers in the same body.<sup>60</sup>

The English common law, however, has never developed the concept of an amnesty. The historical practice of passing Acts of Grace has ceased,<sup>61</sup> and the occasional need for an amnesty of prisoners is met today through the exercise of executive clemency powers. Similarly, under American law, because the Constitution refers only to pardons and reprieves, it was uncertain which branch of government would have the power to grant amnesty and how far its effects would differ from those of a pardon.<sup>62</sup> In practice, amnesty proclamations have on occasion been made by the President, sometimes supported by Congressional action.<sup>63</sup>

Further confusion has been created by the concept of the "general" or "collective" pardon.

<sup>55</sup> In recent times there has been criticism of the practice of granting amnesties for non-political offences in some countries. "Ils ont ainsi fait de l'amnistie, dans certain cas, une sorte de grâce ou de réhabilitation, jetant ainsi le trouble dans la technique juridique" (Thus, they have made amnesty, in certain cases, a kind of pardon or rehabilitation, throwing the confusion into the judicial procedure.). P. BOUZAT & J. PINATEL, *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE* 685 (1970) [hereinafter cited as BOUZAT & PINATEL].

<sup>60</sup> In some of these instances, where the term amnesty is coupled in the same provision with the pardoning powers, it may also appear in the comparative table as a "type of pardon." Since this may reflect no more than an accident of drafting or classification, undue significance should not be attributed to these cases.

<sup>61</sup> See ERSKINE MAY'S *PARLIAMENTARY PRACTICE* (18th ed. B. Cocks 1971).

<sup>62</sup> See L.C.K., *The Power of the President to Grant a General Pardon or Amnesty for Offenses Against the United States*, 8 AM. L. REG. 513 (N.S.) (1969).

<sup>63</sup> Migliore, *Amnesty: An Historical Justification for Its Continuing Viability*, 12 J. FAM. L. 63 (1872).

<sup>55</sup> See generally Damaska, *Adverse Legal Consequences of Conviction and Their Removal*, 59 J. CRIM. L.C. & P.S. 347 (1968).

<sup>56</sup> See Israel's Criminal Registration Bill (1975), and similar proposals in various jurisdictions in the United States, such as Pennsylvania.

<sup>57</sup> See England's Rehabilitation of Offenders Act (1974), which renders evidence of "old" convictions (determined on the basis of given criteria) inadmissible in court.

<sup>58</sup> For Belgium, see art. 87 of the Penal Code; for Japan, see The Offenders Rehabilitation Law (1949).

These terms ostensibly indicate acts resembling a pardon in all respects save that the beneficiaries are designated by category rather than on an individual basis.<sup>64</sup> Some legal systems, therefore, assimilate the general pardon with the regular pardoning power, and distinguish it from amnesty. For example, the Belgian king has the power to grant not only individual, but also collective pardons, while the right to grant amnesty is reserved to the legislature. In other jurisdictions, however, the generality of the power is the critical feature. Thus, under the constitution of Chile, which vests the individual pardoning power in the President, general pardons are classified with amnesties and fall within the prerogative of the legislature.<sup>65</sup>

Conceptual uncertainty is compounded by the linguistic translation of terminology involved in a survey such as the one upon which the current analysis is based, as well as by the translation of the very concepts and institutions themselves from one system to another. Thus, the Hebrew expression usually used to denote amnesty literally means "general pardon," and differentiation between the effects of amnesty and pardon under Israeli law becomes difficult.<sup>66</sup> This problem is aggravated in countries, including Israel, which have been influenced by the common law. At common law, one of the functions of the pardon is to undo the effects of a conviction, a result which is generally seen as the identifying characteristics of amnesty.<sup>67</sup>

<sup>64</sup> These pardons normally take the form of a reduction in the length of prison sentences in honor of some national or royal celebration. They are thus distinct in character from the political amnesty. Unlike individual pardons, however, their rationale is to be found in the special situation or mood of the benefactor, rather than in the circumstances of the beneficiary.

<sup>65</sup> The term "general pardon" sometimes refers to the practice of granting a number of pardons to named individuals at the same time. Examples of this are the French *grâces générales annuelles*, and the pardons granted three times per year in the Dominican Republic. See comparative table. Such pardons are analytically indistinguishable from individual pardons and must be differentiated from the *grâces collectives* discussed above.

<sup>66</sup> See Sebba, 1975, *supra* note 39. Conversely, the individual pardon under Japanese law is generally translated as "special amnesty."

<sup>67</sup> Since the Israeli Amnesty Law of 1967 had a "saving" clause which restricted its effects to those expressly provided within the statute itself, the effects were less far-reaching than those of a pardon. Under

Finally, reference must be made to two other "hybrid" institutions. First, the term *indulto*, which appears in legal literature of the Spanish speaking countries, is generally the equivalent of the French *grâce*. In Uruguay, however, *indulto*, like *amnistia*, is a legislative prerogative, *gracia* being granted by the High Court (in military cases by the President). Similarly, in Italy the government is empowered to pass legislation granting either amnesty or *indulto*, the legal outcome of the latter resembling that of the presidential pardon (*grazia*).<sup>68</sup> Secondly, in the French legal literature the expressions *grâce amnistiante* or *grâce amnistielle* are encountered. These refer to a discretionary power, vested in the President or the government under an amnesty law, to apply amnesty to selected individuals falling within certain categories.<sup>69</sup> Analytically, therefore, this is a form of amnesty.<sup>70</sup>

#### EFFECTS OF PARDON

The aspect of the pardoning power which probably attracts the most attention in the legal literature of the individual countries concerns the legal effects of the pardon. No attempt will be made to deal with this topic comprehensively within the framework of this analysis. There are two reasons for this: first, the problems arising are too manifold, and the solutions developed by the various jurisdictions too diffuse to bear systematic comparison. Second, the norms applicable in this area are not usually found in the constitutions, but rather in regular codes, special statutes relating to pardons, or in the case law.

Accordingly, this analysis will be confined to three observations. First, the civil law systems, as indicated earlier, generally emphasize that

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Israeli law, the effects of a pardon have been held to include the obligation of the state to repay a fine imposed as a result of the offense to which the pardon relates. Under civil law systems, the effects of an amnesty are, of course, much more extensive than those of a pardon, which is normally confined to that portion of the punishment remaining executory.

<sup>68</sup> See 3 V. MANZINI, TRATTATO DI DIRITTO PENALE ITALIANO 405, 480-491 (4th ed. 1961).

<sup>69</sup> It has been doubted whether the Presidential function actually allows such delegation. See MONTEIL, *supra* note 15, at 204.

<sup>70</sup> Terming this power a form of pardon may have the effect of imposing undesirable limitations on its scope and applicability. For this reason recent amnesties generally use a formulation which omits any reference to "grâce." See BOUZAT & PINATEL, *supra* note 59, at 868.

the pardon affects only the penalty served by the offender and does not affect other consequences of his conviction. Second, following the same principle, most systems specify that the rights of third parties shall not be affected by the pardon, in particular the right of the victim to compensation, whether as a result of civil or criminal proceedings. Third, there is an inherent desire that the consequences of a pardon should be consistent with its objectives. This goal presents considerable problems for the common law jurisdictions where the purposes of the pardon are diffuse and where a result appropriate for one purpose will be inappropriate for others.<sup>71</sup>

Some other aspects of the pardoning power appear in the comparative table, but too sporadically to allow for systematic analysis. For example, data are occasionally available on the statistics for the petitions for and granting of pardons.

#### SUMMARY & CONCLUSIONS

There are a number of reasons for abolishing the pardoning power in the modern world, reasons based on the democratization of political power on the one hand and attainments in penal reform on the other. Nevertheless, this institution remains an integral part of the constitutional scheme in almost every jurisdiction. The decision-making power continues to be vested most frequently in the head of state or chief executive. The most common alternative, mainly in Communist countries, vests the pardoning power in an executive or presidential body. The democratization of political power has merely resulted in a tendency for formal heads of state to share or transfer their effective authority to governmental figures who are more directly accountable to the legislature and/or to the electorate. This is achieved either through the designation of governmental ministers as advisors, or by the device of the coun-

tersignature. The impact of penal reform is sometimes reflected in the appointment of special advisory pardon boards or in the reliance on prior investigations by criminal justice personnel. The main exceptions to the general pattern are (a) the nations which vest the pardoning power in the legislature alone, a system which appears inconsistent with the flexibility normally attributed to the clemency power, and (b) the recent Chinese constitution which omits all reference to clemency.

The typology of pardons differs widely, particularly between the common law and civil law systems, and also reflects the purposes and effects of the exercise of clemency. Common law systems use the pardon for a wide variety of purposes, such as rectifying miscarriages of justice and the rehabilitation of ex-offenders, whereas the civil law systems have developed alternative institutions for these purposes. However, common law systems are now moving in the same direction of specialization of function. This is another result of a professionalized penal system, in which the pardon essentially fulfills a supplementary role. Even if the role of the pardon is merely residuary, nations seem to show little inclination to dispense with the institution altogether.

Two areas of application in particular attract the attention of drafters of constitutions such that special provisions are considered necessary: capital cases and political offences. The first has been undergoing a decline but, like the pardon itself, shows great reluctance to disappear entirely. Provisions under certain constitutions for mandatory consideration of clemency in all capital cases will therefore probably continue to be of significance. The importance of political offences, on the other hand, seems to be increasing. While the special provisions in this area mostly serve to limit the scope of the pardon, such restrictions are generally confined only to the matter of ministerial impeachment. Further, with the increasing politicization of "common" crimes, it may be that the role of clemency will expand in this area.

Finally, it should be emphasized that there are certain pitfalls in the type of analysis conducted here, involving broad comparisons and a search for trends and patterns between the legal systems of some one hundred countries. Apparent or formal similarities between sys-

<sup>71</sup> Some of the leading cases in these jurisdictions relate to the question of whether a pardon restores the right of the member of a professional body or a license-holder to his former status. See, e.g., the English case of *Hay v. Tower Division of London J.J.* 24 Q.B.D. 561 (1890); the American case *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); the Israeli case of *H.Ct. 177/50, Reuven v. Chairman & Members of Law Council*, 5 P.D. 737.

tems might conceal practical differences which would only emerge on closer scrutiny of the systems concerned, while apparent differences might disappear. The present survey is not a substitute for a detailed study of the dynamics of the pardoning mechanism in individual countries, including an analysis of the cases or types of cases in which pardons are actually granted. Where pardons are used as a tool in

the reformation of the offender—and this is their most common function today—an evaluation of their effectiveness for this purpose would not be amiss.<sup>72</sup>

<sup>72</sup> The present writer was able to undertake an empirical evaluation of the effects of an amnesty in Israel, but no comparable evaluations of the effects of executive clemency seems to have ever been conducted.