The Relationship between the Power to Pardon and the Judicial System[1]

Among the justifications that used to be given for the institution of pardons was the need to soften the severe results of the justice system. In Anglo-American law, for example, pardons were part of the justice system. Until the start of the twentieth century in England, there was no way of appealing court rulings, and the criminal defense system was not yet developed. Pardons were means of correcting such situations. In the United States, for example, until the early twentieth century, pardons were often given on account of doubts about guilt, a lack of sufficient evidence, and mistaken identity. Some of the reasons for granting pardons were later recognized as grounds for legal defense, such as compulsion, insanity, and mental disability. At a time when no distinction was made between manslaughter and premeditated murder, and both were capital crimes, U.S. presidents tended to commute the death sentences of those found guilty of involuntary manslaughter.

Is this link between the power to pardon and the justice system still valid?

Clearly, the more sophisticated a justice system becomes, the less the need for pardons as a means of rectifying injustices in that system. Nevertheless, even today, the institution of pardons in Israel serves as a kind of corrective mechanism, to repair the imperfect justice of the judicial process. It is a "safety valve" that allows for justice to be done in cases that the judicial system cannot address satisfactorily.

One kind of case where the need for the power to grant pardons arises is where the legislator has left the courts with no room to exercise discretion, requiring them to hand down specific sentences. In the case of offenses for which the legislator has enacted obligatory penalties, for example, sometimes the penalty that the judge is required to deliver is inappropriate to the case at hand. Thus, for example, in the case CrimA. 7894/03 *Masrawa v. The State of Israel*, the court ruled that in cases of incitement to murder, where that murder has taken place, a sentence of

[1] This section is based on the article "Justice and Ethics—Brief Words on Pardons and the Relationship between Them and the Judicial System" by the President's legal advisor, Adv. Udit Corinaldi-Sirkis, which was published on the website of the Jerusalem Center for Ethics: https://www.eth-mishkenot.org.il/ethics/%d7%9e%d7%90%d7%9e%d7%a8%d7%99%d7%9d/

life imprisonment must be imposed. In the same case, the judges saw fit to note that the result that they had arrived at was difficult due to the inability to give expression in their sentencing to the moral disparity between incitement to murder and the act of murder itself. The court noted further that it hoped that in time, those guilty of incitement would be afforded a certain consideration.

Another case is the regulation according to which the court may extend a suspended sentence only once. A request was submitted to the president to reduce the sentence of a man diagnosed with kleptomania. The court that had imposed the suspended sentence in the first sentencing had been unaware of this diagnosis. The court that judged the defendant for other offenses, after his suspended sentence had been extended once before, was compelled to impose a prison sentence even though it was clear that imprisonment would not serve the purpose of punishment in this case.

In cases such as these, the power to grant a pardon was able to solve the problem created by the rigidity of the legal system.

Another sort of case is one in which a court views itself as required to impose a sentence in a particular way due to the principle of uniformity in punishment.

Courts can and must, of course, consider the personal circumstances of defendants and the circumstances in which crimes were committed. They are also required, however, to meet a specific standard of punishment according to precedent and the instructions of the Supreme Court. Moreover, since the enactment of Amendment 113 to the Penal Code, the courts are required to honor the principle of congruence and impose sentences according to the stipulations of this amendment.

In such cases, one often sees comments by judges stating that they felt compelled to impose a specific sentence and referring the defendant to the president to request a pardon.

Other cases are those in which a significant change in circumstances has taken place after sentencing. The legal proceeding is time-limited. The court completes its work when it imposes a sentence on a defendant. But life is dynamic, and the situation that existed at the time of the sentencing may sometimes undergo a dramatic transformation. The defendant’s physical or mental health may deteriorate. Family tragedies sometimes create severe and even extraordinary hardship for the family members.

Sometimes, the defendant even undergoes an extraordinary process of rehabilitation.

One prominent example of this type of clemency granted by the president took place in a shocking case of a soldier sentenced to prison for petty theft. The start of the sentence was delayed for various reasons, and close to the time that the defendant was to begin her term of imprisonment, she was raped. Had the rape been perpetrated before the sentencing, it may be assumed that the court would have taken it into consideration and not sentenced her to a prison term. But since the justice system had already completed its work, the institution of clemency entered the picture, enabling events that had taken place after sentencing to be taken into account and the sentence commuted so that the soldier would not serve time in prison.

Another example of a positive change in circumstances over time was a request by a drug addict who had been handed a prison sentence. Due to various circumstances, the sentencing in his case was delayed by two years, during which his behavior transformed dramatically. He underwent an extraordinary process of rehabilitation, and he and his family began living a normative lifestyle. The president pardoned the petitioner out of the recognition that his circumstances had undergone deep and significant change—a change that the court knew nothing about—and putting him in prison at that stage would have had deleterious effects.

Changes in society and law may also change since sentencing, such as situations in which penal policy has changed due to broader changes or shifting societal attitudes toward the offense at hand.

At the point in time of such a change, the court has already left the picture. But the power to grant a pardon still exists, and it allows the president to consider whether a change has taken place that justifies granting clemency.

Another reason for using the power to grant a pardon, which is accepted in the literature and in rulings but is almost never used—mainly because of the possibility of a retrial—is the rectification of miscarriages of justice, such as wrongful convictions by the legal system.[2]

[2] Another, completely different type of pardon is a pardon given because of an important public interest, such as the pardon given in the Bus 300 affair and the pardons needed to release prisoners for diplomatic reasons, such as the Shalit deal, or the release of prisoners as part of diplomatic negotiations.

It should be emphasized that the president of the State of Israel is not an additional appeals court in the justice system, and that he uses the power to grant clemency for the reasons listed above only in exceptional and extraordinary cases.

As may be seen from the above, the justice system, mainly in the penal sphere, sometimes has difficulty serving the public interest in law enforcement and in dispensing proper justice in the case of each and every defendant.

In FH 13/60, *Attorney-General v. Matana* IsrSC 16(1) 430, Justice Haim Cohn quotes the scholar Beccaria: "In perfect legislation, in which penalties are light, there is no room for clemency…." Regarding this, he writes: "Beccaria's predictions came true, and the cruel penalties of those days have been replaced in the law books with lighter and more humane ones; and his prediction regarding clemency remained unfulfilled. What he felt to be essential only due to the cruelty of the law seems to us no less essential due to the general and mechanical application of the law to each person…. Humanity's life experience proves that 'perfect legislation'… is nothing but an illusion: be the penal judges as wise and understanding and compassionate as they may, justice cannot be done in the penal sphere except where a broad and effective power of clemency exists and is used."