

More on the Power of Clemency and Its Use¹

Constitutional history of the power of clemency

The origins of the power of clemency in Israeli law lie in the power of clemency of the English king. This royal power to grant pardons was itself rooted in the king's power as the "font of justice" to lay down the law, impose criminal responsibility, and hand down punishments.² This power was consolidated in the period of the Anglo-Saxon kings of the seventh century CE.³ The implication of a pardon by the British king was to eliminate any faults attached perpetrators of crimes.⁴

During the British Mandate period, the power of clemency was granted to the high commissioner by article 16 of the king's Order in Council.⁵

When the State of Israel was established, this power of the high commissioner was transferred to the provisional government by force of

¹ Text written by Inbar Nasi.

² Ofer Gutt, *Miscarriage of Justice in the Criminal Process* (2008), 274 [Hebrew] and references; Leslie Sabba, "The Personal Power of Pardons: The Prerogative of the President," *Mishpatim*, 227, 228-229 (5737-5738).

³ HCJ 428/86 *Barzilai v. Government of Israel* IsrSC 40(3), 505, 596-598 (1986). Note that until 1908, England had no criminal appeals court, nor was there any legal means of conducting a retrial. The institution of clemency compensated for this absence.

⁴ HCJ 177/50 *Reuven v. Chairman and Members of the Legal Council* IsrSC 5, 737, 747-751 (1951) (henceforth, the *Reuven* case); FH 13/60 *Attorney-General v. Matana* IsrSC 16, 430, 439, and 445-446 (1962) (henceforth: the *Matana* case; Shneur-Zalman Feller, "Legal Examination of Clemency," *Hapraklit* 25, 106, 108-109 (5729).

⁵ Article 16 of the Order-in-Council, 1922-1947: "When any crime or offence has been committed within Palestine, or for which the offender may be tried therein, the High Commissioner may, as he shall see occasion, grant a pardon to any accomplice in such crime or offence who shall give such information and evidence as shall lead to the conviction of the principal offender or of any such offenders if more than one; and further may grant to any offender convicted of any crime or offence in any Court or before any Judge, or Magistrate, within Palestine a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as the High Commissioner thinks fit, and may, as he shall see occasion, remit any fines, penalties or forfeitures which may accrue or become payable in virtue of the judgment of any Court or Magistrate in Palestine." For more, see Landau, *Basic Law: The President of the State*, 35.

article 14 of Law and Administration Ordinance,⁶ and in 1949, it was transferred to the president of the state in article 6 of the Transition Law.⁷ In 1964, the president's powers were anchored in Basic Law: The President of the State, among them "the power to pardon offenders and modify sentences by reducing or commuting them."⁸

Since the enactment of Basic Law: The President of the State, various aspects of the power of clemency have been anchored in primary legislation. In 1981, the president's power to shorten or cancel the period of obsolescence and the period of the erasure of criminal records was anchored in the Criminal Register and Rehabilitation of Offenders Law.⁹ In 2001, the president's power to shorten the sentences of inmates serving life sentences was regulated in the Parole Law and based on the recommendations of a special parole board.¹⁰ In 2017, the president was given the power to shorten the period of the revocation and suspension of

⁶ Art. 14 of the Law and Administration Ordinance 5708-1948. Note that the high commissioner in Mandatory Palestine was entitled to pardon offenders sentenced to death only after consulting with the judge who headed the judicial panel that convicted the person in question. For more, see the *Matana* case, 439; H. Zadok, S.Z. Feller, Haim Cohn, Leslie Sabba, "Round Table on the Subject of Pardons," *Mishpatim* 15, 16 (5785-5746).

⁷ Art. 6 of the Transition Law 5709-1949 states that: "The President of the State shall sign treaties with foreign states which have been ratified by the Knesset, appoint, upon the recommendation of the competent Minister, the diplomatic representatives of the State, receive diplomatic representatives of foreign states who have been sent to Israel, and approve the appointment of consuls of foreign states; he shall also be empowered to pardon offenders and to reduce punishments." In this context, it is important to note three things: 1) in accordance with the instructions in art. 11 of the Law and Administration Ordinance and art. 2(a) of Law and Administration Ordinance (Further Instructions) 5708-1948, and according to the instructions of art. 29 of Basic Law: The Government, the power of clemency granted to the provisional government was canceled upon its transfer to the president. For more see, the *Reuven* case, p. 750; 2) art. 2 of the Transition Law was revoked in 1964 with the enactment of Basic Law: The President of the State; 3) the power of clemency, according to the Transition Law, was subject to the countersignature of the prime minister or another minister, as per art. 7 of the Transition Law. For more, see Landau, *Basic Law: The President of the State*, p. 33; Sabba, "Personal Power of Pardons," p. 233.

⁸ Art. 11(b), Basic Law: The President of the State.

⁹ Art. 18, Criminal Register and Rehabilitation of Offenders Law 5741-1981.

¹⁰ Art. 29, Parole Law 5761-2001.

professional licenses by force of the Reduction of Disciplinary Sanctions Imposed on Persons of Regulated Professions Law.¹¹

Features of the power of clemency

The power of clemency was granted to the president in art. 11(b) of Basic Law: The President of the State: “The President of the State has the power to pardon offenders and modify sentences by reducing or commuting them.”¹² This authority is applied on an individual basis, paying attention to the personal circumstances of each petitioner, the acts they have committed, and other concrete data.¹³

The power of clemency plays many roles. One of its main functions is to serve as a kind of “safety valve” for the justice system and to allow justice to be done in places where the rigidity of the justice system does not permit it.¹⁴ Another role of the institution of clemency is to correct miscarriages of justice,¹⁵ although this power is used in such

¹¹ Art. 2, Reduction of Disciplinary Sanctions Imposed on Persons of Regulated Professions Law 5778-2017.

¹² Art. 11(b), Basic Law: The President of the State.

¹³ FH 13/60 *Attorney-General v Matana* IsrSC 16 430, 445 (1962) (henceforth: the *Matana* case). See also: HCJ 428/86 *Barzilai v. Government of Israel* IsrSC 40(3) 505, 531 (1986); HCJ 409/87 *Kisch v. Ministry of Justice—Pardons Department* (9 September 1987); HCJ 9631/07 *Katz v. President of the State*, para. 18 (14 April 2008); HCJ 1213/10 *Nir v. Speaker of the Knesset*, para. 8 of Justice Joubran’s ruling (23 February 2013) (henceforth: the *Nir* case); HCJ 4/17 *Siboni v. Minister of Justice*, para. 8 (29 May 2017). It must be emphasized that the power to grant a general pardon is reserved to the Knesset (*Matana* case, p. 455; Moshe Landau, *Interpretation of Basic Laws—Basic Law: The President of the State* 34 (5754).

Israel has enacted several laws concerning general pardons (amnesties): the General Amnesty Ordinance 5709-1949 in honor of the establishment of the state’s democratic regime, and the Pardon Law 5727-1967 on the occasion of the victory in the Six-Day War (for more, see *ibid*, 34-35). Additionally, the legislator has enacted other clemency arrangements, straddling the line between a general amnesty and individual pardons, which provided collective pardons, i.e. for a specific group of individuals identified on the basis of a single characteristic unrelated to the offense itself, in contrast to an individual amnesty and indeed from general pardons that apply to individuals convicted of particular offenses. One example was the Termination of Proceedings and Deletion of Records in the Disengagement Plan Law 5770-2010. For more, see the *Nir* case, para. 3 of Justice Joubran’s ruling.

¹⁴ Landau, *Basic Law: The President of the State*, p. 39.

¹⁵ *Ibid*, 38.

circumstances in Israel only sparingly, not least because of the possibility to request a retrial.¹⁶ The power of clemency is used also in cases of significant changes of circumstances after the original sentence, which the courts cannot take account of, because after sentencing, the courts have finished their work. In such cases, the institution of clemency enters the picture. Moreover, the power of clemency is also exercised in the name of the public interest, such as in the decision to pardon the individuals involved in the Bus 300 affair or prisoners in the context of diplomatic gestures or agreements.¹⁷ In this context, it is important to emphasize that the power of clemency is not intended to provide an additional appeals court to appeal the decisions of the courts.¹⁸

The president enjoys broad discretion in exercising this power.¹⁹ He may take into account considerations of mercy, compassion, atonement, and forgiveness,²⁰ considerations of justice, and other public, diplomatic, and social considerations. The perspective that the president may take in exercising the power of clemency is even broader. The power of clemency allows the president, for example, to take into account considerations related not only to the accused, but also to their surroundings, family, and children.²¹

¹⁶ Art. 31, Courts Law [Consolidated Text] 5744-1984.

¹⁷ HCJ 6230/95 *Tibi v. Government of Israel*, para. 2 (18 October 1995); HCJ 7523/11 *Almagor Terror Victims Association v. Prime Minister*, para. 12 (17 October 2011); Landau, *Basic Law: The President of the State*, pp. 38-39. In this context, note that the government's power to release prisoners for foreign policy and national security reasons is limited by art. 8(b) of the Government Law 5761-2001.

¹⁸ *Barzilai* case, pp. 553-554.

¹⁹ *Katz* case, para. 15; *Zohar* case, p. 449; Landau, *Basic Law: The President of the State*, p. 41.

²⁰ *Matana* case, p. 445; HCJ 706/94 *Ronen v. Minister of Education and Culture* IsrSC 53(5) 389, 414 (1999) (henceforth: the *Ronen* case); HCJFH 219/09 *Minister of Justice v. Nir Zohar* IsrSC 64(2) 421, 439, and 449 (2010) (henceforth: *Zohar* case); *Katz* case, para. 15.

²¹ As for the requirement to explain the rationale for a decision to grant a pardon, it appears the legal situation is not entirely clear: on the one hand, according to the instructions of the attorney-general, the law requiring public authorities to explain their decisions applies also to the president, such that he must explain a refusal to grant a pardon (for more information, see art. 2(a) of the Administrative Procedure Amendment (Decisions and Statement of Reasons) Law 5719-1958; para. 1 of the attorney-general's instructions, no. 3.1004; Landau, *Basic Law: The President of the State*, p. 43. On the other hand, case law has determined that there is no need for the

The president exercises the power of clemency only after receiving professional opinions from the Pardons Department at the Ministry of Justice, and his decision is contingent on the countersignature of the prime minister or the minister of justice.²² The prime minister and the minister of justice may refuse to countersign a pardon signed by the president only in extreme and exceptional cases that raise concerns that the president's decision was unreasonable in the extreme or motivated by extraneous considerations.²³

A presidential pardon may be full, partial, or conditional²⁴ and includes the options of commuting a sentence to a lighter sentence or granting a conditional pardon.²⁵ Likewise, the president is entitled to grant pardons before a conviction, or even before an indictment,²⁶ although convention at the Office of the President states that requests for pardons will be

president to explain decisions in the context of the application of his power of clemency (for more see: *Barzilai* case, p. 588; *Zohar* case, p. 439; Yitzhak Zamir, *Administrative Authority*, vol. 2 1274 (2011); Yoav Dotan, "The requirement of administrative authorities and elected bodies to provide statements of reasons," *Studies in Law* 19, no. 5 (5762). In the legal literature, Prof. Zamir has noted the abovementioned guidance from the attorney-general and states that there is doubt about the application of the Administrative Procedure Amendment (Decisions and Statement of Reasons) Law to the president, because "the president is not part of the public administration" and does not qualify as an "authority" in the sense of this law (for more, see: Zamir, *Administrative Authority*, p. 1274). Either way, the Pardons Department at the President's Office supplies reasons for every decision by the president to reject a request for clemency.

²² Art. 12 of Basic Law: The President of the State: "The signature of the President of the State on an official document, requires the countersignature of the Prime Minister, or of another minister assigned by the Government, except for a document connected with the formation of the Government or the dissolution of the Knesset." See also HCJ 932/97, *Klein v. Government of Israel* (10 February 1997); Landau, *Basic Law: The President of the State*, 49-50.

²³ *Zohar* case.

²⁴ *Matana* case.

²⁵ *Matana* case; Landau, *Basic Law: The President of the State*, pp. 35-37; it would seem that the president has no authority to defer the implementation of a punishment that has been imposed. For more, see the *Matana* case, pp. 458, 470.

²⁶ *Barzilai* case.

considered only after the end of all legal proceedings. A conviction for which the president has granted a pardon is deemed to have been erased.²⁷

The president's decision to pardon offenders is subject to judicial review. Although the president enjoys immunity in the exercise of his office,²⁸ this immunity extends to the president himself, not his actions. In such circumstances, judicial review of presidential decisions is more limited in scope than judicial review of the activities of other branches of government and administrative agencies.²⁹ Thus, for example, it has been determined that the court may cancel a decision to grant a pardon or reduce a sentence if that decision was made *ultra vires*, or if that pardon was obtained through fraud.³⁰

Individual pardons, general pardons, and everything in between

The president's authority to pardon offenders is individual in scope, and he does not have the power to issue general pardons (also known as "amnesties"); this authority is reserved to the Knesset.

Israel has legislated several laws concerning amnesties, including the General Amnesty Ordinance, enacted in 1949 in honor of the establishment of Israel's permanent democratic system of government.³¹ According to the ordinance, every person held in prison or in detention on February 10, 1949, would be released unless convicted of or charged with murder or any other offense for which the maximum penalty in law was the death penalty or life imprisonment.³² The ordinance also stated that anyone who had committed an offense before February 10, 1949, would not be jailed, arrested, tried, or punished for that offense, other than on counts of murder or other offenses for which the maximum penalty in law was the death penalty or life imprisonment.³³

²⁷ Art. 16(3) of the Criminal Register and Rehabilitation of Offenders Law 5741-1981.

²⁸ Art. 13(a) of Basic Law: The President of the State.

²⁹ *Ronen* case, pp. 412-415.

³⁰ *Ibid*, 412-421.

³¹ General Amnesty Ordinance 5709-1949; Landau, *Basic Law: The President of the State*, pp. 34-35.

³² Art. 1 of the General Amnesty Ordinance.

³³ Art. 2 of the General Amnesty Ordinance.

Another law concerning general amnesties is the Pardon Law, passed in 1967 on the occasion of Israel's victory in the Six-Day War.³⁴ The law stated that anyone who had committed a criminal offense before the outbreak of the Six-Day War and serving jail time for that offense as of July 14, 1967, would be released from prison subject to certain exceptions stipulated in the law.³⁵

The Israeli legislator has also granted a general amnesty through the Erasure of Convictions Law of 1982, passed as a gesture to mark the fifteenth anniversary of the liberation of Jerusalem.³⁶ According to the law, the conviction of anyone who had finished serving his sentence by June 7, 1967 (the date of the liberation of Jerusalem), would be erased, on the condition that he had not been convicted of any further offenses between the completion of his sentence and May 21, 1982.³⁷ The law also ordered the erasure of the criminal convictions of minors convicted of whatever offense before the age of fourteen, or of misdemeanors before the age of sixteen, on the condition that at least ten years had passed between their conviction and the enactment of the law, and that during this period they had not been convicted of any further offenses.³⁸

Furthermore, the legislator enacted another clemency arrangement, straddling the line between a general amnesty and individual pardons: the Termination of Proceedings and Deletion of Records in the Disengagement Plan Law.³⁹ This law provided for a collective pardon: a pardon for a specific group of individuals identified on the basis of a single characteristic unrelated to the offense itself, in contrast to a general

³⁴ Pardon Law 5727-1967; Landau, *Basic Law: The President of the State*, pp. 34-35.

³⁵ Art. 1 of the Pardon Law. Note that even individuals who had committed criminal offenses and had been sentenced to prison, but as of July 14, 1957, had not yet commenced those sentences—would not serve them at all.

³⁶ Erasure of Convictions Law 5742-1982; protocol of session 83 of the Tenth Knesset (11 May 1982); Landau, *Basic Law: The President of the State*, p. 35.

³⁷ Art. 2 of the Erasure of Convictions Law.

³⁸ Art. 3 of the Erasure of Convictions Law.

³⁹ Termination of Proceedings and Deletion of Records in the Disengagement Plan Law 5770-2010.

amnesty, which applies to all those convicted of or charged with a specific offense.⁴⁰

Equivalent powers to the president's authority

The powers of clemency at the president's disposal are not the only powers in the Israeli justice system for the reduction of sentences.

Thus, for example, the commissioner of the Israel Prison Service wields significant authority to mitigate sentences, as do parole boards and special parole boards, under the Conditional Release from Imprisonment Law.⁴¹ The commissioner and these boards are entitled to order prisoners to be released on probation, sparing them the rest of their prison sentences, in accordance with various provisions in law. When they do so, they must take into account, *inter alia*, the severity of the crime for which the prisoner is serving his sentence, prior convictions, his behavior in prison, and professional opinions about his case from the relevant authorities.⁴²

Further power to reduce sentences is reserved to the chief of staff of the IDF, by force of the Defence (Emergency) Regulations and Military Justice Law.⁴³ Thus, for example, the chief of staff may moderate a sentence imposed in the context of the Israeli Military Court of Appeals and special military courts,⁴⁴ and may commute a prison sentence delivered through these institutions with a suspended sentence.⁴⁵

⁴⁰ HCJ 1213/10 *Nir v. Speaker of the Knesset*, para. 3 of Justice Joubran's ruling (23 February 2012).

⁴¹ Conditional Release from Imprisonment Law, 5761-2001.

⁴² For more, see chapter 2 of the Conditional Release from Imprisonment Law. Note that the power to free prisoners before the end of their prison sentences used to be reserved to the minister of the police, by force of art. 49 of the Penal Code 5737-1977, but this authority was revoked with the entry into force of the Conditional Release from Imprisonment Law, 5761-2001.

⁴³ Defence (Emergency) Regulations 1945 and arts. 167, 442, and 510 of the Military Justice Law 5715-1955.

⁴⁴ Besides the death penalty, in which case this power is reserved to the minister of defense. See art. 442(2)(1) of the Military Justice Law.

⁴⁵ Art. 442 of the Military Justice Law. Note that a committee to examine sentencing, formed in accordance with art. 509 of the Military Justice Law, is also entitled to mitigate prison sentences imposed by military courts, although in a much more

Similarly, the IDF chief of staff may cancel a penalty imposed under disciplinary law, and may moderate it by reducing it or commuting it to a lighter penalty.⁴⁶ The chief of staff may also, at the time of sentencing by a military court, acquit a defendant, mitigate his sentence, or commute it for another penalty.⁴⁷

The commander of IDF forces in Judea and Samaria also has the authority to grant a pardon, reduce a sentence, and even commute a penalty imposed by a military court in Judea and Samaria.⁴⁸ Likewise, the commander of IDF forces in Judea and Samaria may also mitigate life sentences imposed on prisoners convicted by military courts in Judea and Samaria.⁴⁹

limited format and subject to the instructions of the law. For more, see arts. 510-512 of the Military Justice Law.

⁴⁶ Art. 167 of the Military Justice Law.

⁴⁷ Art. 48 of the Defence (Emergency) Regulations.

⁴⁸ Art. 184 of the Order regarding Security Provisions [Consolidated Text] (Judea and Samaria) (No. 1651), 5770-2009; art. 44 of the Order regarding Security Provisions (Judea and Samaria) (No. 378), 5730-1970.

⁴⁹ Ibid; HCY 2025/17 *Khaled v. Commander of IDF Forces in the West Bank*, ruling 23 (September 4, 2018).