
The Scope and Limits of Presidential Pardon in Pakistan





RESEARCH CENTER, HIGH COURT OF BALOCHISTAN

COURT: MR. JUSTICE HON'BLE JUSTICE KAMRAN MULAKHAIL

SUBJECT: CONSTITUTIONAL AND SHARIA LAW.

DATE: 30TH MAY 2025

BY: WASEEM AHMED RAEES RESEARCH OFFICER

QUERY: *Whether the power of clemency granted to the President under Article 45 of the Constitution of Pakistan is consistent with the injunctions of Islam as embodied in the Qur'an and Sunnah?*

In response to the query with regard to *the concept of pardon in sharia law*, it is submitted as follows:

The Shariah, as a comprehensive religious legal system, derives its primary sources from the Qur'ān and the Sunnah of the Prophet Muhammad (PBUH), and includes juristic consensus (ijma') and analogical reasoning (qiyas) as secondary tools for legal development. Shariah is a divine mandate binding upon all Muslims in every time and place.¹ In contrast with common law jurisdictions, where the power of pardon lies solely with the head of state—the Shariah emphasizes a more *participatory* framework, especially in qīṣāṣ (retaliation) cases. The Shariah pardon system not only acknowledges the rights of the offender but centralizes the role of the victim or the victim's heirs².

In Shariah, the term "*pardon*" is often expressed through the Arabic words "al-'Afuw," "al-Ṣafḥ," and "al-Maghfirah." While *al-'Afuw* implies the legal omission of punishment, *al-Ṣafḥ* indicates moral detachment and reconciliation, and *al-Maghfirah* signifies divine forgiveness with spiritual reward. According to Imam Shafi'i and the Hanbali School, pardon in murder cases includes the remission of qīṣāṣ either gratuitously or for compensation³.

The concept is heavily emphasized in Islamic Holy Scriptures. The Qur'ān states:

(Law of Retribution and Pardon)

"O believers! 'The law of' retaliation is set for you in cases of murder—a free man for a free man, a slave for a slave, and a female for a female. But if the offender is pardoned by the victim's guardian, then blood-money should be decided fairly and payment should be made courteously. This is a concession and a mercy from your Lord. But whoever transgresses after that will suffer a painful punishment."
(Surah al-Baqarah 2:178)

(Sanctity of Life)

"Do not take life, which God has made sacred, except by right..."
(Surah al-Isrā' 17:33)

(Retribution vs Forgiveness)

"The reward of an evil deed is its equivalent. But whoever pardons and makes reconciliation, his reward is with Allah."
(Surah Ash-Shūrā 42:40)

(Forgiveness and Self-Control)

“...who restrain their anger and pardon the people—Allah loves the doers of good.”
(*Surah Āli ‘Imrān* 3:133–134)

The ***Sunnah*** of the Prophet (PBUH) is replete with examples of forgiveness, such as his general amnesty during the conquest of Makkah, the Farewell Sermon, and his instructions in numerous Hadiths:

“No case requiring *qīṣāṣ* was ever brought to the Messenger of Allah (PBUH), but he enjoined pardoning.”
(*Sunan An-Nasā’ī*, *ḥadīth* no. 4788)

“There is no man who suffers some injury on his body and forgives, but Allah will raise him one degree in status or remove a sin.”
(*Sunan Ibn Mājah*, *ḥadīth* no. 2693)

Islamic law also places a significant emphasis on repentance and remorse. The Qur’ān assures divine forgiveness for sincere repentance (*Surah al-Baqarah* 2:222; *Surah al-Mā’idah* 5:34, 5:39; *Surah al-Nisā’* 4:16), and classical jurists like **Imam Abu Ḥanifah** and **Imam Malik** recognized that true repentance could mitigate or even nullify *ḥudud* penalties, especially for first-time or repentant offender. Additionally, Shariah jurisprudence grants the authority to pardon in cases of murder primarily to the *wali al-dam* (guardian of blood), i.e., the victim's heirs. If the heirs agree, they may:

- Demand *qīṣāṣ*;
- Accept *diyya* (blood money); or
- Pardon the offender without compensation⁴.

This unique model permits pardon at any stage—from the occurrence of the crime to just before execution⁵. Once granted, the pardon is irrevocable.⁶ In nutshell, the Shariah pardon framework is rooted in balancing justice with mercy and preserving both individual and collective rights. It provides a profound ethical and participatory mechanism, seeking to rehabilitate the offender and honor the grievances of victims, with the ultimate aim of achieving societal harmony and divine reward.⁷

THE POWER OF THE HEAD OF THE STATE TO GRANT PARDON UNDER SHARIAH

Mohammad Hashim Kamali⁸ in his legal scholarship on *Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice* expounds that in contrast to the modern constitutional systems where the power of pardon is vested in the head of state, Islamic law (Shariah) ***distributes the authority to pardon based on the classification of crimes and the underlying principles of justice and divine sovereignty***. The scope of pardon by the head of state in Islam is not absolute and varies across the categories of *ḥudud*, *qīṣāṣ*, and *tazir*

Shariah distinguishes between *ḥaqq Allah* (rights of God) and *ḥaqq al-abd* (rights of individuals). In the case of *ḥudud*—fixed penalties for crimes such as theft, adultery, slander, and intoxication—the punishment is seen as a right of God and hence ***irrevocable once reported and proven***. Scholars argue that neither the judge nor the head of state nor even the mujtahid has discretion to pardon such crimes once they meet the evidentiary threshold, thus making the ***power of executive pardon inapplicable in hudud cases***.

In *qisas* cases (retaliatory punishment for murder or bodily harm), Islamic law recognizes the ***exclusive right of the victim or their legal heirs (wali al-dam)*** to pardon. The head of state cannot override this private right. However, in ***cases where the deceased has no legal heirs***, the ***ruler may assume the role of the wali***, based on the hadith: “The ruler is the guardian (*walī*) of the one who does not have a guardian”. Still, this does not grant the head of state unrestricted

pardon power, as the ruler cannot, for example, **compensate on behalf of the offender**, which would go against public interest.

State Authority in Tazīr and Siyasah Shar'iyyah

The **broadest scope of state pardon** exists within the category of *tazīr*, which refers to **discretionary punishments** for offenses not covered by fixed *ḥudud* penalties or *qīṣāṣ*. In such cases, both the judge and the head of state may *exercise discretion in granting amnesty* or determining an appropriate punishment based on the circumstances of the case and the condition of the offender. Kamali explains that *tazīr* is a subset of **siyasah shar'iyyah**—Shariah-oriented governance—which allows rulers to pursue **justice, reform, and public interest (maṣlaḥah)** even if that requires departing from strict scholastic interpretations: He says:

“For siyasah empowers the authorities to act in accordance with the spirit and objectives of Shariah at the expense even of a certain departure from scholastic interpretations and ijtihād”

However, there is **some disagreement** among jurists about whether all *tazīr* offenses can be pardoned by the authorities, especially when a *ḥadd* punishment has been downgraded to *tazīr* due to lack of evidence. In such cases, amnesty may not be permissible.

Pardon in Post-Conflict Settings and Collective Justice

In fragile or post-conflict societies, Islamic law recognizes the **value of reconciliation, rehabilitation, and restorative justice**. Kamali argues that **public interest and peace-building** may necessitate *collective pardons or amnesty*, which can be initiated by the state as part of *siyasah*. This is consistent with the higher objectives of Islamic law (*maqāṣid al-Shari'ah*), which prioritize the protection of life, dignity, and social harmony:

“Legalities may need to be contextualized, even superseded, if one's bona fide efforts are likely to realise the higher objectives of Islam—to end conflict, save people's lives, and restore peace.”

Similarly, Assoc. Prof. Saim Kayadibi⁹ in his scholarly work titled *"Role of the Government in the Implementation of Islamic Criminal Law"* in its detailed discussion on the application of *Siyasah Shar'iyyah*, has also affirmed that **the head of state in an Islamic system holds no authority to pardon ḥudud or qīṣāṣ offences once proven, as these are either the exclusive right of Allah (in ḥudud) or of the victim's heirs (in qīṣāṣ), respectively**. The author clarifies from many sources that the power to grant clemency is valid only in *tazīr* offences, which fall within the realm of discretionary punishments imposed for the sake of public interest. It also cites the Prophetic ḥadīth reported in Sunan Abu Dawud (ḥadīth no. 4376), where the Prophet (PBUH) declared that once a *ḥadd* reaches the ruler, its enforcement becomes obligatory, thus eliminating the scope for executive pardon.⁹

STATE POWER TO GRANT PARDON IN PAKISTAN

The concept of granting clemency by the head of state is deeply rooted in historical governance systems and remains a prominent feature of many modern constitutional democracies. This power, commonly referred to as the power to pardon, has evolved from its origin as a **royal prerogative** into a structured constitutional authority that serves the broader goals of justice, equity, and executive mercy.

Historically, the **pardon power traces its lineage to the English legal tradition**, where it was exercised by the monarch as a royal prerogative. The king or queen, as the sovereign, possessed the discretionary authority to pardon offences against the Crown. This prerogative was not subject to judicial oversight and was considered an attribute of absolute sovereignty. The

rationale was both political and humanitarian—intended to correct judicial errors, provide relief in exceptional cases, and foster political stability, such as by granting amnesty after civil unrest or rebellion.

This royal tradition significantly influenced the framing of constitutions in other parts of the world, particularly in former British colonies. The **United States Constitution**, for example, incorporates the pardon power in **Article II, Section 2**, which states:

“[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”

In the United States, the presidential pardon is viewed as an act of grace, largely unfettered by statutory constraints. However, its use is subject to **political accountability** and has, over time, attracted public debate—particularly when exercised in controversial cases. The U.S. Supreme Court in *Biddle v. Perovich* (274 U.S. 480) observed that a pardon is not merely a private act of mercy but a **constitutional mechanism** intended to serve the public good by correcting injustices or achieving policy objectives. Similarly, in **India**, the President’s power to grant pardons, reprieves, respites, or remissions of punishment is enshrined under **Article 72 of the Indian Constitution**, with a parallel power granted to the Governors of States under Article 161. However, the Indian judiciary, particularly the Supreme Court, has introduced **judicial review** over the exercise of clemency, especially where it is arbitrary, discriminatory, or motivated by extraneous considerations. The landmark decision in *Epuru Sudhakar v. Government of Andhra Pradesh* (AIR 2006 SC 3385) affirmed that while the power is wide, it is **not immune from constitutional scrutiny**.

In **Canada**, the clemency power exists under the **Criminal Records Act**, and is administered by the **Parole Board of Canada**. Unlike the unstructured royal prerogative of earlier eras, the Canadian model emphasizes **institutional procedures and public interest assessments**. Applicants must meet strict eligibility criteria and undergo an extensive review process before being granted a pardon (referred to as a record suspension).

In the **United Kingdom**, the modern exercise of the royal prerogative of mercy is now largely ceremonial and subject to ministerial advice. Clemency decisions are made by the Secretary of State for Justice, typically upon the recommendation of the Criminal Cases Review Commission. This ensures that the power remains **embedded within a rule-of-law framework**, allowing for fairness and due process.

These international perspectives illustrate that while the power to pardon is recognized as a vital constitutional instrument, its modern exercise is increasingly subject to **transparency, procedural safeguards, and normative consistency with constitutional or statutory frameworks**. Countries with a common law heritage have evolved from monarchic absolutism to **accountable executive discretion**, often reinforced by judicial oversight or legislative guidelines.

For Pakistan, the power to pardon was first enshrined in **Section 295 of the Government of India Act, 1935**, and was subsequently carried forward into Article 209 of the 1956 Constitution and Article 18 of the 1962 Constitution. The current formulation under **Article 45 of the 1973 Constitution** is the culmination of this legal and historical trajectory. Article 45 of the Constitution of the Islamic Republic of Pakistan vests in the President the power to "grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority." While this power is structurally located in a constitutional framework rooted in Westminster traditions and global presidential systems, its application in an Islamic republic like Pakistan raises fundamental questions. Is this power absolute or constrained? Is it reconcilable with Islamic jurisprudence, especially in cases involving *Hudood*, *Qisas*, and *Diyat*?

This paper addresses these core constitutional and jurisprudential tensions, providing a deep legal analysis for judicial consideration.^{10 & 11}

Article 45 of the 1973 Constitution of Pakistan reads:

“The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.”

The language is imperative, beginning with the word "shall," establishing a discretionary but constitutionally enshrined power that is not contingent upon statutory law or subject to subordinate legislation. This power is executive in nature and is exercised under Article 48(1) on the advice of the Prime Minister.

Case Law Analysis on the Extent and Boundaries of Article 45 Powers

The scope of the President’s power to grant pardon, as delineated in Article 45 of the Constitution, has been the subject of judicial scrutiny in multiple landmark decisions. In the case of ***Federation of Pakistan v. Mian Muhammad Nawaz Sharif*** (PLD 2009 SC 284), the Hon’ble Supreme Court held that the power vested in the President under Article 45 is confined strictly to the alteration, suspension, remission, or commutation of the sentence imposed by a court of law. The Court made it explicitly clear that this authority does not extend to annulling or setting aside the conviction itself, which remains a judicial function and subject only to appellate or review jurisdiction within the judiciary.

This distinction between 'sentence' and 'conviction' is of paramount importance. A conviction represents a judicial determination of guilt, a finding rendered by a court of competent jurisdiction after due process. In contrast, the sentence is the penalty or punishment imposed as a consequence of that conviction. While the President may, in the interest of justice or public policy, remit or alter the punishment, he does not possess the authority to declare the individual innocent or to erase the conviction from the legal record. Such executive clemency cannot override the judicial findings of fact or law that underlie a conviction.

The principle laid down in the Nawaz Sharif case has been consistently reaffirmed in subsequent jurisprudence. In ***Abdul Malik v. The State*** (PLD 2006 SC 365), the Court emphasized that remission or commutation of sentence does not imply the reversal of the conviction itself. The judicial process, once culminated in a finding of guilt, retains its legal effect irrespective of any executive intervention concerning the sentence. Similarly, in ***Nazar Hussain v. The State*** (PLD 2010 SC 1021), the Supreme Court reinforced the doctrine that the President’s powers under Article 45, being constitutional in nature, are immune from limitation or curtailment by ordinary legislation or administrative rules. The Court also observed that these powers must be exercised judiciously and in consonance with the principles of justice, equity, and good conscience.

The jurisprudential stance of the ***Federal Shariat Court (FSC)*** is particularly significant in understanding the limitations of the presidential pardon under Article 45 when measured against the standards of Islamic law. One of the landmark decisions in this regard is ***Habib-ul-Wahab Al-Khairi v. Federation of Pakistan*** (PLD 1991 FSC 236), where the Court directly addressed the question of executive clemency in Islamic criminal jurisprudence.

In that case, the petitioner had challenged various provisions of the law as being repugnant to the injunctions of Islam. Among the issues examined was whether the President or any executive authority could remit, suspend, or commute sentences related to Hudood and Qisas offences. The Federal Shariat Court ruled emphatically that while **pardon or remission is permissible in Ta'zir offences**, where the punishment is discretionary and determined by the judge or the state in light of public welfare and judicial reasoning, the same is **not permissible in Hudood or Qisas offences**, unless it is exercised within the very narrow boundaries set by Shariah.

The Court observed that in **Qisas cases**, the right to forgive or demand retribution lies entirely with the victim's heirs and not with the state or any of its functionaries. This is rooted in the Qur'anic verse (2:178), which unequivocally places the authority to forgive on the 'brother of the slain,' i.e., the legal heirs. Consequently, any interference by the President or executive in the form of pardon or remission, without the consent of the victim's heirs, would be ultra vires of Islamic law.

Regarding **Hudood punishments**, which are fixed and ordained by the Qur'an and Sunnah, the FSC reiterated that such punishments are considered the 'rights of Allah' and are beyond the purview of human discretion once the standard of evidence is fulfilled. Since these penalties are meant to uphold divine commands, the Court held that neither the judiciary nor the executive, including the President, can remit such punishments unless the evidentiary threshold is not met or there is a procedural flaw in the conviction.

Importantly, the FSC acknowledged that **Ta'zir punishments**, being based on public interest and administrative discretion, fall within the realm where executive intervention is permissible under Islamic law. This allows the President to exercise his powers under Article 45 in such cases, particularly where justice demands mercy or where the sentence appears to be excessive or unjust under the circumstances.

The case of *Habib-ul-Wahab Al-Khairi* stands elucidate that the power to pardon must not only comply with constitutional provisions but must also conform to Islamic injunctions. The President's authority under Article 45, though constitutionally granted, is limited by the overriding normative framework of the Shariah in matters concerning Hudood and Qisas. Thus, the exercise of this power must always be subjected to Islamic constraints, particularly where divine or victim-specific rights are at stake.

Summary and Legal Implications

From both an Islamic and constitutional standpoint, the following synthesis emerges:

- **Permissibility:** Pardons in *Ta'zir* offences are permissible under both constitutional and Islamic principles.
- **Prohibition:** Pardons in *Hudood* and *Qisas* offences are not permissible without the consent of victims or heirs, per Islamic injunctions and recognized by both the FSC and superior courts.
- **Independence:** Article 45 remains a discretionary and constitutional power but must be exercised with due regard to public welfare and Islamic limitations.
- **Judicial Review:** Courts cannot annul Article 45 unless the legislature amends it; however, they can interpret its scope in light of Article 2A and Shariat principles.

The power granted under Article 45 of the Constitution of Pakistan is a unique blend of constitutional mandate and moral discretion. While the Constitution provides the President with unfettered authority to grant clemency in terms of sentence, not conviction, Islamic law carves out explicit exceptions in cases involving *Hudood*, *Qisas*, and *Diyat*. As such, judicial interpretation have attempted to harmonize the constitutional supremacy of Article 45 with the Islamic imperatives embodied in Article 2A.

References

- 1- (Abdullahi Ahmed An-Na'im, 'The compatibility dialectic: Mediating the legitimate coexistence of Islamic law and state law,' *The Modern Law Review*, vol. 73/1 (2010))
- 2- (Power of pardon in the shari'ah and its applicability in common law Shad Saleem Faruqi Emeritus Professor, Tunku Abdul Rahman Chair, Faculty of Law, Universiti Malaya, 50603 Kuala Lumpur, Malaysia, Moin Uddin Corresponding Author, PhD Candidate, Faculty of Law, Universiti Malaya, 50603 Kuala Lumpur, Malaysia)

- 3- (*‘Abd al-Qādir ‘Awdah, al-Tashrī‘ al-Jinā’ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍ‘ī*, vol. 2 (Bayrūt: Dār Ihyā’ al-Turāth al-‘Arabī, 1985), 157-58).
- 4- (Kamali, 2015; ‘Awdah, 1985; al-Maqdisī, *Al-Mughnī*).
- 5- (Osāma ‘Adlī, *Diyya al-Qatl* (Cairo: Dār al-Nahḍah al-‘Arabi, 1985)
- 6- (*‘Abdullāh Ibn Aḥmad Ibn Qudāmah al-Maqdisī, Al-Mughnī*, 475).
- 7- (Majdah Zawawi and Nasimah Hussin, ‘Forgiving the enemy: A comparative analysis of the concept of forgiveness in Shari‘ah and Malaysian Law,’).
- 8- Mohammad Hashim Kamali, Founding CEO of IAIS Malaysia, graduated from Kabul University, and took his PhD in Islamic and Middle Eastern Law at the University of London in 1969. Professor Dr M. H. Kamali served as Professor of Islamic Law and Jurisprudence at the International Islamic University Malaysia (IIUM, 1985– 2007), then Dean of the International Institute of Islamic Thought and Civilization (ISTAC). He also held Visiting Professorships at McGill University’s Institute of Islamic Studies; Capital University, Ohio; and the Wissenschaftskolleg, Berlin. A member of the Constitution Review Commission of Afghanistan (2003), he has provided expert legal consultation to the new constitutions of Iraq, the Maldives and Somalia. Eminent authority on Islamic legal studies, he has published over 170 academic articles and 35 texts, including standard textbooks at universities worldwide. He can be contacted at ceo@iais.org.my.
- 9- Department of Economics, Kulliyah of Economics and Management Sciences, Research Fellow in Centre of Islamic Economics (CIE), International Islamic University Malaysia (IIUM), KL, Malaysia. Email: saim@iiu.edu.my, Tel: +601139090475
- 10- *A Comprehensive Study Of Presidential Power To Grant Pardon In Pakistan*: by Abdul Samee Sohoo
- 11- *President Of Pakistan: A Study On The Right Of Pardon* Muhammad Ramzan, Sadia Saeed, Ilahi Buksh, Zubair Hussain, Hafiz Muhammad Obaid,