

The exercise of prerogative of mercy within the milieu of the national ethics of integrity and discipline in Nigeria

Dr. Uwemedimo Otung¹, Dr. Grace Ahiakwo²

¹ Department of International Law and Jurisprudence, University of Uyo, Nigeria

² Department of Private and Property Law, University of Port Harcourt, Nigeria

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Abstract

This paper examines the exercise of the prerogative of mercy in Nigeria against the backdrop of the national values of integrity, accountability, and discipline. The power to grant pardon, which has been recognised in successive Nigerian Constitutions, is founded on the principle that mercy has an important place in the administration of justice and the rehabilitation of offenders. However, the exercise of this constitutional power raises concerns where pardon is granted in circumstances that appear inconsistent with the principles of accountability and responsible governance. The study therefore examines the extent to which the constitutional framework adequately regulates the exercise of the prerogative of mercy and addresses the interests of both convicted persons and the wider society. It adopts a doctrinal methodology, relying on constitutional and statutory provisions, judicial decisions, books, journal articles, newspapers, and relevant governmental and administrative instruments. A comparative approach is also employed to examine the operation of the power of pardon in another common-law jurisdiction. The study finds that the existing constitutional framework is inadequate in accommodating persons to whom the State may legitimately wish to extend mercy, particularly non-convicts, and that the exercise of the power has, in some instances, been vulnerable to personal interests and political expediency. It concludes that although mercy remains a legitimate component of the criminal justice system, its exercise must be guided by constitutional values, transparency, and public interest. The paper recommends the incorporation of amnesty into the constitutional framework on the prerogative of mercy to accommodate appropriate cases involving non-convicts, as well as clearer constitutional safeguards restricting the granting of pardons to certain categories of offenders. These reforms would help preserve the humanitarian purpose of mercy while strengthening integrity, accountability, and public confidence in its exercise.

Keywords: Amnesty, clemency, convicts, pardon, and prerogative of mercy

Introduction

Many constitutions in the world have provisions for the prerogative of mercy and for presidential pardons. This enables the President and Governors, as the case may be, to visualize justice through their own spectacles, knowing that leadership is an additional responsibility having been selected by the people and that justice is the first condition of the society.^[1] There are provisions in the constitution empowering the president or governors to exercise the power to pardon convicts. Chief Justice Marshall posited that pardon is an act of grace proceeding from the power entrusted with the execution of laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed.^[2]

The Nigerian Court of Appeal conceives pardon as the act of officially nullifying punishment or other legal consequences of a crime.^[3] A pardon in Nigeria is an official act of mercy through which a person who has been convicted of a criminal offence may receive relief from some or all of these legal consequences of the conviction. It is generally associated with the exercise of the prerogative of mercy by the appropriate constitutional authority. Under the 1999 Constitution of the Federal Republic of Nigeria, the President has the power to grant a pardon or other forms of mercy in respect of offences against the laws of the federation. Governors also have similar powers in relation to offences against the laws of their states.

A pardon may take different forms, including a full or conditional pardon, a respite of punishment, a substitution of a less severe punishment, or a remission of punishment. The purpose is not necessarily to declare that the person was innocent but to provide an opportunity for mercy, rehabilitation, reconciliation, or consideration of exceptional circumstances. The exercise of the prerogative of mercy is expected to comply with constitutional procedures and is generally considered in consultation with the relevant advisory councils on the prerogative of mercy. Pardon can therefore play an important role in the Nigerian justice system. It provides a mechanism for correcting or mitigating the harsh consequences of punishment, especially where there are compelling humanitarian, social, and public interest considerations.

The stress that the purport of a pardon does not bestow innocence on the crime for which the person was convicted constitutes the philosophical superstructure upon which a pardon is predicated. The precise legal effect of a pardon depends on the circumstances and the particular legal consequence being considered. Some constitutional jurisdictions assign the parameters for pardon to the discretion of the pardoning authorities, while others provide the guiding principle for pardon in their constitutions.

Pardon Under the Constitution

The Constitution empowers the President of the Federal Republic of Nigeria to grant pardon to deserving persons. The provision provides:

“The President may grant any person concerned with or convicted of any offence created by an act of the National Assembly a pardon, either free or subject to lawful conditions; grant to any person respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence; substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or remit the whole or any part of any punishment imposed on that person for such an offence, or of any penalty or forfeiture otherwise due to the State on account of such an offence.”^[4]

This section relates to the pardoning power of the President. The grundnorm grants the same power to the Governor of a State, save that the exercise of the power is predicated on the advice of the Advisory Council of the State on Prerogative of Mercy.^[5] The concept of Pardon is constitutionalized under the broad heading of ‘Prerogative of Mercy’. Under the Constitution, the pardoning power is vested in the elected sovereign, the President or the Governor of a State. The exercise of the power by the chief executive is unfettered, just as it is obtained under the American Constitution.

The exercise of the Power of Pardon by the President is required to be made after consultation with the Council of State,^[6] while the law expects the Governor of a State to exercise the power after consultation with the Advisory Council on Prerogative of Mercy of the State.^[7] The Council of State as a statutory body^[8] comprises the President, who is the Chairman, the Vice President who serves as the deputy chairman, all former Presidents and Heads of States of the Federation, all former Chief Justices of Nigeria, the President of the Senate, the Speaker of the House of Representatives, all Governors of the States and the Attorney-General of the Federation.^[9]

On the other hand, the Council on Prerogative of Mercy of a State is set up pursuant to the enabling enactment by the House of Assembly of the State. However, States in the Federation have not followed the template set out by the Constitution in the composition of their Council on Prerogative of Mercy. In Lagos State, for instance, the Council consists of a Chairman, the Attorney-General of the State, a minimum of five and a maximum of seven other members, one of whom must be a woman, and all appointed by the Governor.^[10] This appears to be the pattern of the composition of the Advisory Council on Prerogative of Mercy by the States.^[11]

The Council of State, made up of eminent Nigerians, is considered the full complement of the nation’s leaders. Although the pardoning power of the President is not subject to the approval of the Council of State, the President cannot proceed to act unilaterally.^[12]

This can be gleaned from the use of the word ‘shall’ in the provision: “The powers of the President shall under subsection (1) of this section shall be exercised by him after consultation with the Council of State.”^[13] It however, remains a source of debate, the exact force in law that the advice of the Council of State or Council on Prerogative of Mercy carries. Can the advice of the Council be interpreted as limiting the pardoning powers of the President or the Governor, or is it simply a matter of procedure meant to be followed? The pardoning process is concluded with the mandatory documentation by the President in the official Public Notice of the Government of the Federation.^[14]

Condition for the Grant of Pardon

The grant of clemency pursuant to the exercise of the power of prerogative of mercy by the President or Governor of a State is not made as a matter of course. The person sought to be pardoned must satisfy certain prerequisites before he can invoke the pardoning power to his favour. The conditions for the grant of the power of pardon are as provided by the Constitution or laid down under judicial pronouncement.

Citizens and Residents

Beneficiaries of the pardoning power of the President may be citizens of Nigeria, by whatever form^[15] or foreign nationals who reside in the country. This may be understood from the language of the law which enshrines that ‘the President may grant any person concerned with or convicted of any offence created by an Act of the National Assembly pardon....’^[16] Thus, the privilege of pardon is available to any person residing in Nigeria, irrespective of his nationality.

Conviction

An applicant for the grant of a pardon is required to have been convicted by a court of competent jurisdiction upon a criminal charge of an offence created by an Act of the National Assembly or a law of the State House of Assembly, as the case may be, and this relates to the civil populace.^[17] The requirement of conviction was judicially affirmed when the High Court of Sokoto State, North West Nigeria held that the Governor of a State was vested with the power to grant a State pardon to a convict.^[18]

There are no restrictions on the President as to whom he can grant a pardon under the Constitution, insofar as the person sought to be pardoned has been convicted and sentenced for any criminal charge. Although the Constitution has not stated that the convict must have been sentenced, it can, by corollary, be said that the Constitution contemplates that the convict must have been sentenced.

The pardoning power of the President is not limited to the civil populace of the nation, but extends to members of the armed forces.^[19] The President is vested with the power to pardon any member of the armed forces convicted or sentenced by a Court martial.^[20] The National Industrial Court of Nigeria upheld the President’s constitutional power to pardon a member of the armed forces, ruling that an unconditional presidential pardon under Section 175 of the Constitution completely wipes out a court-martial conviction, sentence, and dismissal, thereby entitling the affected military personnel to reinstatement.^[21]

Exhaustion of Right of Appeal in Capital Offences

When a person has been convicted of a capital offence,^[22] such a person must exhaust his right of appeal in court before he can be considered for pardon.^[23] The Supreme Court of Nigeria held this position of the law, that a person who had been convicted for murder by the High Court and Court of Appeal is deemed to have lodged an appeal in the Supreme Court. Until that appeal is finally determined, the Head of State or the Governor of a State cannot, pursuant to Sections 175 or 212 of the 1999 Constitution, as the case may be, exercise his powers of prerogative of mercy in favour of that person.^[24]

Other Considerations

In granting a pardon, the offence must be within the authority of the person granting the pardon. The President may pardon offences created by an Act of the National Assembly (Federal offences), while a State Governor may pardon offences created by a law of that State. In practice, pardoning authorities often consider factors such as rehabilitation, good conduct, age, illness of the proposed beneficiary, humanitarian grounds, excessive punishment, or the possible miscarriage of justice. These are not constitutional conditions; they are discretionary considerations. These factors were cognizable by the Supreme Court of Nigeria as considerations for the grant of the prerogative of mercy by the President.^[25]

Pardon By Way of Amnesty

The Constitution adopts the diction of 'Pardon' in granting clemency, mercy, or amnesty to deserving persons. Unlike a pardon grantable upon conviction of a person, the sovereign executive grants amnesty to a class of persons who are subject to trial but have not yet been convicted. Unlike an ordinary pardon, amnesty is usually addressed to crimes against state sovereignty. Such crimes are considered political or economic offences, in respect of which forgiveness is deemed more expedient for the public welfare than prosecution and punishment.

Amnesty is usually general, addressed to classes or even communities, also generally termed a pardon. The Nigerian State granted amnesty to the Niger Delta militants to restore peace to the oil-rich region.^[26]

The grant of amnesty to persons who have not been arrested, arraigned, prosecuted, and convicted by a court or a court-martial does not fall within the ambit of Sections 175 and 212 of the Constitution. The pardoning authority derives the power to grant amnesty from inherent jurisdiction as the elected leader of the people, with deemed authority to advance their well-being.

However, pardon and amnesty have been used interchangeably, whether the President or the Governor relies on the constitutional provisions for pardon or invokes the inherent power vested in him as the elected representative of the state.^[27] Some State Governors in Nigeria granted amnesty to civil servants who were rationalized out of the service or who breached certain public service rules. The Governor of Rivers State granted amnesty to civil servants who were dismissed from the Rivers State Civil Service during the military era.^[28]

The Circular directed the ministries, departments, and agencies in Rivers State to treat the affected officers as beneficiaries of the Governor's exercise of the prerogative of mercy under Section 212 of the Constitution of the Federal Republic of Nigeria, 1999, and to process their reinstatement and related service benefits. The people of the State commended the Governor, Dr. Peter Odili, for that act of mercy. Similarly, the Governor of Akwa Ibom State, Architect Victor Attah, granted amnesty to all civil servants who embarked on further studies in universities without obtaining study-leave approval.^[29]

Procedure for Grant of Pardon

The Constitution does not prescribe a detailed application format or a step-by-step administrative process for the grant of pardon.

The stages of petition/application review by the Council of Prerogative of Mercy, Recommendation, Consultation, and Execution of the instrument of pardon resonate from the administrative practice of the Presidency and State Governments.

The procedure followed for the grant of pardon includes the following:

a. Consultation with Appropriate Bodies

The President or Governor is required to exercise the power of pardon after consultation with the Council of State or the Advisory Council on Prerogative of Mercy, as the case may be.^[30]

b. Submission of a Petition/Application

A petition for pardon may be submitted by the convicted person, a family member, a legal representative, prison authorities, or another interested person to the pardoning authority.^[31]

c. Verification of the Conviction and Sentence

The relevant authorities obtain a certified true copy of the judgement in which the petitioner was convicted, a prison conduct report, and any other relevant information concerning the applicant.

d. Consideration by the Council of State or Advisory Council on Prerogative of Mercy

Upon receipt of a petition, it is examined by the Council of State or the Advisory Council on the Prerogative of Mercy of the State, which assesses factors such as rehabilitation, good conduct, age, illness, humanitarian considerations, remorse, and other circumstances. The statutory body proceeds to make a recommendation either for or against the grant of pardon.

e. Decision of the President or Governor

After receiving the advice, the President or Governor decides whether to grant or refuse the pardon sought. The Constitution allows a free or conditional pardon, permits reprieve, commutation of sentence, substitution of a lesser punishment, or remission of penalties.

f. Execution of the Instrument of Pardon

If the petition is favourably considered, the President or Governor signs an instrument of pardon and transmits copies of the pardon to relevant authorities, such as the Attorney General, the Nigerian Correctional Service, and any other relevant agencies related to the pardon for implementation.

g. Publication in the Official Gazette

The issue of the instrument of pardon is followed by the publication of the pardon in the official gazette of the government. The publication validates the pardon, puts the public on notice, and streamlines clemency as an act of the State.^[32] An instance was the Federal Government Gazette that published the Instrument of Presidential Pardon granted by President Muhammadu Buhari in April 2022.

Save for the consultation stage in the procedure, the other stages do not find expression under the Constitution. The non-Constitutional stages receive recognition under the administrative instruments issued by the Council of State

and the Advisory Council on Prerogative of Mercy of the State, guiding the discharge of their responsibilities.^[33]

Legal Consequences of Pardon

Ordinarily, a convicted person, upon completing the imprisonment term, is subject to the legal disabilities cognizable in the land. The fact of conviction disentitles him from electoral contestation, completion of certain legal or administrative forms, and extinguishes his right of employment in certain institutions of the State, among others.

The convict who has been sentenced to death continues his incarceration in the correctional centre pending the assent of the President or Governor on the execution warrant. In practice, state authorities are weary to sign execution warrants, and persons on the death roll languish in the centre until death.

A pardon extinguishes or mitigates the penal consequences of a conviction, restores civil rights, and removes legal disabilities attachable to conviction.^[34]

Judicial Review of Clemency

The grant of pardon operates to obliterate the criminal conduct upon which a conviction was entered. The exercise of the prerogative of mercy by a president or governor adorns itself with the garment of finality, and another chief executive cannot revoke the grant for whatever reason. However, the exercise of the power of clemency is subject to judicial review. Where the grant of pardon has breached a constitutional stipulation, the Court could void the grant for being *ultravires*. Thus, pardoning authorities must ensure that they comply with the constitutional prerequisites for the exercise of the power. The need for constitutional compliance by pardoning authorities was stressed by the Court of Appeal, that the President or Governor is placed under a duty to consult the Council of State or the Advisory Council on the Prerogative of Mercy for the pardon to be valid. The requirement for consultation with the appropriate statutory body is intended to guide the exercise of the Pardoning Power and guard against arbitrariness or abuse.^[35] In the same vein, the requirement for the conviction of a person must be observed by the pardoning authority. This issue came to the fore when the Governor of Sokoto State granted pardons to persons during the pendency of their criminal trial in court, who had not been convicted. The Court of Appeal held that the Governor could not, pursuant to Section 212(1)(a) of the 1999 Constitution, utilize the prerogative of mercy to terminate a criminal trial against persons who were not convicted.^[36] Nigerian courts do not treat a pardon as completely beyond judicial review. Where the constitutional conditions for exercising the prerogative of mercy are not satisfied, the purported pardon can be held invalid or legally ineffective.

Instances of Grant of Pardon

The power of pardon has enjoyed recognition under different Constitutions in Nigeria, and convicted persons have taken advantage of the provision. The former nationalist, Chief Obafemi Awolowo, who was convicted of treason, repeatedly applied for pardon.

In his application, he stated his achievements and contributions to the unity and progress of the nation. He also alluded to the testimonies of his good deeds, even by his

inveterate enemies. The petition was made pursuant to the law^[37] and addressed to the then Head of State, Major General Aguiyi Ironsi. Following the counter-coup of July 1966, the Head of State, General Yakubu Gowon, granted a pardon to Chief Obafemi Awolowo on August 2, 1966.^[38] President Shehu Shagari granted clemency to the self-exiled Chief Chukwuemeka Odumegwu Ojukwu.^[39]

The pardon of Chief Ojukwu cannot be situated within the contemplation of the Constitution that a person must be convicted before he could enjoy pardon. Since Ojukwu was not convicted, the National Council of State advised that clemency be used instead of pardon. Chief Olusegun Obasanjo was convicted for treason^[40] and he applied for a state pardon. The Federal Military Government, after considering his petition, granted pardon to him.^[41] A former Speaker of the House of Representatives, Alhaji Salisu Ibrahim Buhari, was alleged to have doctored his resume with forged educational results and certificates, including an N.Y.S.C. discharge certificate. He also forged a university degree purporting to have been issued by the University of Toronto, Canada. He was further accused of having falsified his youthful age of 29, whereby he bloated his age to 36 years, all in a bid to satisfy the statutory age for the office he vied for. He confessed to the crimes and was summarily tried and convicted. He became remorseful and apologized. The former Speaker, in a broken state, said in his resignation speech, 'I apologise to the nation. I apologise to my family and friends for all the distress I have caused them. Everything in life is for a purpose and my prayer is that my humiliation will illustrate that in our democracy, nobody, no matter how highly placed, will be above the law.' As I look up from the ground following my fall from grace, I solemnly ask for forgiveness'.^[42] On the basis of the apology, President Olusegun Obasanjo granted him a State Pardon.^[43]

Abuse of the Power of Pardon

The Nigerian State conceives the virtues of integrity and discipline as national ethics guiding the conduct of public affairs.^[44] The virtues appear to be valued by international institutions, that public officials should exhibit them in the discharge of state affairs. The United Nations Convention Against Corruption^[45] and the African Union Convention on Preventing and Combating Corruption^[46] mandate state parties to prevent and combat treasury brigandage in all its manifestations.

The Federation, in further expression of the maintenance of treasury sanctity, enacted a myriad of anti-graft legislations to confront the monster of corruption. The Code of Conduct Bureau and Tribunal Act,^[47] Criminal Code Act 2020, the Economic and Financial Crimes Commission (Establishment) Act,^[48] Corrupt Practices and other Related Offences Act,^[49] Penal Code Act,^[50] Money Laundering (Prevention and Prohibition) Act 2022, and the Public Procurement Act 2007 constitute the domestic legal armoury for confronting treasury theft.

Despite the laudable initiatives to maintain fiscal and monetary integrity, the governing apparatus sometimes compromises the spirit of the Federation at the altar of personal interest. Presidents have granted pardons to persons who were convicted of corruption. Although it is located within their Constitutional purview to pardon persons who have been convicted of criminal offences,

corruption constitutes the principal cause of Nigeria's status as the poverty capital of the world. It presupposes that the Nigeria State should abhor corruption in its letter and spirit. President Goodluck Jonathan granted a state pardon to Governor Diepraye Alamiyeseigha. Diepraye Alamiyeseigha, who was the Governor of Bayelsa State, South-South Nigeria, was convicted of corruption and money laundering charges after stealing billions of naira, property of the state. President Jonathan, who was then his deputy, pardoned him when he became President of Nigeria.^[51]

Equally, President Muhammadu Buhari, invoking the power of the prerogative of mercy, pardoned Messrs Joshua Dariya and Jolly Nyame of Plateau and Taraba States, respectively.^[52] The duo was convicted by the Court for converting the financial wealth of their states to themselves. Also, President Bola Ahmed Tinubu pardoned Mr Farouk Lawan, a former member of the House of Representatives. Nwogu Peters, Anastasia Daniel Nwaobia, Hussaini Alhaji Umar, and Ayinla Saadu Alanamu were convicted for corruption. The pardon of the convicts by the three Presidents was predicated on their primordial relationship with the convicts as political godfathers and associates.^[53] The guiding sentiment contravened Section 23 of the Constitution and the oath of office which they swore that they would not allow their personal interest to influence their official conduct or official decisions, and that they would discharge their duties with integrity in the Federal Republic of Nigeria.^[54]

Grant of Pardon in India

The Constitution of the Republic of India vests pardoning power in the President, including the power to revoke and reduce sentences. The pardon provision specifically provides:

1. The President shall have the power to grant pardons, reprieves, respites, or remissions of punishment, or to suspend, remit, or commute the sentence of any person convicted of any offence.
 - a. In all cases where the punishment or sentence is by a court martial;
 - b. In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
 - c. In all cases where the sentence is a sentence of death.
2. Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.
3. Nothing in sub-clause (c) of clause (1) shall affect the power to suspend remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.^[55]

The Constitution subjects the pardoning power of the President to the advice of the Council of Ministers under the headship of the Prime Minister, and the President is bound by the advice.^[56] In the light of the robust federal status of the Republic, the same power is granted to Governors.^[57] The Governor is required to exercise the grant of pardon on the advice of the Council of Ministers under the leadership of the Chief Minister. Under the Constitution, the power between the President and the

Governor appears to have equal potency, as a request for pardon can be made to either officer.^[58]

In exercising his powers, in line with the advice of the relevant Council of Ministers, the President or Governor is obligated to consider the interests of society and the convict, the period of imprisonment undergone and the remaining period, the seriousness and relative resentment of the offence, the age of the prisoner, and the reasonable expectation of his longevity, and the health of the prisoner. Other parameters include a good prison record, Post conviction record, character and reputation, remorse and atonement, and deference to public opinion.

It has been noted that vesting pardoning power in both the President and the Governor is to make it a constitutional absolute and remove any room for it to be fettered by the Indian Parliament or any other law.^[59] It is instructive to note that the legal status of the Indian Council of State is different from that of the Nigerian Council of State. While the latter is a ceremonial advisory body, the former is a Federal Executive body vested with decision-making powers, and the President of Nigeria is not bound by the advice of the Council of State.

Conclusion

The machinery of pardon was conceived to express the empathy of the state for a convict who has shown genuine remorse, or upon other considerations, deserves mercy. The constitutional provision of pardon has been effectively used by pardoning authorities to appreciate or recognize contributions to statehood or nation building.^[60] The invocation of the prerogative of mercy has been utilized for the purpose of national integration and cohesion,^[61] restoration of peace in the Niger Delta region^[62] and the expression of empathy for a convict who has demonstrated genuine and hearty remorse for his offence.^[63] Unfortunately, pardoning authorities have invoked the provision of the prerogative of mercy in favour of convicts on unstated grounds, personal interest, and political expediency.^[64] The mechanism of pardon has been valued to obliterate shame from the family of a convict, particularly where the convict has made enormous contributions to nation building. Such pardon has been granted posthumously.^[65]

The constitutional provision of prerogative of mercy donates power to the President or Governor to grant pardon to a convict. There have been instances where persons who were not convicted received state pardon.^[66] Pardoning authorities have granted pardon to convicts on the basis of their affiliation with the beneficiaries. For about three decades, the Nigerian polity has been reeked with the crimes of corruption, money laundering, murder, kidnapping, and terrorism. In the face of the abuse of the power of pardon orchestrated by pardoning authorities, it has become a desideratum to restrain the President and Governor from granting pardon in respect of the commission of the selected offences.

It would also be safe to incorporate the grant of amnesty into the mechanism of prerogative of mercy in the Constitution to legally accommodate non-convicts who deserve to be shown mercy. The incorporation of parameters to guide the consideration of a person for pardon by a President or Governor is germane to preventing constitutional absolutism.

By virtue of the power vested in the State House of Assembly by the Constitution and taking cognizance of the composition of the Council of State, it is thinkable that the Governor and the deputy Governor should serve as the Chairman and deputy Chairman of the Council. Other members should include all former Governors of the State, all former Chief Judges of the State, the Speaker of the State House of Assembly, all Chairmen of Local Government Council and the Attorney-General of the State.

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