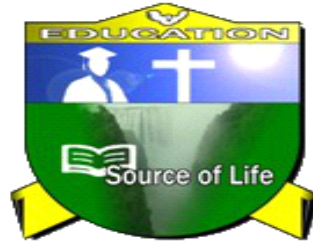


RUAHA CATHOLIC UNIVERSITY



(RUCU)

FACULTY OF LAW

**CRITICAL ANALYSIS OF THE EXERCISE OF PREROGATIVE OF MERCY BY
THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA: LESSONS
FROM REPUBLIC OF NIGERIA.**

**A Research Paper Submitted in Partial Fulfillment of Requirements for the award of the
Bachelors of Laws Degree (LLB) of Ruaha Catholic University.**

BY

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RU/LLB/2020/095

Prepared under the supervision of

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At Faculty of Law

2024

CERTIFICATION

The below signed certify that he has ready and hereby recommended for acceptance by Ruaha Catholic University Research title: *“The Exercise of Prerogative of Mercy by President: Critically Legal Analysis in Tanzania and Nigeria”* Submitted in partial fulfillment of the requirements for the degree of bachelor of laws of the Ruaha Catholic University.

Signed on day of,2024

.....

Supervisor

Fr. Denis Mlimira

DECLARATION

I Sifa Ferooz, hereby declare that this research paper is my own work and is original. Other people's literary works and findings have been used in this research and have been acknowledge.

This work has been not been submitted at any university or institution for a similar degree award or any other.

.....

Sifa Ferooz,

Date

.....

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DEDICATION

This dissertation is dedicated to my family, especially to my Rukia Yasin, and My Deus Nyimbo who have always supporting me all the time in my journey of academic studies.

TABLE OF THE LEGAL INSTRUMENT

INTERNATIONAL LEGAL INSTRUMENT

International Convention on civil and political right of 1966

Universal declaration of human right of 1948.

Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984

Regional Legal Instrument

The African charter on human and people's right of 1981

The European convention on human right of 1950

Municipal Legal Instrument

The Parole Boards Act No 25 Of 1994

The prisons Act, No 34 of 1967

The Presidential Affairs Act [Cap [9 R.E 2002]

The Constitution of Federal Republic of Nigeria [Cap 6 1999]

The constitution of United Republic of Tanzania [Cap 2 of 1977]

Tanganyika Order In council, [1920]

Penal Code [Cap 16 R.E. 2022]

Criminal procedure Act, [CAP 20 RE 2019]

Advisor Council on Prerogative of Mercy Law Act No. 16 of 2012

LIST OF CASES

Nguza Viking@ Babu sea and papii S/O Nguza vs Republic criminal case No 555 of 2003.

LIST OF ABRIVIATION**CURT****DPP**

Director of Public Prosecution

P.M.

Prerogative of Mercy

A.C.P.M

Advisory Committee of Prerogative of Mercy

A.C.H.P.R

African Charter on Human and People's Right

UDHR

Universal Declaration on Human Right

P.A.A.

Presidential Affair Act

ICCPR

International Covenant on Civil and Political Right

ECHR

European Convention on Human Rights

TABLE OF CONTENTS

CERTIFICATION	i
DECLARATION	ii
STATEMENT OF COPYRIGHT	iii
ACKNOWLEDGEMENT	iv
DEDICATION.....	v
TABLE OF THE LEGAL INSTRUMENT	vi
LIST OF CASES.....	vii
LIST OF ABRIVIATION	viii
TABLE OF CONTENTS	ix
CHAPTER ONE	1
1.1 BACKGROUND OF PROBLEM	1
1.2 Statement of Problem.....	3
1.3 Literature Review	4
1.4 Hypothesis	8
1.5 Objectives of Research.....	8
1.5.1 Main objective.....	8
1.5.2 Specific objectives.....	8
1.6 Significance of the Study	9
1.7 Research Methodology.....	9
1.7.1 Research design.....	9
1.8 Sampling and sample size.....	10
1.9 Research method.....	10
1.9.1 Primary data	10
1.9.2 Interview	10
1.9.3 Secondary data.....	11
1.10 Scope and Limitations of the Research	11
1.10.1 Scope of the research.....	11
1.10.2 Limitations of research	12

CHAPTER TWO	13
THE CONCEPTUAL FRAMEWORK ON EXERCISE OF PREROGATIVE OF MERCY BY..	13
2.1 Introduction.....	13
2.2 Prerogative of mercy	13
2.3 Executive Clemency	14
2.4 Mercy	15
2.5 President	15
2.5.1 Tanzania	15
2.5.2 Nigeria	16
2.6 Rationale for prerogative of mercy.....	16
2.7 Challenge of Prerogative of Mercy	18
CHAPTER THREE	21
3.0 LEGAL AND INSTITUTIONAL FRAMEWORK ON PREROGATIVE OF MERCY.....	21
3.1 INTERNATIONAL LEGAL FRAME WORK.	21
3.1.1 The Universal declaration of Human right of 1948.	21
3.1.2 International covenant on civil and political right of 1966.....	22
3.1.3 Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984.....	22
3.2 REGIONAL LEGAL FRAME WORK.....	23
3.2.1 The European Convention on Human Right of 1950	23
3.2.2 The African Charter on Human and People's Right of 1981.	24
3.3 MUNICIPAL LEGAL FRAME WORK	25
3.3.1 The Constitution of United Republic of Tanzania of 1977	25
3.3.2 The Parole Board Act No. 25 Of 1994.....	26
3.3.3 The prisons service Act [CAP 5 R.E 2002].	27
3.3.4 The Penal Code [Cap 16 R.E 2022]	28
3.3.5 The Presidential Affairs Act [Cap 9 R.E 2002]	29
3.3.6 The Constitution of Federal Republic of Nigeria [Cap 6 1999].	30
3.3.7 The advisory council on prerogative of mercy law Act no 16 of 2012.	32
CHAPTER FOUR	33

4.0 FINDINGS OF THE RESEARCH	33
4.1 The procedures which are followed by president during exercise the prerogative of mercy in Nigeria and Tanzania.....	33
4.1.1 Procedures Followed by the President during the Exercise of the Prerogative of Mercy in Nigeria.....	33
4.1.2 Procedures Followed by the President during the Exercise of the Prerogative of Mercy in Tanzania.	35
4.2 Legal Similarities on constitutions provision about prerogative of mercy between Tanzania and Nigeria.....	36
4.2.1 In Nigeria and Tanzania, the power of prerogative of mercy are provided in the constitution	36
4.2.2 In Nigeria and Tanzania, the power of prerogative of mercy vested to the president	37
4.2.3 Tanzania and Nigeria adopt the power of mercy from common law.....	38
4.2.4 In Nigeria and Tanzania follows the procedure in its application	38
4.3 Legal disparities on constitutions provision about prerogative o mercy between Tanzania and Nigeria.....	39
4.3.1 In Nigeria the power of prerogative of mercy is also provided to the governor but in Tanzania it's not	39
4.3.2 In Nigeria the president is bound before exercise that power to consult with the council of the state while in Tanzania it's not mandatory	39
4.3.3 In Tanzania there is advisory committee while in Nigeria there Advisory Council.	40
4.4 What good can Tanzania Learn from Nigeria in the Law relating to Prerogative of mercy?	40
4.5 Negative Effects resulting from wrong setup of law in prerogative of mercy in Tanzania.	41
4.5.1 Wrong set up of law in Prerogative of mercy encourages the increase of crimes....	41
4.5.2 Wrong setup of law in Prerogative of mercy it encourage the mis use of power...	41
4.5.3 Wrong set up of law in Prerogative of mercy undermines the rule of law	42
CHAPTER FIVE.....	43
RECOMENDATIONS AND CONCLUSION.....	43
5.0 General Comment	43

5. 1.1 Recommendations to the Government	43
5.1.1 Recommendations to legislature	44
5. 1. 3 Recommendations to the Public.....	44
5.2 CONCLUSION	45
BIBLIOGRAPHY.....	46

CHAPTER ONE

1.1 BACKGROUND OF PROBLEM

Prerogative of mercy; is an ancient power to forgive or temper the punishment of legal wrong. These are most regularly used to spare the lives of persons found guilty of offences carrying mandatory death sentence.¹The prerogative of mercy has been traced back from many years ago where by most constitutions especially in democratic governments had the provision of prerogative of mercy which enable the president or the governor as the case maybe to look at justice through their own spectacles. The prerogative of mercy is there to protect the citizens against the misunderstanding of justice for which there is remedy from the courts.²

The prerogative of mercy can be done in three ways; first pardon which mean that an expressions of forgiveness. A pardon can help eliminate some of the consequences of convictions and it involves released from prison, second is the reduction of sentences; which means to reduce some redundant word or phrases from the original sentence by creating new sentence in which the given meaning of original sentence was uncharged.³ Third is the commutation mean that a power to substitute a sentences imposed by the judiciary for lesser sentences or is the power to reduce or lessen a sentences resulting from a criminal convictions ⁴

The prerogative of mercy has been traced in different eras whereby in British the king was considered as a dominant figure. In British the prerogative of mercy was exercised by

¹<https://www.bridgesmonash.ed> (accessed on 22 May, 2023 at 19:30 p.m.)

²<https://www.abebooks.com> (accessed on May 22, 2023 at 19:32 P.m.)

³<https://www.aclanthd.org> (accessed on May 23, 2023 at 19:44 p.m.)

⁴<https://www.law.cornell.ed> (accessed on May 20, 2023 at 20:00 p.m.)

the king as the country ruler and the king was the head of state and he had final Say in the country. All institutions including court and prisons belong to him, and there was no any person in the realm had power to question him for any act. Also there was no legal restriction in exercising the power of prerogative of mercy. The king had an uncontrolled power in exercise of prerogative of mercy.⁵ The prerogative of mercy was “discretionary power” exercised by the king. The tradition of uncontrolled exercise of prerogative of mercy by the king was inherited by many constitutions in exercising the presidential power without limit.

For the prerogative of mercy to be good there must be a transparency and rule of law which means the president should follow what are being stipulated in the Act and not to use that power on his own views. For example the president must seek advice from advisory committee and must be bound to follow that advice in order not to be biased. Today the prerogative of mercy is still used; however it’s no longer based on the will of the king.

In Tanzania the prerogative of mercy was imported during the colonial period, whereby in British leadership, the Governor General was head of Tanganyika Under Article 11 of Tanganyika Order In Council (TOC), which was the 1st written Constitution of Tanganyika, empowering the Governor General the power to pardon, commuting the Sentences and other prerogative power on behalf of king ⁶.In Tanzania therefore the issue of exercise of prerogative of mercy was there even before the independence where

⁵H. Barry., *The king can do no wrong in Virginia law review*, volume 11, No 5 / march 1925

⁶Section 11 of Tanganyika Order In council

by the Governor General⁷ was not following the procedure in exercise of the power of pardon. Even after independence president is still exercising that power without following the procedures whereby he just used his discretion to check whether to grant or not a to mean that one of the law that provide the procedure is the presidential Affairs Act which requires that before the president to commence the prerogative of mercy it require him to take advice from the committee in which Section 3(1) of the presidential Affairs Act establishes the advisory committee for prerogative of mercy also section 3(3) it says the president shall not bound to follow the advice provided by the advisory committee. Through this it shows that the president ignore the advisory committee simply because the law require him to take advice from advisory committee so why does he is not be bound to follow the advice. Hence through this study will make a legal analysis on exercise of prerogative of mercy by president in Tanzania and Nigeria.

1.2 Statement of Problem

The prerogative of mercy requires a clear procedure which will be transparent and uphold rule of law. In Tanzania the Constitution of the United Republic of Tanzania of 1977 as amended time to time vests power to president on mater related to prerogative of mercy, which means power to grant pardon to any person convicted, commuting, prevailing the sentences, substitute a less severe from punishment of any person imposes by any offences.⁸In Article 45 (2) of the same Constitution the parliament is empowered

⁷Sir, Horace Byatt, the 1st Governor

⁸Article 45(1) of the Constitution of the United Republic of Tanzania OF 1977

to enact laws for procedure to be followed by the president in exercising that power⁹. One of the laws which have been enacted is the Presidential Affairs Act Cap 9 2002.

Under section 3(1), ¹⁰ this law provide for advisory committee for prerogative of mercy which will advise the president on matters related to prerogative of mercy. But under the same Act section 3(3)¹¹the Act provide that in case there is a person who has been sentenced to death, the president shall take advice from advisory committee and after obtaining that advise the president shall decide on his own deliberate judgment whether to exercise any of his power under Article 45 of the constitution. This shows that the law which has established advisory board of prerogative of mercy has given to the president ability to ignore the advice provided by the advisory committee. This allows him to act on his personal wishes. This is different from other Jurisdiction like Nigeria where president is obliged to observe the advice provided by council of state, hence greater transparency.

1.3 Literature Review

There are different readings, which are relevant and useful as far as exercise of prerogative of mercy is concerned. Although there are different writers who wrote about prerogative of mercy they did not exhaust on how the executive through the exercise of presidential prerogative of mercy can affect the required procedure.

⁹Article 45(2) of The Constitution of United Republic of Tanzania of 1977

¹⁰ Cap 9 R.E 2002

¹¹Ibid (section 3(3) of presidential Affairs Act provides that “ when any person has been sentenced to death (other than by a court – martial) for any offences, the president shall cause a written report of the case from the trial judge or magistrate, together with such other information derived from the record of the case or elsewhere as he may require, to be considered at a meeting of advisory committee; and after obtaining that advise of the committee, the president shall decide in his own deliberate judgment whether to exercise any of his power under section 45 of the constitution.)

Macmillan in his work titled; '*The pardon: political or mercy*', talks about quality of mercy, where he tries to explain about the mercy, which he shows that it was the gift of monarch ruling, by divine right. But in current day politicians tries to act as unbiased, good and the flexible nature of the pardon power which makes it so useful can also lead to arbitrary consequences, in most countries we have formalised the process he say "I think this may be because the political actors no longer want to take responsibility for such decisions. The more formalised and legal it become, the less capable it is to discharge the original purpose".¹²

I appreciate this work where by the writer explain the current situation on matter of prerogative of mercy based on politics and unbiased. But also in my works i will explain more on the law that govern the president in exercise that presidential power of pardon Kareem, in his work titled; *Are presidential pardons really prerogative of mercy or political hand ought*; defines the prerogative of mercy to mean an exclusive order granting clemency to an individuals, accused of state offences. In Nigerian federal Constitution the president may grant any person convicted of any offences created by an Act of National Assembly a pardon either free or subject to law condition¹³, So due to that it show that power of pardon its more politically because when you see many pardon that are granted are follows to some government officials and especially who are convicted for big offences like corruptions. But the author fail to show that if there are some procedure which president or governor may follow and if does not exist he may at

¹² Macmillan., *The pardon: political or mercy* available at <https://www.ibanet.org> accessed on 20 may 2023 at 1 9:43 p.m

¹³Kareem, *Are presidential pardons really prerogative of mercy or political hand ought in Nigeria* 4th Republic. Available at <https://www.dataphyte.com> accessed on 23 may 2023 at 20:10

least tell on his own views what good procedure that the president may follow. So in my view is that there must be the procedure like creation of advisory committee who will be elected by the members of parliament and the prisoner officer so that to avoid politics and biases in granting the pardon and that advisory committee Members must include health officer, prisoner officer, ministers and some community who will be representing the community.

Kwanzas, in his article titled; *presidential pardon and prerogative of mercy: A necessary National smoothing Balm for social justice*; He define pardon to mean an act of grace, proceeding from the power entrusted with the execution of laws which the individual on whom it is bestowed from the punishment the law inflicts for crime he has committed, its exercised by executive that is why it can never be subjected of litigation of any court because of the discretionary nature. Pardon is the party of constitutional schemes to be exercised for public welfare, also it's a matter of grace that needs to be justified or defined within legal system. Also prerogative of mercy are exercised in some case for those offenders who have been subjected to severely punishment or wrongly convicted by reasons for some technical or procedural error, or convicted on the right facts under wrong laws and whose plight is discovered too late for redress in any judicial court of appeal the writer has wrongly for the criteria that are considered¹⁴. The author fail to explain in current that most of president use politics in exercise their power they don't follow the procedure, and also the criteria that the author state in granting pardon most of them doesn't follow them, in my work aim going to add that not only that power

¹⁴A.M. Ekwebze, *Presidential pardon and prerogative of mercy: A necessary National smoothing Balm for social justice* at page 4.

must be granted to the president but also there must be some restriction to guide the president in exercise the power.

Alder, In his book titled *The constitutional and administrative law*; define the issue of Royal prerogative of mercy to mean is a collection of special power, right and immunities vested in the crown that is not conferred by parliament identifying each of those power and their scope is problematic, since there is no authoritative sources, this uncertainly is a concern because as a matter constitutional principle those exercising power should be able to identify authority justifying its exercise. In this book the author fail to specify the power that shows there is a prerogative of mercy it just generalized all power that vested to the president are not prerogative of mercy.¹⁵

Ndamungu; in his Article titled *The paradox of presidential power of pardon: Tanzania in perspective*; talks that the president is the chief executive of the whole country his power and function are specified in the Constitution of Tanzania of 1977, and the law enacted by the parliament for the president of Tanzania to use that power and said the president of Tanzania has no prerogative but has only power granted and functions enjoined by the Constitution¹⁶. In Tanzania parson is granted after a person has committee offences and has been convicted by the court and that pardon must follow some procedure that are stipulated under presidential affairs Act,¹⁷ criminal procedure Act,¹⁸ such pardoning power have been exercised by all president of Tanzania and

¹⁵Alder., *The constitutional and administrative law* 5th Edition, Macmillan law masters series,(2005) at page 10.

¹⁶ O. Ndamungu. *The paradox of presidential power of pardon: Tanzania in perspective*. Available at www.ijsrp.org(accessed on 23 may 2023 at 20:03 p.m)

¹⁷CAP 9 RE 2002

¹⁸CAP 20 RE 2019

therefore, the purpose of article was to educate on the practical evolution of the president's pardoning power and in so doing to ascertain the scope and legal implication inherent in such executive act of pardon.

The author succeeded to explain very well the procedure and the history of prerogative of mercy but fail to criticize the mistakes which are in procedure

1.4 Hypothesis

It seems that the law guiding the exercise of prerogative of mercy by president does not enforce him to uphold transparency in his procedure.

1.5 Objectives of Research

1.5.1 Main objective

To critically analyse the procedure of exercising the prerogative of mercy by the president of Tanzania in relation to Nigeria.

1.5.2 Specific objectives

- i. To evaluate the law which govern the president to exercise the prerogative of mercy
- ii. To analyse the procedures which are followed by president during exercise the prerogative of mercy
- iii. To explain the prerogative of mercy in Tanzania and Nigeria

1.6 Significance of the Study

The research had different significances after its accomplishment and some of significances are the follows;

Firstly the research helps at bringing awareness to the society in general on understand the power of president in exercise the prerogative of mercy which has been provided in the Constitution of United Republic of Tanzania

Secondly it helps to understand the procedure and criteria that are used by president in granting the power of pardon. And research is compulsory valuable for research as it needed as partial fulfilment of the requirements of LLB at Ruaha Catholic University (RUCU).

1.7 Research Methodology

1.7.1 Research design

The researcher employed doctrinal and non – doctrinal methodology, the researcher intended to pass through different legal documents like books, journals, and newspaper and laws especially regarding to presidential power of pardon, hence through methodology a researcher was great position to find the results. Also the researcher used non – doctrinal because researcher intended to challenge the procedure that were stipulated under Presidential Affairs Act and other relevant laws in Tanzania.

1.8 Sampling and sample size

The researcher used both purposive sampling as well as snowball sampling techniques in selecting the most appropriate sources relating to the research topics. The researcher used purposive sampling technique in order to avoid wastage of time in selecting relevant source, also the researcher used snowball sampling because it given a researcher a wide range of selecting criteria for her sources.

1.9 Research method

The researcher used both primary and secondary method as the best methods in analysis the law in order to understand the procedure of the prerogative of mercy, this include interview on several questions and analyse different laws and read different document relate to research topics.

This study was consisted the use of both primary and secondary data to obtain relevant and accurate information.

1.9.1 Primary data

The researcher decide to employ use of interview for primary data for the reason of exercise of prerogative of mercy by president of Tanzania

1.9.2 Interview

The researcher was used interview to gather primary data simply for the barely truth that interview are a useful tools which can lead to flexibility further research using other methodology such as observation. This flexibility was also allowing the researcher to practice deeper into the initial response of the respondent to gain more detailed answers to the questions.

In saying so it means that the researcher was attempted to blend tests of the one in the quest for data respecting critically analyse of prerogative of mercy by president in Tanzania.

1.9.3 Secondary data

This involves collection of data in both published and unpublished document relation to research topics, as far as gathering secondary data is concerned the researcher used internet, books, journals, documentary review, different laws and other material related because it's important to research to assess what others have written in the past that is relative to what one is saying to current purpose.

In this way it was able to evaluate the extent of problem in Tanzania.

1.10 Scope and Limitations of the Research

1.10.1 Scope of the research

This study was cantered on the issue concerning on the analysis on the exercise of prerogative of mercy by president, the main discussion was no guarantee procedure by the president to exercise the prerogative of mercy in Tanzania and also the president he is not bound to follow the advice that was given by Advisory committee of prerogative of mercy of exercise such power.

This study was concerned on getting different opinion from different people involving like prisoner officers, general public practicing lawyer, law student and others in order to discover on how they understand the issue of prerogative of mercy. The study fallen within the area of laws enforce the presidential power of pardon towards the president, the study was relay on the provision of the constitution of the United Republic of

Tanzania of 1977 as amended time to time also the presidential affairs act, criminal procedure Act, and the parole Boards act. This research deal with analysis on the exercise of prerogative of mercy by president.

1.10.2 Limitations of research

The researcher was experience some obstacles like money which was one of the challenge that facing research simply because due to shortage of money it affect travel to different places so as to collect the information also to buy some books which helped to collect more information. Also another challenge was time. The time of conducting research was not enough as I have been given one month which was accompanied with compulsory test which makes difficult. Also another challenge was shortage of material relating with my study which made difficult in collecting information related to my study and finally was absence of cooperation during the conducting of interview whereby people were not able to provide the data relate to my study which lead to inadequate data collection to meet the objective of the study.

CHAPTER TWO

THE CONCEPTUAL FRAMEWORK ON EXERCISE OF PREROGATIVE OF MERCY BY PRESIDENT: CRITICAL LEGAL ANALYSIS OF TANZANIA AND NIGERIA.

2.1 Introduction

This chapter discuss the concepts that might inevitably arise in the study concerning with an analysis of exercise of prerogative of mercy by the president: critical legal analysis of Tanzania and Nigeria.

2.2 Prerogative of mercy

The word prerogative of mercy is to mean that power of president or governor to pardon a criminal or commute criminal sentences.¹⁹

The prerogative of mercy in other term it mean the special power to grant pardon, respites, to remit, suspend or commute by president or monarch of any sentence passed by the court of law , tribunal or any other authority.²⁰ The prerogative of mercy enables the president to relieve convict of their punishment by pardoning commuting or reprieving their sentences and this power is the constitutional power granted to president.

Another explanation on the term prerogative of mercy in other term it can be known as a president exercise of clemency which mean that is the loyal prerogative of monarch or head of state to grant pardons and exercise clemency. This prerogative of mercy allows the sovereign to grant pardons, commutes, and sentences and show mercy of individual's

¹⁹<https://www.legalresearchnigeria.worldpress.com> accessed on 19 may 2023 at 20: 00 pm

²⁰ A. Navak., *comparative executive clemency: The constitutional pardon power and prerogative of mercy in global perspective*, Taylor and Francis of 2015 at page 20

offences. It is important to note that the exercise of prerogative of mercy is subject to legal and institutional consideration and may vary based on specific legal systems and traditions.²¹

In the cases of prerogative of mercy is for those offenders who have been too severely punished or wrongly convicted by reasons of some technical or procedural error or convicted on the right facts under the wrong law and whose plight is discovered too late for redress in any judicial court of appeal. The course of justice there should be prerogative of mercy this is because a wrong person may be convicted and the real criminal who should be convicted is discharged and acquitted in this view the prerogative of mercy may be the last line of defence of justice. The implication of prerogative of mercy granted to a citizen is to wipe out not only the sentence or penalty but the conviction and all its consequences and from the time it is granted leaves the person in exactly the same position as if he had never been convicted.²²

2.3 Executive Clemency

This refers to the general power of president or governor to pardon, grant amnesty, commutation and reprieve to an individual who has either been convicted of or may face the prospect of conviction for criminal offences. Generally clemency is all about act

²¹ H. Lacey., *the loyal pardon: access to mercy in fourteenth- century England* , York medieval press, University of York, (2009) at page 5-8

²² A.M. Ekwenze., *presidential pardon and prerogative of mercy: a necessary National smoothing Balm for social justice* at page 12.

of forgiveness that is conducted by president or governor to a person who commits a crime.²³

2.4 Mercy

This concept of mercy is rooted in compassion forgiveness, and kindness, it refer to the leniency or compassion shown toward someone whom it is within ones power to punish or to harm. Mercy involves refraining from inflicting harm or choosing to alleviate the suffering of others even when they may not necessary “deserve” such treatment, The idea of mercy is often associated with moral and ethical consideration and it can play a significant role in legal, philosophical, religious and interpersonal context. Many culture and beliefs systems emphasise the importance of showing mercy as a way to promote understanding, hearing and empathy.²⁴

2.5 President

Is an elected official serving as both Head of state and Head political executive in a republic having a presidential government. An elected official having the position of chief of state but usually only minimal political power in a republic having a parliamentary government, so the president is the head of state and commander in chief of the armed forces and political defence force.

2.5.1 Tanzania

Tanzania is East African country situated south of equator. Tanzania was formed as a sovereign state in 1964 through the union of therefore separate state of Tanganyika and Zanzibar. Tanzania mainland cover more than 99 percent of the combined territory total

²³A. Sarat&N. Hussain., *forgiveness, mercy and clemency*, Stanford University press, 2007 at page 47.

²⁴P. Francis., *The joy of mercy, catholic trust society*, 2017 at page 7

area, Mafia Island is administering from the mainland while Zanzibar and Pemba Island have a separate government administration. Dodoma since 1974 was designated official capital city of Tanzania its central on mainland, Dar es Salaam is the largest city and port in the country. Its neighbours are Kenya, Uganda to the north, Rwanda, Burundi, and Democratic republic of Congo to the west and Zambia, Malawi and Mozambique to the south.²⁵

2.5.2 Nigeria

Nigeria is an African country located in western coast of Africa; it has a diverse geography with climate ranging from arid to humid equatorial. However Nigeria's most diverse features is its peoples hundreds of language are spoken in the country including Yoruba, Igbo, Fula, Hausa, Edo, Ibibio, Tiva and English. Whereby it's the federal republic comprising 36 state and federal capital territory, the capital city is Abuja and largest city is Lagos.²⁶

2.6 Rationale for prerogative of mercy.

Often times it has been questioned by many people in Tanzania; why the president is given a power to relieve criminal offenders from punishment? This party of research is going to explore the reasons for the prerogative of mercy. Therefore that transcend from compliance with public sentiments to the demand of justice necessary of preserving the country's political tranquillity and maintenance of international relations. These reasons are explain here.

²⁵G. James., *Introduction to Tanzania, Gilad James mystery school*, 2023 at page 5-7.

²⁶ A. Usman., *the Yoruba from prehistory to the present*, Cambridge university press, page 3.

The prerogative of mercy enables the president to pardon the person convicted under the laws which are considered repressive or draconian. These means if the legislature acting malicious or angrily enact the law that is draconian in nature and if the court may mitigate the situations by pardoning person convicted by virtue of that law in such case president can assent the law and wait the political storm to settle down first before realising person convicted under such law.²⁷

The power of mercy maybe used in promotes and maintain diplomatic relations between one state and another.²⁸ This may happen when one state demand release of its own national in car created in one of the prisons of another, the failure of which may lead to discourage of diplomatic relations or even eruption of war. E.g. in talking America hostage on 4th November 1979 in Teheran led to the longstanding strained diplomatic relations between Iran and USA.²⁹ So through the power of mercy it may strength diplomatic relation in order to avoid different problem.

It also useful applied to restore public tranquilities in the event of insurrection. For example there exist of civil violence demonstration by the people who are calling for release of a certain prisoned person the head of state can release him by virtue of power of mercy in order to restore public order and peace, Also the country maybe engulfed by a civil war rebel maybe rejected any idea of peace agreement until their imprisoned Colleagues are released in such case the president could relieve the imprisoned rebel of

²⁷I. Mandi, *observation on the law and exercise of prerogative of mercy in Tanzania*, University of Dar-es-salaam law school, (2014)

²⁸I. Mandi, *observation on the law and exercise of prerogative of mercy in Tanzania*, University of Dar-es-salaam law school, (2014)

²⁹R. Falk, "the Iranian Hostage crisis: Easy answer and hard questions" *in America journal of international law*: volume 74 No.2 (April 1980). 411- 417

their punishment in order to redeem the country peace. As Clemency fectovic contends, if the ultimate purpose of Constitution is established workable but limited form of government the government must be equipped to handle the unforeseeable contingencies of politics.³⁰

The prerogative of mercy affords the head of state an opportunity to correct a mistake that occur in the course of the administration of criminal justice. There is always a possibility for an innocent person to be convicted by mistake or perjury, the suggestion of Professor John Wig more that "Cross examination is the greatest legal engine ever invented for the discovery of truth".³¹

Prerogative of mercy used to temper the rigidity of law by dispensing clemency in appropriate circumstances. The purpose of that power is strictly speaking there are no legal restrictions on the exercise of the power the power is only exercised in rare one exceptional circumstance where it is necessary in the public interest.³²

2.7 Challenge of Prerogative of Mercy

The prerogative of mercy as the power vested to president to exercise it the following are the challenges that facing the prerogative of mercy.

It affects the independence of judiciary. This mean that once judiciary made its decision there discourage due to the efforts they use to control and fight against crime and fight

³⁰C. Falotic, "constitutionalism and presidential prerogative Jefferson an and Hamiltonian perspectives" *In American Journal of political science*, volume 48 No.3 (july2004) PP. 429 - 444

³¹Wimore, J.A *Treatise on Anglo American system of Trials at common law*. Vol.1 little Brown and co. Boston. P. 29

³² I. Mand. *Observation on the law and exercise of prerogative of mercy in Tanzania*, University of Dar-es-salaam law school, (2014).

against a criminal offenders at the end two days such accused is pardoned and that why most of police officers, state attorney and the general public are hated this power of mercy.

Also grant of pardon on less acceptable grounds has played party in provoking public outrage.³³ The most cause for presidential pardon in recent years have been overcrowding in prisons most of prisons facilitate in Tanzania mainland were built during colonial period, the increase of population the dwelling employment opportunities in the formal sector recent collapse education and widening economic inequality has led to many youth crime also the prison infrastructure are inadequate in number so it lead to the increase of number of prison intimates include non-custodial sentence has been taken by the government in recent years. In 2007 the capacity of prison has been exceed by whopping 193%³⁴

The process of identifying potential pardoners is exceeding shrouded in secrecy.³⁵ There is no transparency to mean that it's difficult for the member of the public or institutions to ensure the eligibility or suitability of those earmarked for pardon, but voice have been raised about corruption and favours in the process of listing names in prison of course as already noted pardon cannot be claimed of right. Nevertheless discriminative selection of prisoners is objection able in that very prisoner in entitled to be treated equally with other, this means that the key discussion regarding the prerogative of mercy are usually

³³I. Mandi, *Observation on the law and exercise of prerogative of mercy in Tanzania*, University of Dar-es-salaam law school, (2014)

³⁴ Cap 400 R.E 2002

³⁵Mandi, I. *observation on the law and exercise of prerogative of mercy in Tanzania*, University of Dar-es-salaam law school. (2014)

made by officers in charge of prisons at prison level and all decision made is strict confidentiality and the qualified prisoners who is unjustifiably excluded can petition against such exclusion once the criteria for pardon are made public but the prison environment in such that is difficult to do so.

Accompanying the official secrecy is lack of public education. One of the efforts have been taken by the government to raise public awareness on the exercise of prerogative of mercy the procedure and other related aspect are not known to the public. That what the prerogative of mercy are usually greeted with public disapproval ³⁶as necessity exercise of public power and administration of criminal justice must be supported by citizens, this cannot be realised if public awareness is very low to them

³⁶Mandi, I. *observation on the law and exercise of prerogative of mercy in Tanzania*, University of Dar-es-salaam law school. (2014)

CHAPTER THREE

3.0 LEGAL AND INSTITUTIONAL FRAMEWORK ON PREROGATIVE OF MERCY.

This chapter must be given appropriate heading and it's under the same where the research problem, hypothesis and objectives of the study are examined in the light of relevant municipal law and appropriate regional and international instruments. It provides the opportunity to present the research problem the light of the law in which it relates in legal system.

3.1 INTERNATIONAL LEGAL FRAME WORK.

3.1.1 The Universal declaration of Human right of 1948.

The Universal declaration of Human right of 1948 is a mile stone document in the history of human rights which was adopted by the UN general assembly at its third session in Paris on 10December 1948. Under Art 3 of UDHR it talking that “everyone has the right to life, liberty and security of person.”³⁷ This mean that the declaration provide for human right that everyone has the rights and that rights must be protected, the right that provided under this declaration is the right to life, liberty and security of person. In relation to P.M everyone has the right to liberty because you may find a person has been force imprisoned so the president is vested a power to protect its people in any circumstances that's why the president has been given the power of prerogative of mercy.

³⁷Universal declaration of human right of 1948.

3.1.2 International covenant on civil and political right of 1966.

This covenant was adopted by the UN general assembly on 16 December 1966 and entered in to force on 23 march 1976 and then by May of 2012 the covenant had been ratified by 167 states, the covenant elaborate further the civil and political right and freedom like listed in the Universal declaration of Human right. But in Tanzania was adopted under the bill of rights in 1984 .whereby under this convention it explain about the right to life and the freedom from inhuman or degrading treatment or punishment under Art 6 of this convention it says “the right to life and survival” and Art 7 of the same convention in says “freedom from inhumane or degrading treatment or punishment”.³⁸So this law recognize the right to life and inherent dignity of human person and enlighten the importance of mercy and humane treatment in the administration of world justice. In the exercise of prerogative of mercy it encourage the president to administer justice and then to overcome inhumane practice that may happen to a person who is not supposed to be punished due the technicality that might happen in the course of administer justice to that person.

3.1.3 Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984.

The convention Against Torture and other cruel, inhuman or degrading treatment or punishment was adopted by the UN general assembly on 10 December 1984. It completed the codification process to combat the practice of torture and other inhuman

³⁸International Convention on civil and political right of 1966

practice which are stated under Art 2(1) of convention which says; “each state party shall take effective legislation, administrative, judicial or other measures to prevent Acts of torture in any territory under its jurisdiction”³⁹. This shows that this convention empowers every state government to enact the laws that will prohibit the use of torture, cruel and other inhumane treatment or punishment in order to administer the administration of justice in its territory.

3.2 REGIONAL LEGAL FRAME WORK

3.2.1 The European Convention on Human Right of 1950

The European Convention on Human right was signed in Rome (Italy) on 4th November 1950 by 12 member states of councils of Europe and entered into force on 3th September 1953. This convention protects human rights and the general fundamental freedom. This was the first instrument to give effects and binding force to some of the right stated in universal declaration of human rights. It was also the first treaty to establish a supranational organ to ensure that the states parties fulfilled their undertakings. Article 3 of the convention states; that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”⁴⁰. Also article 2 of the same convention it protect the right of life which state that “everyone’s right to life shall be protected by law. No one shall be deprived of his life internationally except in the execution of a sentence of a court following his convention of a crime for which this penalty is provided by law.” This article does not explicitly mention the prerogative of

³⁹The convention Against Torture and other inhuman or degrading treatment or punishment of 1984.

⁴⁰Art 3 of the European Convention on Human Right of 1950

mercy but the concept of mercy or clemency may be considered within the context of protecting the right of life in certain circumstances. And this convention binds all member state.

3.2.2 The African Charter on Human and People's Right of 1981.

This also known as Banjul charter which mean that it an international human right instrument that is intended to promote and protect Human rights and basic freedoms in the African continent. It emerges under the ages of the organization of African unity, at its assembly of heads of state and government in 1979, whereby a resolution calling for the creation of committee of experts to draft a continental wide human right instrument, was adopted. This was similar to those that already this committee was duly set up, and it produced a draft that was unanimously approved at the organization of Africans 18th assembly held in June 1981 in Nairobi Kenya.

This charter of 1981 does not specifically mention the prerogative of mercy or presidential pardon, however Article 6 of the charter guarantees the right to liberty and security of the person, which can be interpreted as encompassing the right to seek clemency or mercy from the state⁴¹, the principal in respect of human dignity and the protection of human right as enshrined in the charter can also be seen as supporting the idea of providing avenues for mercy or pardon of an individual who have been convicted of crimes. So under this charter does not clearly explain about prerogative of mercy, but it's principals like respect of human right and dignity can be applied in consideration of mercy and pardon.

⁴¹Article of the African charter on human and people's right of 1981

3.3 MUNICIPAL LEGAL FRAME WORK

3.3.1 The Constitution of United Republic of Tanzania of 1977

The CURT of 1977 as amended time to time is the mother law of the country which gave the power to president stipulated under Article 45 of CURT; which is the power to pardon which state that the president may do the following;

This presidential power is seems to be unlimited, where by a president can grant pardon to any persons for any offence and sub Article 45(2)of the Act the parliament are empowered to enact the law for the procedure to be followed by the president in the exercise of his power in addition⁴².

Article 2 it enables the parliament to enact the law for the procedure to be followed by president while exercising his power The Acts made are like; presidential Affairs Act, the parole board Act, in which under Section 4⁴³ provides that, for eligibility for parole, one of the conditions is a prisoner to have served sentence of imprisonment for a period of eight years or more. Also article 13 (6) (e) and article 15 (2) of the same act it explain the term prerogative of mercy in explicitly ways in which under article 13 (6) (e) of the Tanzanian constitution it state that “no person shall be subjected to torture or inhuman or degrading punishment or treatment.” Also article 15 (2) it says that for the purpose of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only.

⁴²The Constitution of United Republic of Tanzania of 1977

⁴³The Parole Boards Act No 25 Of 1994

3.3.2 The Parole Board Act No. 25 Of 1994

The parole board include the national parole board and the regional parole Board⁴⁴. The national parole Board for mainland Tanzania and a regional Parole Board for every regional in main land Tanzania, is established under S.3 of parole Board Act ,⁴⁵ where by NPB consist of the chairman who shall be a person having a knowledge and experience in legal matter or administration of criminal justice who is appointed by president, Dpp(director of public prosecution)or a representative from his office, the chief medical officer from the ministry of health, the commissioner of social welfare, a senior officer from the president's office and two other member appointed by the minister from amongst persons of good standing in society⁴⁶. The regional parole Board consist of the chair man who is appointed by minister and who is vested with knowledge and experience in legal matter or administration of criminal justice the state Attorney in charge of the zone in which that region is situated, regional medical officer, a senior social welfare officer from the region office, a senior office representing the office of the regional commission and for other member appointed by minister from people of good standing in the society⁴⁷.

Under section 4 provide for eligibility and conditions for parole as it read as "Prisoner who is serving a life sentence. He is not serving sentence for the armed robbery dealing in dangerous drugs of defilement, his sentences has not otherwise been commuted, he has served his sentence for four year or one third of the sentences whichever of the two

⁴⁴The Parole Boards Act No 25 Of 1994

⁴⁵ Ibid

⁴⁶Section3(3) of parole board Act No 25 Of 1994

⁴⁷Ibid

period is longer he has conducted himself with good behaviour for all of time he has been serving the sentence before he is due for parole and while on parole he complies with parole conditions laid down under section 7 of this Act⁴⁸ with regard to such condition in real sense are not followed since the CURT under Article 45 empower president to grant pardon to any person for any offences and punished for any sentence. Also under 5.4 (a) provide that a prisoner cannot be eligible to grant the parole if he is serving for life imprisonment. Hence the exercise of prerogative of mercy does not reflect what has been provided by the other laws enacted by the parliament, hence through there are law provides for the procedure to be followed by the president while and before exercising his presidential power but this procedures are not adhered to since the CURT granted much power to the president.

3.3.3 The prisons service Act [CAP 5 R.E 2002].

This Act provide for the prerogative of mercy by the president as it is provides that; “convicted criminal prisoners sentenced to imprisonment may by industry and good conduct earn a remission of one third of their sentence or sentences, provided that no case shall by any remission of one – third of their sentence or sentences: provided that in no case shall any remission be granted to a prisoner sentenced to imprisonment for life or to be detained at the president’s pleasure.⁴⁹

⁴⁸Section 4 of parole board Act No 25 of 1994

⁴⁹Section 49 (1) of the prisons Act, No 34 of 1967

Through this section it shows the president can only exercise his power to all prisoner instead to all prisoners who saves for life imprisonment, this provision shows that the power of president is limited to that matter.

This provision was applied currently by president Dr. Samia Suluhu Hassan on 26/4/2021 when she granted pardon to 1,516 prisoner who were released after a quarter of their sentence reduced in lieu of a standard one third reduction under the provision of this Act. Other 3,485 inmates, their sentences were reduced by quarter under section 49(1) of the Act. According to the statement issued by the director of presidential communication, Garson Msigwa, the 3485 prisoners whose sentences have been reduced where to continue to serve the remaining part of their sentence in prison. Through her statement, President Samia Suluhu called on released prisoner to make good use of the training received while in prison and to join their fellow citizen's in building nation while respecting and complying with national laws.⁵⁰

3.3.4 The Penal Code [Cap 16 R.E 2022]

This Act provides for various offences and punishment for each offences or a crime committed. The law also provides for the prerogative of mercy by the president in that; “any power of the president to grant pardon, to remit or commute in whole or in part, or to respite the execution of any sentence passed or to be passed⁵¹ with regard to such, section 3 of the penal Code empower the court of law to make trial and punish a person who commit an offences under any law in mainland Tanzania. Under such section the

⁵⁰President Samia Suluhu Hassan pardon 5001 prisoner accessed from <https://www.thecitizen.co.tz>

⁵¹ Cap 16 2022

president may grant pardon, remit, commute in whole or part or respite the execution of any sentence passed or to be passed even before the sentences or punishment is pronounced by the court of law. The president has the power to intervene in terms of grant pardon, remit, and commute whole or party or to respite the execution of any sentence or punishment.

3.3.5 The Presidential Affairs Act [Cap 9 R.E 2002]

Pursuant to the constitution of the united republic of Tanzania of 1977, which provide that “parliament may enact law making provisions for the procedure to be followed by president in the exercise of his power under this article” Through this provision, Act (cap 9 of 2002).Whereby under Section 3(1)of Presidential affairs it establish for advisory committee on prerogative of mercy which consist of minister who is appointed by the president, the Attorney general and not less than 3 or more than 5 other members appointed by president and the president preside at the meeting of the committee. This shows that even the member of advisory committee are appointed by the president, this make difficult for them to criticize the president as they appointed by the president⁵².

Also the law continue to explain that under 3(3) of the same Act, it state that “where person has been sentenced to death (otherwise than the court – martial) for any offence, the president shall cause a written report of the case from the trial judge or magistrate together with such other information derived from the record of the case or elsewhere as he may require to be considered at a meeting of the advisory committee; and after obtaining the advice of the committee, the president shall decide on his own deliberate

⁵²The Presidential Affairs Act Cap (9 R.E 2002)

judgment whether to exercise any of his power under article 45 of the constitution”. This means that the president can exercise his power provided under article 45 to a person sentenced to death after consult with the advisory committee but the president is not bound to follow the advice that he will be given by that advisory body.

3.3.5.1. The Presidential affairs act under Section 3(3) according to this section the prerogative of mercy did not apply to the people who convicted by court martial, and also the president is not bound to follow the advice which he will receive from advisory body to a person who convicted by murder, and also the president is not bound to take advice and receive advice to other prisoner than murder convict. Due to that it show the possibility of abuse the power by the president one of the abuses it may be in relation to grant pardon by the president to a person in order to protect themselves from possible legal jeopardy or embarrassment⁵³, also the president may use his power to favour his people which may be dangerous to the society, and finally it abuse the principle of democracy, This is because the president is not transparent in using his power.

3.3.6 The Constitution of Federal Republic of Nigeria [Cap 6 1999].

The Nigerian Constitution is the mother law of the country which gave different power to the president including the power of mercy or the presidential pardon, which is stipulated under Section 175 and 212 of the constitution of the Federal Republic of Nigeria. Under section 175 (1) of the constitution, president may; a) grant any person concerned with or convicted of any offence created by an Act of the National assembly,

⁵³ <https://www.rsearchgate.net>

pardon, either free or subject to lawful condition b) grant to any person a respite, either for an indefinite or for a specified period of the execution of any punishment imposed on that person for such an offence, c) substitute or less severe form of punishment for any punishment imposed on that person for such an offence or d) remit the whole or any part of punishment imposed on that person for such an offence of any penalty or forfeiture otherwise due to the state on account of such offence. And Section 175 (2) the power of the president under section one shall be exercised by him after consultation with the council of state.

And then S 212 (1) of the same constitution talks about the governor of the state that; the governor may a) grant any person concerned with or convicted of any offence created by any law of a state pardon, either free or subject to lawful condition, b) grant to any person a respite of the execution of any punishment imposed on that person for such punishment imposed on that person for such an offence c) substitute or less severe form of punishment for any person for such an offence or remit the whole or any part of punishment for any punishment imposed on that person for such any offence or of any penalty forfeiture otherwise due to the state on account of such an offence. And (2) the power of the governor under subsection (1) of this section shall be exercised by him after consultation with such advisory council of the state on prerogative of mercy maybe established by the law of the state

But the same constitution under section 153 (1) (b) it provides for the council of state to advise the president in different matter including the exercise of prerogative of mercy, where by the parliament manage to enact the law which will provide that advisory

committee in matter of prerogative of mercy, which is Advisory council on prerogative of mercy law Act no 16 of 2012, which establish the advisory board on Prerogative of mercy and the function of that advisory board. So this law shows that it is the obligation to president or the governor to follow the advisory committee on prerogative of mercy before taking any action.

3.3.7 The advisory council on prerogative of mercy law Act no 16 of 2012.

This law specifically enacted for the purpose of establishing the advisory committee on prerogative of mercy which establish the council of state which is responsible for prerogative of mercy, in which under section 2 talks about the composition of the council of state which comprise with the a) the Attorney general and commissioner for justice who shall be the chairman, b) solicitor general and permanent secretary, minister of justice, c) the commissioner of police or his representative, d) the comptroller of prisons or his representative and the director of public prosecution.

Section 3 of the same Act it talks about the functions of the council which are; a) serve as an advisory body to the governor of the state in the exercise of governor's prerogative of mercy and b) recommend any appropriate person to the governor for the purpose of enjoyment of any respect of prerogative of mercy exercisable by the governor under the constitution of federal republic of Nigeria of 1999 as amended times to times.

CHAPTER FOUR

4.0 FINDINGS OF THE RESEARCH

In this chapter the researcher present information and data collection from various sources include different category of respondent like magistrate, practicing advocate, legal expert and Officers, Non-governmental officers and local citizen. During research the researcher obtain different data through interview and also other data were obtained through secondary data collection which involves data obtaining through, reading different material includes books, manual, journal, online materials Newspaper, government and Non-governmental reports and other reading, on considering questions which are what is the legal frame work of prerogative of mercy?, What are the similarities and difference of prerogative of mercy between Tanzania and Nigeria? What are that procedure of granting prerogative of mercy between Tanzania and Nigeria?, What law say is what is practiced in relation to prerogative of mercy? And what is the effect of prerogative of mercy on Tanzania? The response is well discussed herein below.

4.1 The procedures which are followed by president during exercise the prerogative of mercy in Nigeria and Tanzania

4.1.1 Procedures Followed by the President during the Exercise of the Prerogative of Mercy in Nigeria

In Nigeria, the exercise of the prerogative of mercy is a constitutional power vested in the President. The procedures followed by the President during this exercise are outlined as follows:

Recommendation from Advisory Council: The process typically begins with are commendations from the Advisory Council on the Prerogative of Mercy. This council reviews applications for clemency and advises the President on granting pardons, reprieves, respites, or remissions of punishment.

Consideration of Recommendations: The President considers the recommendations made by the Advisory Council and evaluates each case individually. Factors such as the nature of the offense, time served, behaviour while incarcerated, and other relevant circumstances are taken into account.⁵⁴

Consultation with Relevant Authorities: Before making a final decision, the President may consult with relevant authorities such as the Ministry of Justice, legal experts, and other stake holders to ensure that all aspects of the case have been thoroughly examined.

Approval and Issuance of Order: Once a decision has been reached, the President approves there commendation for clemency and issues an order granting pardon, reprieve, respite, or remission of punishment to the eligible individuals.

Communication of Decision: The decision to grant clemency is communicated to the concerned parties, including the beneficiaries of mercy, prison authorities, and other relevant entities involved in implementing the pardon or commutation.⁵⁵

⁵⁴ The Constitution of Federal Republic of Nigeria of 1999

⁵⁵K. O., Mrabure. "Contending Issues in the Exercise of Prerogative of Mercy by State Executives under the Nigerian Law." *AJLHR* 4 (2020): 153.

4.1.2 Procedures Followed by the President during the Exercise of the Prerogative of Mercy in Tanzania.

In Tanzania, similar to Nigeria, the power to grant pardons and exercise mercy is vested in the President under Article 45(1) of the Constitution. The procedures followed by the President in exercising this prerogative are generally as follows:

Submission of Petition: Individuals seeking clemency must submit a formal petition to the Office of the President outlining their request for pardon or commutations of sentences.

Review by Advisory Board: A Presidential Advisory Board on Prerogative of Mercy reviews all petitions received and makes recommendations to the President based on their findings and assessment of each case.

Consideration and Decision: The President carefully considers the recommendations provided by the Advisory Board and assesses whether granting clemency aligns with national.

Approval and Implementation: Upon reaching a decision to grant mercy, the President approves there commendation and issues an order for pardon or commutation as deemed appropriate in each case.

Notification and Public Announcement: The beneficiaries are notified about their granted clemency while public announcements maybe made regarding significant cases where clemency has been granted.⁵⁶

⁵⁶The Constitution of the United Republic of Tanzania of 1977

Recommendation: Based on their assessment, these authorities may make recommendations to advise the President on whether to grant a pardon or there forms of clemency.

4.2 Legal Similarities on constitutions provision about prerogative of mercy between Tanzania and Nigeria.

4.2.1 In Nigeria and Tanzania, the power of prerogative of mercy are provided in the constitution. In Tanzania and Nigeria has the provision in their constitution that explain the power of mercy in which in Tanzania under Article 45 (1) it says that ‘ subject to the other provision contained in this Article, the president may do any of the following: (a) grant pardon to any person convicted by a court of law of any offence, and he may subject to law grant such pardon unconditionally or on condition; (b) grant any person a respite, either indefinitely or for a specified period, of the execution of any punishment imposed on that person for ant offence; c} substitute a less severe form of punishment for any punishment imposed on any person for any offence; and (d) remit the whole or party of any punishment imposed on any person for any offence, or remit the whole or art of any penalty of fine or forfeiture of property belonging to convicted person which would otherwise be due to the government of the United Republic on account of any offence’.⁵⁷

In Nigeria constitution under Article 175(1) it says that “The President may; (a) grant any person concerned with or convicted of any offence created by an Act of the national Assembly as pardon, either free or subject to lawful conditions. (b) grant to a person a

⁵⁷ Article 45{1} of the constitution of United Republic of Tanzania cap 2 of 1977

respite either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence; (c) substitute a less severe form of punishment imposed on that person for such an offence; or (d) emit the whole or any part of any punishment imposed on that person for such an offence or any penalty or forfeiture otherwise due to the state on account of such an offence⁵⁸. So due to that it shows that both Tanzania and Nigeria recognize the prerogative of mercy in their constitution and the president is the one who exercise that power.

4.2.2 In Nigeria and Tanzania, the power of prerogative of mercy vested to the president. In Tanzania and Nigeria the power of mercy are vested to the president where by the president has given power to exercise the clemency to his people who may be convicted by court of law for criminal offence, where by this power is unlimited and it subject by following some procedure on its application. In Tanzania the president can exercise that power even to the capital offence like treasons and murder where by in 1972 Mwalim Julius Nyerere grant pardon to Bibi Titi Mohamed who was convicted to treason offences this was in the case of *Hatibu Gandhi and others vs. R.* and also president can grant pardon to the person who did not confess guilty, this was shown in 2017 where by the president Magufuli was grant the pardon to Nguza Viking @ Babu Seya and his two sons⁵⁹ were granted pardon despite fact that they did not confess committing the crime which were charged with and convicted with.

Also in Nigeria the president is given power to exercise the presidential power of pardon under Article 175 which says the “president may” tis show that the president is only

⁵⁸ Article 175{1} of the constitution of federal republic of Nigeria of 1999

⁵⁹ Application No. 006 of 2015 , the African Court on Human and people’s Rights , Arusha ,(Unreported)

person who exercise the power of pardon and that power is done after consultation to the council of state. In Nigeria the prerogative of mercy is a constitutional power vested to the president to exercise in respect of federal offences.⁶⁰

4.2.3 Tanzania and Nigeria adopt the power of mercy from common law. Tanzania and Nigeria are under common wealth countries whereby both they were colonised by the British colony and after gaining their independence they adopt some laws and some provision and one of the provision is prerogative of mercy, in British the prerogative of mercy was vested to the crown, in Tanzania and Nigeria the prerogative of mercy was adopted in their constitutions where by in Tanzania is under Article 45 and in Nigeria is under section 175 and 212.

4.2.4 In Nigeria and Tanzania follows the procedure in its application. Both Tanzania and Nigeria has the procedure in exercise of this power of mercy where by in Nigeria under section 175 {2} it say that ‘the power of the president under subsection (1) of this section shall be exercised by him after consultation with the council of state’, and section 153 (1) it provide for the council of state who will advise the president in matter related to prerogative of mercy and other power.

And then in Tanzania under Article 45(2) it says that “parliament may enact law making provisions for the procedure to be followed by the president in the exercise of this power of his power under this Article”. The parliament of Tanzania enact different laws to provide the procedure and one of them is the presidential affairs act in which under

⁶⁰ I. Udofa., *the abuse of presidential power of pardon and need for restraints*, faculty of law, university of uyo, 2018. Accessed on <https://www.scirp.org>.

section 3(1) it provide for the advisory committee on prerogative of mercy in which is the one of the procedure that the president before exercise its power must follow it .

4.3 Legal disparities on constitutions provision about prerogative o mercy between Tanzania and Nigeria.

4.3.1 In Nigeria the power of prerogative of mercy is also provided to the governor but in Tanzania it's not. In Nigeria the power of mercy is also vested to the governor of the state in which its constitutional rights which provided under section 212(1) of the Constitution of federal republic of Nigeria of 1999, which stat that “ the governor may: a) grant any person concerned with or convicted of any offences created by any law of a state o pardon, whether free or subject lawful condition; b) grant to any person a respite, of the execution of any punishment imposed on that person for such an offences, c) substitute a less severe form of punishment for any person for such an offences; or d) remit the whole or any part of punishment for any punishment imposed on that person for such any offences or for any penalty forfeiture otherwise due to the state on account of such an offence⁶¹.

This is different to Tanzania whereby the only president is the one who has been vested that power and not anyone else. Due to that Nigeria can have a big way of the maintenance of justice that Tanzania because the power is exercises different people than Tanzania where by only president only one who has that power of mercy is

4.3.2 In Nigeria the president is bound before exercise that power to consult with the council of the state while in Tanzania it's not mandatory. In Nigeria there is a provision

⁶¹ Section 212(1) of the constitution of federal republic of Nigeria of 1999.

in their constitution which provide for the mandatory requirement to the president to consult with the council of state which is under section 174(2) which says “The power of president under subsection (1) of this section shall be exercised by him after consultation with the council of state” and the same constitution under section 153 it establish the council of state. This is not the same to Tanzania since the president is not bound to get the advice from Advisory committee except the offence of murder and even if he will receive it is not bound to follow it this has been provided under Article 45(2) of the Constitution of united republic of Tanzania and section 3(3) of the presidential affairs Act.

4.3.3 In Tanzania there is advisory committee while in Nigeria there Advisory Council. In Nigeria the board that has a duty to advice/ consult the president In matter related to prerogative of mercy is called the council of state which has established under Section 153 of the constitution of federal republic of Nigeria, while in Tanzania it's called Advisory committee on prerogative of mercy which is established under Section 3(1) of the the presidential affairs Act.

4.4 What good can Tanzania Learn from Nigeria in the Law relating to Prerogative of mercy?

The good things that Tanzania can learn from Nigeria are that firstly; the composition of advisory committee proposed to be established in constitution. As Nigeria establish the council of state in their constitution also is advised that Tanzania to establish advisory committee in their constitution, so that to make a mandatory requirement for the president to do not ignore the advice provided by advisory committee.

Secondly; the parliament to put the provision under the presidential affairs Act that will give the president the mandatory requirement to follow the advice of advisory committee, to any person for any offence before he exercise his power. This will help to avoid bias and exercise transparency and uphold role of law which will render the justice to the society.

4.5 Negative Effects resulting from wrong setup of law in prerogative of mercy in Tanzania.

4.5.1 Wrong set up of law in Prerogative of mercy encourages the increase of crimes. As we know prerogative of mercy is granted to the people who has been convicted by the criminal offences, where by when those people granted pardon they return back to the public and continue with their behaviour of committing crimes. This is seems to be dislike by the magistrate, police officer and the general public for their duty of fighting of crimes in their society. One of the retired judge once spoke publicly against presidential pardon speaking at the law academic Constitutional forum held on 30th and 31st august 2013 at Nkrumah hall (UDISM) in which the present author attended, the retired judge Lawrence Mchome revealed that he say “ to convict and see the convict walking on the street after a weak⁶²”. This is seems that he hate the prerogative of mercy because it discourage the effort of the public to fight against crimes.

4.5.2 Wrong setup of law in Prerogative of mercy it encourage the mis use of power. The prerogative of mercy it encourage the mis use of power because it give much power

⁶² I. Mandi., *observations on the law and exercise of Prerogative of mercy in Tanzania*, University of Dar es salaam law school, (2014).

to the president to do as he wishes, so due to the exercise of his power the president may mis use his power and the law will still protect him on his action.

4.5.3 Wrong set up of law in Prerogative of mercy undermines the rule of law. The rule of law it means that no one is above the law, but the procedure provided by the Acts which provides the procedure gives power to the president to be above the law, because the law give him an ability to ignore the advice provided by the advisory committee and also it violate other law like the parole board Act, one of the example under Section 4 of the parole board Act provide for the eligibility and condition for the prisoner to be granted prerogative of mercy, where by under Section 4 (a) it state that “ he is not serving of life sentence”⁶³ for this it means that a person who is sentenced for life he is not eligible for parole. But the president Magufuli he was grant pardon to the Viking@ Babu sea and Johnson Nguza (criminal case no 555 of 2003), where by the accused person was imprisoned for life for an offence of rapping 10 primary school girl⁶⁴. So due to that it shows that the president is undermining the rule of law.

⁶³ Section 4(a) of parole board Act No 25 of 1994.

⁶⁴ Nguza Viking(also Known as) Babu sea and papii S/O Nguza vs Republic criminal case No 555 of 2003.

CHAPTER FIVE

RECOMENDATIONS AND CONCLUSION

5.0 General Comment

This chapter deals with conclusion and the general recommendation essentially basing on the findings, the recommendation are mannered by give general comments to the government, legislature, and general public and to all stakeholders of prerogative of mercy in Tanzania.

5. 1.1 Recommendations to the Government

In order to avoid the mis use of power the president has to be constitutionally compelled to consult the Advisory committee and exercise his power in accordance with the committee.

The government should submit a bill to the parliament to make change on the provision of Section 3 (3) of the presidential affairs Act and the Article 45(2) of the constitution of united republic of Tanzania, so that to give the mandatory requirement for the president to do not ignore the advice of the advisory body and to make compulsory for the president to follow the procedure provided by the parliament.

Then the government should make people aware on the importance of prerogative of mercy and to encourage them to stop committing the crime for the reason of pardon, because that power is only used by the president as a discretion so the president grant it as what he wish and it's not mandatory.

5.1.1 Recommendations to legislature

The parliament is advised that the composition of the committee proposed to be established in drafting constitution to be started.

Also the parliament is advised to make a clear and transparent mechanism through which convict may apply for pardons, commutation or reprieves needs to be provided. This must be go together with establishment if institutions for receiving and process such application because they forwarded to the president.

Also the parliament should make sure that the law that are enact must uphold rule of law and transparency so that to adhere the principal of democracy. The parliament is advised that through making the laws the process of identity prisoners eligibility for pardon at prison level should include all stake holder like local police officers, local social welfare official.

5. 1. 3 Recommendations to the Public

The public should stop to commit the offences for the reason that the president will give them pardon, instead of that they may engage in different activities to increase the income which will lender to the development especially economic development.

Then the public they had a duty their law especially the law relate to prerogative of mercy, so will help them to know the procedure and the effects of the prerogative of mercy to the society, due to that it will help them to shape their behaviour and to be the good citizens.

5.2 CONCLUSION

The Constitution of United Republic of Tanzania under Article 45(1) has clearly stated the prerogative of mercy that are the power granted to the president, So due to that it seems that the power of mercy is still exercised in monarchical fashion first, the Prerogative of mercy is exercised by the head of state as the same way as it was by the British monarch. Secondly a kin to the British practice, pardon and commutations are granted on the public holidays. And thirdly the two presidents of Tanzania and Zanzibar are given widely discretionary powers which are completely uncontrolled. It has also established that pardon and other relief of the prerogative of mercy which are granted under the atmosphere of confidentiality that encourages impropriety and forecloses any possibility of accountability.

Also the process of sorting potential pardons excludes important stakeholders like the police officers; moreover recently there has been a flurry of presidential pardons granted on less justifiable grounds, the stakeholders. It's respected that if the recommendation given will be followed, the procedure of grant pardon will be established to the Constitution and also the democracy will be adhered so that will ensure transparency and accountability; and also the public will be aware concerning with prerogative of mercy which will lead to the reduction of crimes in our country.

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