

## EXAMINATION OF THE APPROPRIATE STAGES FOR GRANT OF PREROGATIVE OF MERCY BY THE PRESIDENT IN NIGERIA

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**ABSTRACT:** Under the Nigerian Constitution, the scheme of prerogative of mercy is provided to allow the President to pardon convicts for federal offences. This constitutes an exception to the rule that the judgment of the Supreme Court is final. Many mistake it that this power can be exercised at his whim and at every stage of criminal proceedings for which reason the power has been subjected to various forms of abuses. Following this challenge, this paper critically examined constitutional provisions that authorise the President to grant pardon in addition to judicial decisions that arose therefrom. The paper established that prerogative of mercy by the President should be properly exercised in order not to defeat the constitutional presumption of innocence. The paper further established that pardon is extended or grantable only after conviction or when there is no pending appeal and never otherwise. To do the contrary will amount to naked usurpation of judicial powers. As the use of prerogative of mercy can be subject of abuse, it was recommended that this humungous power of the President must be exercised only after consultation with the Council of State in accordance with due process of the law.

**Keywords:** conviction, appeal, final, pardon, prerogative, President.

## 1.0 Introduction

This presentation will interrogate the scheme of prerogative of mercy grantable by the President of Nigeria and at what stage it will be appropriate to grant same. There is also consideration of how such power is derived and how it should be exercised; when it should be exercised; and for what purpose it can be granted. In order to properly illuminate the law in this area, the paper will discuss relevant constitutional provisions and judicial decisions handed down on prerogative of mercy as they affect the office of President. It is believed that this will serve to properly situate the law as well as disabuse some of the misgivings and confusion surrounding the power of clemency a President under the Nigerian legal system. To facilitate grasp and intellectual order, the paper is further divided into the following segments namely: Meaning of “prerogative of mercy”; Constitutional power of “prerogative of mercy” by the President; Stage at which pardon may be granted or grantable by the President; Additional important things to note about prerogative of mercy; Consequence or effect of prerogative of mercy; Conclusion and recommendations.

## 2.0 Meaning of “prerogative of mercy”

“Prerogative of mercy” is synonymous with “pardon” or “clemency” and these terms are used interchangeably in this paper. The *Black’s Law Dictionary*<sup>i</sup> does not interpret the phrase or term “prerogative of mercy”. Rather, it interprets “prerogative” as “An exclusive right, power, privilege, or immunity, usually acquired by virtue of office” and “mercy” as “compassionate treatment, as of criminal offenders or those in distress; especially imprisonment rather than death, imposed as punishment for capital murder”.<sup>ii</sup> It also interprets “pardon” as “The act or an instance of officially nullifying punishment or other legal consequences of a crime. A pardon is usually granted by the chief executive of a government. The President has the sole power to issue pardons for federal offenses, while state governors have the power to issue pardons for state crimes. Also termed executive pardon”,<sup>iii</sup> while “clemency” is defined as “mercy or leniency; especially power of the President or a Governor to pardon a criminal or commute a criminal sentence- also termed executive clemency”.<sup>iv</sup> In Nigeria, “prerogative of mercy” is a constitutional scheme that empowers the executive, meaning either the President or Governor of a State, to

grant pardon, whether conditionally or unconditionally, to convicts of offences within the sphere of the legislative competences of their respective legislatures. Pardon is analogous to amnesty, but they do not mean one and the same thing. In *Falae v Obasanjo*,<sup>v</sup> it was decided that “A pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and privileges forfeited on account of the offence ... The effect of a pardon is to make the offender a new man (*novus homo*), to acquit him of all corporate penalties and forfeitures annexed to the offence pardoned.”

Thus, prerogative of mercy is “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. Prerogative of mercy serves as an act of grace that exempts a convicted person from punishment for a crime that he committed, was prosecuted and convicted”. In some cases, he may have finished serving sentence or paid imposed fine while in others, the convict may still be an inmate in the Correctional Centre serving his sentence. Thus, prerogative of mercy or pardon formally forgives and releases the convict from legal consequences, including punishment like imprisonment, and can restore their civil rights. In Nigeria both the President under *section 175* and a State Governor under *section 212* of the CFRN, 1999 as amended have powers to extend prerogative of mercy via different devices and spheres of competences. However, only the scheme of “prerogative of mercy” granted or grantable by the President is the subject matter of this paper.

### **3.0 Constitutional power of “prerogative of mercy” by the President**

The office of the President of Nigeria is established in *section 130(1)* of the CFRN, 1999 as amended and under *subsection (2)* thereof, he shall be three things in one namely: “the Head of State; the Chief Executive of the Federation; and Commander-in-Chief of the Armed Forces of the Federation”. One of the many executive powers exercisable by the President is the power to grant prerogative of mercy. This power is traceable to the provisions of *section 175* of the CFRN, 1999 as amended which provides *verbatim* as follows:

“(1) The President may -

(a) 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.

(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 a 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 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.

(2) The powers of the President under subsection (1) of this section shall be exercised by him after consultation with the Council of State.

(3) The President, acting in accordance with the advice of the Council of State, may exercise his powers under subsection (1) of this section in relation to persons concerned with offences against the army, naval or air-force law or convicted or sentenced by a court-martial.”

From the foregoing, it stands to reason that only the President is constitutionally authorized to grant the prerogative of mercy. It is an executive pardon although it is beyond the power of any Minister<sup>vi</sup> at the Federal level. Furthermore, exercise of this power by the President is discretionary as he cannot be compelled either by judicial compulsion or coercion by any individual, no matter how powerful, to exercise his prerogative. In *FRN v Akali*,<sup>vii</sup> it was held that “there is no legal compulsion on either the President or Governor to grant anyone pardon or prerogative of mercy as it has thus come to be associated with a somewhat personal concession by a head of State to the perpetrator of an offence in mitigation or remission of the full punishment that

he has merited. A pardon is the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the crown.”

Prerogative of mercy may either be (a) without conditions (meaning total and without conditions attached) or (b) subject to lawful conditions. This discretionary power may be exercised in three significant ways namely- (i) by way of “grant to any person a respite, of the execution of any punishment imposed on that person for such an offence”.<sup>viii</sup> This is complete reprieve or unconditional pardon. (ii) By way of “substituting a less severe form of punishment for any person for such an offence”.<sup>ix</sup> This is a conditional pardon. (iii) By way of “remitting 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”.<sup>x</sup> In addition, and to the exclusion of any other person including a State Governor, under *section 175(3)* of the CFRN, 1999 as amended, the President, acting in accordance with the advice of the Council of State, may exercise his powers of free or conditional pardon under *section 175(1) of the CFRN, 1999* as amended “in relation to persons concerned with offences against the army, naval or air-force law or convicted or sentenced by a court-martial.”

The scope of the President’s power of pardon or prerogative of mercy extends to two classes of convictions namely- (a) “pardon for offences created by Acts of the National Assembly” under *section 175(1(a))* of the CFRN, 1999 as amended; and (b) “pardon of persons concerned with offences against the army, naval or air-force law or convicted or sentenced by a court-martial” under *section 175(3)* of the CFRN, 1999 as amended. Thus, by a combined reading of the above provisions, there are four categories of persons who can be beneficiaries or subject-matter of pardon pursuant to the powers conferred on the President namely-

- “(a) any person concerned with or convicted of any offence created by an Act of the National Assembly;
- (b) persons concerned with offences against the army, naval or air-force law;
- (c) Persons convicted by a Court-martial; and
- (d) persons sentenced by a Court-martial.”

It may not be out of place to accentuate that prerogative of mercy must be in writing and not oral or by word of mouth. The pardon should be by way of a written “Instrument of Pardon explicit on its face that the power was exercised by the President after due consultation with the Council of State.” The President cannot therefore exercise “prerogative of mercy” without consultation with the Council of State as expressly provided in *subsection 2 of section 175* of the CFRN, 1999 as amended. It is submitted that failure, refusal or neglect by the President to consult with the Council of State before the exercise of prerogative of mercy renders such exercise unconstitutional, null and void. The Council of State is established under *section 153 CFRN, 1999* as amended with clear membership<sup>xi</sup> and it “shall have power to among other things advise the President in the exercise of his powers with respect to the prerogative of mercy”.<sup>xii</sup>

#### **4.0 Stage at which pardon may be granted or grantable by the President**

Discussion in this segment will examine and pinpoint the appropriate stage at which prerogative of mercy can only be granted. This is because pardon, as it were, is a source of controversy whether in relation to the stage at which it can be granted or specifically whether a person granted pardon after his conviction can still appeal against his conviction. Emphatically, pardon is granted or grantable only after conviction and or when no appeal against conviction is pending. The exercise of the power of the President to extend prerogative of mercy to “any person concerned with or convicted of any offence” in *section 212(1)(a)* of the CFRN, 1999 as amended does not contemplate that an executive should constitute himself into the Attorney-General of the Federation who is empowered under *section 211(1)(c)* of the CFRN, 1999 as amended to discontinue any criminal trial instituted by him before any Court without the necessity of giving reasons for such; which is also known as the power of *nolle prosequi* or that the executive should imbue himself with judicial functions prescribed in *section 272* of the CFRN, 1999 as amended. The point being made is that premature or wrong timing of grant of clemency or mercy offends the constitutional presumption of innocence. Granting pardon before conviction will impinge on the presumption of innocence of the defendant enshrined in *section 36* of the CFRN, 1999 as amended by forgiving them for offences for which they are still

presumed innocent (and so not yet deserving of forgiveness) and yet to be found guilty. Hence, the vexed question that always begged for clear judicial resolution was whether it accorded with logic and common to forgive an innocent person or a guilty person?

Pardon is only granted to a convict. Untimely or precipitate grant of prerogative of mercy also amounts to naked usurpation of judicial functions by the executive. Pardon or prerogative of mercy is not extended to a defendant/person still undergoing trial or before his conviction. The President's authority to extend forgiveness "is not the equivalent power granted to the Attorney-General to discontinue criminal proceedings at any stage, *id est*, to enter a *nolle* prosequi during trial and before proceedings come to an end, and so effectively bring the proceedings to a screeching halt even before exoneration or conviction, as well as pardoning them".

The stage at which the power of prerogative of mercy can be granted was initially controversial and unsettled as evidenced by the below discussed decisions of the Court of Appeal. In 2017, it was held by the regular panels that pardon can be granted (by a Governor under applicable constitutional provisions) before or after conviction. This was in *Saifullahi & Anor v FRN*<sup>xiii</sup> and subsequently in 2018 in *FRN v Alkali & Anor*.<sup>xiv</sup> In the same 2018, in *Dingyadi v FRN*,<sup>xv</sup> the decision was reached that pardon cannot be granted before conviction at the stage when trial was on-going. It stated that a person whose trial is ongoing and constitutionally presumed innocent cannot be granted pardon because an innocent person cannot be pardoned for any offence. There must be a conviction before pardon can be granted. Subsequently, in *FRN v Achida*,<sup>xvi</sup> the Full Panel of the Court of Appeal held that pardon, in this case by the Governor (including of course the President), should not be overreaching. "Pardon should come at the end of final appeal in the Supreme Court because a person is adjudged not guilty until the Court pronounces so". Thus, to contemplate the grant of pardon to an offender who is yet to undergo trial or to fully pass through the justice system to its full extent and be pronounced guilty of the crime for which he is standing trial yet presumed innocent, is to unnecessarily short-circuit the criminal process of trial anticipated by *sections 175 and 212* of the CFRN, 1999 as amended. Prerogative of mercy should not be granted when there is a pending trial

because it is the exclusive preserve of the Judiciary to try offenders and convict or exonerate them of offences alleged/charged, as the case may be or as the circumstances deserve.

## **5.0 Additional important things to note about prerogative of mercy**

(a) Pardon is not extended when appeal is pending.

A person is entitled to a prerogative of mercy or pardon where the convict had exhausted all his right of appeal. The question whether prerogative of mercy can be exercised in favour of an accused who has lodged a further appeal to the Supreme Court was decisively answered in the affirmative in *Solola & Anor v State*<sup>xvii</sup> wherein the apex Court, per Edozie, JSC held that a person convicted for murder and sentenced to death by a High Court and whose appeal is dismissed by the Court of Appeal is deemed to have lodged a further appeal to this Court and until that appeal is finally determined, the President or the Governor of a State cannot pursuant to *sections 175 or 212* of the 1999 Constitution, as the case may be, exercise his power of prerogative of mercy in favour of that person. In the same vein, such person cannot be executed before his appeal is disposed of. It is hoped that the prison authorities will be guided by this advice.

In *Oloyede v The State*,<sup>xviii</sup> one of the issues before the Supreme Court was whether the applicant can appeal after his death sentence was reduced to life imprisonment. Respondent had contended that since the applicant approached the Ogun State Governor to exercise prerogative of mercy in his favour, and was successful, he cannot appeal after his death sentence was reduced to life imprisonment. It was contended for the applicant that the applicant never applied for mercy; rather it was the Prison authorities who forwarded the name of the applicant and that of several other prisoners to the Ogun State Prerogative of Mercy. The Supreme Court, per Rhodes-Vivour, JSC, held that at no time did the applicant approach, or apply to the Ogun State Governor to “exercise prerogative of mercy in his favour, rather it was the Prison authorities that forwarded the names of the applicant and other prisoners to the Ogun State Advisory Council on the Prerogative of Mercy for the remission/release of prisoners to commemorate democracy day in 2016.” On 5

December 2013, the applicant's appeal to the Court of Appeal was dismissed. The applicant quickly filed an appeal on 24 December 2013, and filed his brief of argument (applicant's brief) on 13 March 2014. In this case, the applicant's death sentence was reduced to life imprisonment. He is still not a free man. He wants to be free. After the applicant lost his appeal at the Court of Appeal on 5 December 2013, he appealed to the Supreme Court and no one can deny him that right of appeal. In this case, the appellant is serving a life sentence. He is not a free man. He never applied for prerogative of mercy, and his intention is to be a free man. An appeal could very well go either way. A death sentence may again be affirmed or the appeal allowed. The appellant has a choice, and he decided to appeal. The applicant can appeal after his death sentence was reduced to life imprisonment.

Furthermore, in the case of *Obidike v The State*,<sup>xix</sup> the Court deciding on the propriety of granting pardon to a convict of capital offence while appeal against conviction is pending held that it is not proper that a convicted prisoner should be granted presidential pardon while his case is pending on appeal. Presidential pardon could come after appeal has been heard and determined. On the exercise of prerogative of mercy on a recommendation by the Attorney General of Federation suffice to say that where the prerogative of mercy is exercised while the convict's case is pending at whatsoever stage, such mercy is “nothing short of the back of a duck fowl; it cannot hold water.”

Flowing from the above judicial authorities therefore, conclusively, prerogative of mercy cannot be exercised in favour of a person who has lodged an appeal or further appeal to the Supreme Court.

(b) There can be appeal against conviction after grant of pardon

Another area of misunderstanding concerning prerogative of mercy is the question “whether a person who has been granted pardon after his conviction can still appeal against his conviction”. In *Dr. Obi Okongwu v The State*,<sup>xx</sup> the issue on appeal was whether the appellant, who had been granted pardon by the Governor after his conviction for contempt, could still appeal against his conviction. The conclusion was reached by the Court of Appeal that the appellant was not precluded from

lodging this appeal, the free pardon granted to him notwithstanding. It was held that a Governor could not by an executive act reverse the Court decision. It follows that the Governor could not in the exercise of his constitutional power under *section 192(1)(a)* of the Constitution reverse the decision of the High Court convicting the appellant of contempt of Court; that power lies only with the Court. The Governor could only, by a grant of pardon to the appellant, relieve the latter of "all pains, penalties and punishments whatsoever that from the said conviction may ensue".

## **6.0 Consequence or effect of prerogative of mercy**

Grant of prerogative of mercy or pardon has many consequences or effects. These include but are not limited to the following-

(a) One consequence or effect of grant of "prerogative of mercy" is clearly enshrined in *section 36(10)* of the CFRN 1999 as amended which provides that "No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence." This is "the principle of double jeopardy" established in *Amedu v Federal Republic of Nigeria*.<sup>xxi</sup> In *Saifullahi & Anor v FRN*,<sup>xxii</sup> it was interpreted that "provision lays down the principle of criminal law that where a person accused of committing a criminal offence(s) which are recognised by law and where he has shown that he has either been pardoned of that offence(s) by the appropriate authority or that he has been tried by a Court of law or a tribunal set up by law, then he cannot be subjected to any further trial by any Court or tribunal on that same offence(s). A bar to further prosecution has now been placed between him and those offences."

(b) Pardon is the act or an instance of officially nullifying punishment or other legal consequences of a crime. Thus, another consequence or effect an unconditional pardon is that it wipes or cleans out the criminal records of the beneficiary. In *Falae v Obasanjo*,<sup>xxiii</sup> the Court of Appeal, per Musdapher, JCA (as he then was) held *inter alia* as follows "A pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and privileges forfeited on account of the offence...The effect of a pardon

is to make the offender a new man (*novus homo*), to acquit him of all corporate penalties and forfeitures annexed to the offence pardoned."

(c) What pardon does is to wipe away the stigma of the conviction and not the conviction itself. It contains no notion that the person to whom the pardon is extended never had in fact committed the offence. It is a matter of forgiveness. In the case of *United States v Wilson*,<sup>xxiv</sup> pardon was defined as an act of grace proceeding from the power entrusted with the execution of the laws, which exempts the individuals, on whom, it is bestowed from the punishment the law inflicts for a crime he has committed. It is further defined as the "private", though official act of the Executive. Prerogative of mercy on the other hand has the effect of granting to a convict a respite or remission of punishment, pardoning, forgiving or conditionally or unconditionally washing clean a sentenced criminal.

(d) Conditional prerogative of mercy may have the effect of substitution of a less severe punishment for a more severe one that has already been judicially imposed on the defendant.

(e) Prerogative of mercy is an exception to the finality of decision of the Supreme Court as consecrated under *section 235* of the CFRN, 1999 as amended. In *APC v Enwerem & Ors*,<sup>xxv</sup> it was held that by virtue of *sections 6 and 235* of the CFRN, 1999 as amended, the Supreme Court is the highest Court in the hierarchy of Courts and without prejudice to the powers of prerogative of mercy of the President and the Governor of a State, the decision of this Court is binding on all Courts and is not subject to review by any other Court or persons.

(f) Grant of pardon or prerogative of mercy is a bar to confiscation of passport. Specifically, under *section 81* of the Immigration Act, 2015, "the passport of any Nigerian convicted of an offence of smuggling of migrants under Immigration Act shall be forfeited to the Federal Government and it shall not be returned to that person unless the Minister directs otherwise or after the grant of a pardon or on the exercise of the Prerogative of Mercy under the Constitution of the Federal Republic of Nigeria."

(g) Under *section 23* of the Economic and Financial Crimes Commission (Establishment) Act, 2004, “the passport of any person convicted of an offence under this Act shall be forfeited to the Federal Government and shall not be returned to that person till he has served any sentence imposed or unless or until the President directs otherwise after the grant of a pardon or on the exercise of the prerogative of mercy under the Constitution of the Federal Republic of Nigeria 1999 as amended”.

(h) When properly granted, pardon is final and not subject to review or authority by any person or authority. The Prerogative of Mercy, once exercised, represent a sovereign act of grace. It is hornbook law that what has been constitutionally pardoned cannot be administratively unpardoned. To suggest otherwise will impinge on the hegemony of the constitution and tantamount to anarchy, unconstitutional act and unpardonable illegality.

## **7.0 Conclusion and recommendations**

Discussions herein established that President’s power to extend prerogative of mercy is constitutional but it can only be exercised at the appropriate stages. There can be no pardon in *vacuo*. The power of pardon by the President will be adjudged wrongly exercised, improper or unconstitutionally if it is prematurely exercised at the stage it will conflict with presumption of innocence or amount to interference with functions of the judiciary. In order to checkmate misuse and improper and inopportune exercise of this power, it is recommended that presidential pardon must be granted only in accordance with the due process of the law as already laid down in this paper.

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6. *Saifullahi & Anor v FRN* (2017) LPELR-45136(CA).
7. (2018) LPELR-45237(CA).
8. Under *section 175(1)(b)* of the CFRN, 1999 as amended.
9. Under *section 175(1)(c)* of the CFRN, 1999 as amended
10. Under *section 175(1)(d)* of the CFRN, 1999 as amended.

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11. For the membership of the Council of State, see Third Schedule, Part 1B (5) of the CFRN, 1999 as amended.
  12. Third Schedule Part 1B (6)(a)(ii) of the CFRN, 1999 as amended.
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