

The Paradox Of The Presidential Power Of Pardon: Tanzania In Perspective

Omari Issa Ndamungu*

*Ph.D. candidate at the Open University of Tanzania, Faculty of Laws,
Assistant Lecturer (Laws) at Mzumbe University (Mbeya Campus), P. O. Box 6559 Mbeya, Fax +255 2502862, Mob. +255 (0)652451140,

Email: oissa@mzumbe.ac.tz

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ABSTRACT

In February 2020 President Donald John Trump of the United States of America (USA) granted four clemency orders and seven pardons, which in turn rejuvenated debate about pardon powers of the President. Similar situation emerged in Tanzania in December 2019 when President John Pombe Magufuli granted 600 pardons in commemoration of 58th Anniversary of independence of the country. This drove me to write this paper giving brief explanation of presidential pardoning power. The paper explains historical snag of the power in the world, focusing on England and USA and then relates it to Tanzania. In the process the article brings to the fore salient features of presidential power of pardon like self pardoning and procedure of its exercise. The main conclusion drawn from the analysis points out that the power of pardon in Tanzania is wide and unlimited and the President can exercise it to convicts of any offence.

Key words: Power of pardon, Salient features, Extent of the power, Self pardoning

1.0 Introduction

This article analyses the origin of the pardon power generally. It examines scope of the power in England and USA and explores its position in Tanzania. The article critically explores the limitations of the pardon power, assesses its potential for abuse and takes up the possibility of self pardoning in all the three jurisdictions. England has been taken because from her, both USA and Tanzania base their legal jurisprudence. USA and Tanzania have been picked because both share some similar features major one being that the two countries follow presidential system of government.

The paper therefore is set to see if the experiences of England and USA can be emulated to remedy the deficiencies experienced in Tanzania in so far as presidential power of pardon is concerned. From what has been gathered the article has summarized the observations, critiques and recommendations on reforms needed to be effected in exercise of presidential power or pardon.

1.1 Methodology

In collecting and organizing materials for this paper, I conducted research in libraries for literature that specifically focuses on presidential power of pardon. This was by examining historical background of the power, its governing laws and its procedures and

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practices. I have relied mostly on publications in books, journals and papers presented in seminars and conferences, comments from legal practitioners as well as other scholars that have addressed the issue in three countries, which are England, USA and Tanzania.

After reading the writings on presidential power of pardon I have identified and analyzed the position of constitutional law of England, the constitutional provisions of the US Constitution of 1787 and the Constitution of the United Republic of Tanzania (CURT) of 1977. All of these three countries share a common law background and so have something in common on presidential power of pardon. This means I consulted and compared the presidential power of pardon in England, USA and Tanzania. Before the article embark on the analysis of presidential power of pardon hereunder is a recap of its history.

2.0 Synopsis of Presidential Power of Pardon

The exercise of the presidential power of pardon can be traced to a very ancient ancestry with the earliest roots in practices among the Romans. Despite being very old its exercise has always been under criticisms for being inconsistent with a solid theory of criminal law. Beccaria, C.B for example contends that pardons are capricious and irregular and thus inconsistent with a good theory of criminal justice.¹ Pardons are also argued to be an inherently idiosyncratic arbitrary exercise of presidential authority. It is further argued that in exercise of presidential power of pardon one person makes a decision without standards or formal guidance.² This is so because in granting pardon ‘the supposition of the connivance of the judge is entirely excluded.’ The pardon is the presidential decision to allow any person to be absolved of guilt for any alleged crime charged as if the crime never occurred.³ The power of the President to grant pardon is discretionary, final and conclusive and no appeal can be made against the decision of the President in exercise of power to grant pardon. This is so because pardon power is not the subject of legal rights but begins where legal rights end.⁴ That is why from the earliest years of the Republics, pardon was used to benefit ordinary people for whom the results of a criminal prosecution were considered unduly harsh or unfair. However, the power of the President to grant pardon can be challenged by way of judicial review.

2.1 Meaning of Pardon

The pardon is sometimes and in some countries known as prerogative of mercy or clemency.⁵ As such the power to pardon also includes more limited acts of clemency like reprieves (delay of sentencing) and commutation (reducing) of sentence or punishment.⁶ Reprieve refers to the act of suspending or staying execution of the sentence met by the courts. The President of the country has

¹ See Moore, K. D, Pardons 39 (1989) citing C.B., Beccaria, *An Essay on Crimes and Punishment*, pp. 158-59, (1953)

² Rosenzweig, P., Reflections on the Atrophy pardon Power, *Journal of Criminal Law and Criminology*, Vol. 102, Issue 3 (2012), p. 603

³ Weihofen, P., *The Effect of Pardon*, 88 U. Pa Rev 177, (1939), p. 179

⁴ See the words of Lord Diplock in the case of *De Freitas vs. Benny* (1976) AC 239

⁵ Ekwenze, S.A.M., *Presidential Pardon and Prerogative of Mercy: A Necessary National Soothing Balm for Social Justice*, Anambra State University, Igbariam Campus, Lagos, (2011), p. 2

⁶ Pfiffner, J.P., *The Scope of the President’s Pardon Power*, George Mason University, (2010), p. 1

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power to reprieve the whole of the sentence or part of it at any time and for any offender. The reprieve is taken by the President as a preparation stage for granting of pardon. For that before the President grants pardon to the offender he may first grant reprieve in which case the offender shall not serve his sentence awaiting for pardon.

The pardon once pronounced in favour of the person will usually restore civil rights which were lost as a result of the conviction. So pardons generally restore the right to vote and the right to run for and hold public office. The pardon however, does not bar any civil legal actions against the person pardoned. So, the person who receives a pardon for murder may, after his release from custody, be subject to a law suit for wrongful killing.

According to Garner, B A commutation means the executive's substitution in a particular case of a less severe punishment for a more severe one that has already be judicially imposed on the defendant.⁷ It can be based on discovery of pertinent facts that were not known or available when the sentenced was decided, or that arose and were developed afterward. It may also be based on the executive's statutorily or constitutionally granted discretion, regardless of the facts. Commutation was an 'extraordinary' remedy for person seeking reduction of sentence.⁸ It is because of this that after 1910 grants to prisoners in USA were styled 'sentence commutation' replacing the full or conditional pardon more frequently used in early years to release a person from a prison term.⁹ Commutation is rarely granted but may be considered for old age, illness, disparity or undue severity of sentence.

Once granted commutation normally cannot be rejected whereas at least the pardon can be rejected. In the case of *Biddle v Perovich*,¹⁰ President Coolidge commuted a federal death sentence, and he was transferred to the state of Connecticut, which convicted him of the murder and sentenced him to hang. Biddle appealed by arguing that he had not accepted the commutation of his sentence and thus it was not valid. Justice Holmes wrote that the commutation of a sentence did not have to be accepted by the recipient in order to be valid. He stated that 'commutation was a part of the constitutional scheme and the public welfare is more important than a criminal's wishes.'

2.2 Scope of Power of Pardon

In all civilized and refined societies pardon has become considered as an act of grace. It is something of a living relic from the days when rulers possessed the power to punish and to remit punishment as an act of mercy. It is the oldest form of release procedure and it survives in vivid form in various States.¹¹ The pardon may be granted at any time either before institution of the criminal proceedings

⁷ Garner, B. A., Black's Law Dictionary, 9th Edition, A Thomson Reuters Business, Dallas, (2004), p. 318

⁸ Love, M.C., The Twilight of the Pardon Power, *Journal of Criminal Law and Criminology*, Vol. 100, Issue 3, (2010), p. 1191

⁹ Ibid

¹⁰ 274 US 480 (1927)

¹¹ Sebba-Leslie, Criminology, The Pardoning Power, *World Survey*, Vol. 68, Issue No. 1, (1977), pp. 83-85

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but after commission of the crime, during pendency of the criminal proceedings or after conviction for the crime depending on the laws of the country.¹² The pardon is granted to the deserving persons especially to those who were thought to have been wrongly convicted or who claim to have been wrongly convicted.¹³ By granting pardon the President can set free any offender who has been tried and convicted by the courts. In some countries the persons who accept the pardon implicitly admit guilt. But once the person is granted pardon he is cleared of all guilt and he becomes as if he had never been tried or convicted of any offense. The persons who are granted pardon therefore has all the rights as any person who had never been subject to criminal charges in courts of law.

The pardon is entrenched in the Constitution of the country as a way to supplement judicial justice. This is because it is possible sometimes that through judicial justice a wrong person may be convicted and the real criminal who should be convicted may be discharged or acquitted. In the case of *Umaru vs. the State*,¹⁴ Nnamani, JSC said;

“Those accused persons ought not to have been discharged. Luckily for them, however, their case is not before this court there being no appeal against their discharge. What is, therefore, in issue is whether these errors do in any way affect this case of the appellant.”

The words of Nnamani, JSC confirm that it is sometimes possible for the offender to be acquitted wrongly and innocent person may wrongly be convicted. In view of that the pardon is taken to be mode of attaining social justice and as the last line of defense for justice. Jurisprudence suggests that legislature and courts of law have no ability to infringe on the presidential power of pardon. It insists that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself.¹⁵

2.3 Self Pardoning as Part of Presidential Pardon Power

The President is human being and so he may error or may commit a crime while in office. If the President commits the crime which is subject to criminal proceeding he shall be convicted by the court. In this way the President may be tempted to exercise presidential pardon power to pardon himself from criminal proceeding or from conviction. This is what is called self pardoning as part of presidential pardon power. Self pardoning is possible since the President, in various ways, may be subjected to due process of law.¹⁶ The President however, cannot grant pardon to himself. This is because ‘no one shall be the judge in his own cause.’ This paper

¹² Hastedt, G.P., Presidential Pardon, White House Studies Compendium, Nova Science Publisher Inc. (2007), p. 328

¹³ Ekwenze, S.A.M., op. cit, p. 2

¹⁴ (1988)1 NWLR (pt7)274

¹⁵ Menitove, J., The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency, *Harvard Law & Policy Review*, Vol. 3, (2009), p. 451

¹⁶ See Bayer, P.B., The Due Process Bona Fides of Executive Self Pardon and Blanket Pardons, Scholarly Works, (2017), pp 95-170

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however, argues that since the presidential power of pardon is wide and mostly unlimited the President may pardon himself subject to the fact that he comports with the principle of fundamental fairness.

2.4 Control of Exercise of Presidential Power of Pardon

Menitove J. T argues that the presidential power of pardon should have three main goals. First the presidential power of pardon must be sufficiently agile to respond to the public interest. Second, the procedure for exercising pardoning power must reinvigorate the pardoning power so as to make the system more responsive to offenders deserving it. Third, there must be a mechanism to prevent any presidential abuse of the pardoning power. He argues that the creation of a small partisan presidential clemency boards can achieve those three goals. From what Menitove, J. T says constitutional law has devised mechanisms to control exercise of presidential power of pardon in order to avoid abuse by the President. This is important because a wide power to the President to grant pardon can be subject of abuse by the President. The President can, for example, grant it as part of bribe transaction in which he may pardon the persons who made great contribution during campaigns as part of *quid pro quo* arrangement.

There are different modes of controlling exercise of presidential power of pardon. In some countries there are specified bodies of State which assist the President in exercising the pardon power.¹⁷ The aim of these bodies is to assist and control the President in his exercise of power of pardon. But in most cases these bodies are mere rubber stamps because they do not have real power to prevent the President to use the presidential power of pardon. Yet the bodies have been recommended to avoid the President to use pardon 'as a means by which to protect those with whom he had conspired to do harm to the State by adhering to or giving aid and comfort to its enemies.'¹⁸ This is so because the Presidents are not always some ones of pure social character and high intelligence.

This paper argues that the most effective way to control the presidential power of pardon is the Constitution to be effusive on the procedure, steps and requirements of the pardon. The Constitution of the Republic of Uganda of 1995 is one of the Constitutions of the country which are fulsome for control on the exercise of the power of pardon. The other mode may be through the use of courts, although not by way of petition. The presidential power of pardon can be limited through judicial review. In the case of *Ohio Adult Parole Authority v Woodard*,¹⁹ the US Supreme Court stated that pardon power is appropriate subject for judicial review.

Having analyzed the synopsis of the presidential power of pardon generally hereunder is an account of the presidential power of pardon in specific country. The paper has picked three countries, which are England, USA and Tanzania. England has been taken

¹⁷ See for example Article 121 of the Constitution of the Republic of Uganda of 1995

¹⁸ Kalt, B.C., Five Myths About Presidential Pardons, The Washington Post, (2018), p. 3

¹⁹ 523 US 272 (1998)

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because it is believed that pardon power originates from royal prerogative of mercy which is exercised by the Monarchs of England. USA like Tanzania is the country which has Presidents and both have the presidential power of pardons in their countries.

3.0 Pardoning Power in England

England is the country with unwritten Constitution and it is a country whose head of State is Monarch. For that England does not have President. Despite having no President there is pardoning power, which is known as royal pardon.²⁰ The royal pardon is the power, equivalent to the presidential pardon power, which is exercised by the Monarchs of England. Legal historians like William Blackstone have traced royal pardon to the laws of England the Confessor. According to Blackstone the King used the royal pardon as part of pure grace of the Sovereign to show mercy to an offender by mitigating or removing the consequences of conviction. This is so because during coronation oath the Monarchs promise that justice in England shall be administered in mercy. Basing on this perceptive analysis of the presidential pardon power without an understanding of it from England becomes incomplete. It means in order to understand the position of the presidential power of pardon in the world it is significant to examine the origin of the power as it evolved in England.

3.1 Origin of Pardon Power in England

Antecedent of the royal pardon in England is rooted deep in antiquity. Grupp, S for example suggests that the royal pardon has its origin among the Teutonic tribes.²¹ But gradually and in juxtaposition with the growing nationalization of England the royal pardon became increasingly solidified. In 1535, Parliament permanently secured the King's power with the enactment of 27 Henry VIII, Chapter 24, which provided;

“That no person or persons, of what estate or degree so ever they be ... shall have any power or authority to pardon or remit any treasons, murders, manslaughters or any felonies whatsoever they be ... but that the king's highness, his heirs and successors, kings of the realm, shall have the whole and sole power and authority thereof united and knit to the Imperial Crown of this realm, as of good right and equality it appertaineth; any grants, usage, prescriptions act or acts of parliament, or any other things to the contrary notwithstanding.”

It is also argued elsewhere that the roots of the presidential pardon power are found in the history of medieval England.²² The Framers of the Constitution all over the world therefore, adapted the pardon provision from the royal English prerogative of Kings, which dated from before the Norman Conquest. In England the royal pardon power is a discretionary power based on the ancient rights and

²⁰ Kalt, B. C., op. cit

²¹ Grupp, S., Some Historical Aspects of the Pardon in England, *The America Journal of Legal History*, Vol. 7, No. 1, (1963), p. 52

²² Ducker, W. F., “The President's Power to Pardon: A Constitutional History, *William and Mary Law Review*, Vol. 18, No. 3, (1977), in Pfiffner, J., op. cit, p. 1

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privileges of the Monarchs to grant mercy. This practice is based on the understanding that the Sovereign possesses the divine right and hence can exercise this prerogative on the ground of divine benevolence.²³

For centuries in England, the royal pardon was the sole means to remedy an injustice by ameliorating harshness of sentence imposed by the courts. It also operated to temper the inadequacies of substantive law before the development of common law or statutory defenses, like insanity and self defense. Finally, it also came to provide safety net when judicial appeal had been exhausted.

3.2 Self Pardoning Power in England

In England, there is no question about self pardons or their legality because there can be no criminal executive actions. The law of England supposes it impossible that the Monarch can act unlawful or improperly.²⁴ This means it is common understanding in England that there is nothing that the King can do that will require a pardon. This is partly due to the long existing doctrine of “the King can do no wrong.”²⁵ This is expressed in Latin maxim as *rex non potest peccare* which implies there is no redress if the King injures a citizen.²⁶ Of course, Parliament could and occasionally did, exercise an extra legal option (removing the King) in response to which a self pardon would have been useless.²⁷

The absence of executive criminal liability in England removes possibility of the Monarchs to self pardoning themselves as they, basing on *rex non potest peccare* maxim, cannot commit any crime which will make them to be convicted and thus requiring the royal pardon. However in 1678 self pardon was about to happen for the first time in England. This was in relation to the impeachment of Earl of Danby Thomas Osborne.²⁸ The Earl, Thomas Osborne was a Lord High Treasurer of England under King Charles II. In December 1678, Parliament began impeachment proceedings against him for conspiring with France. The grounds for the charge were that Danby had written a letter to the British ambassador in France that empowered the ambassador to make an offer of neutrality as between France and Holland. Danby however was merely acting in accordance with the orders of the King. Days later Parliament had begun preparations for war against France. Parliament realized what happened, but the King was ‘beyond reach’ of legal remedies and so impeaching hapless Treasurer was the best that Parliament could do. Unfortunately for Parliament, the King had in March 1679 issued a pardon for Danby. If King Charles II had only been trying to protect Danby he could have pardoned the Earl in December, but the King was now acting to solve a different problem. An examination of Danby’s actions would have revealed that King Charles II had been receiving bribes from France. The pardon ended the investigation and spared the King embarrassment.

²³ Wolfe, G.B., I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts, (2007), p. 27

²⁴ Chitty, J, A Treatise on the Law of the Prerogatives of the Crown, Joseph Butterworth and Son, London, (1920)

²⁵ Barry, H., The King Can Do No Wrong, Virginia Law Review, Vol. 11, No. 5, (1925), p. 352

²⁶ Barry, H., *ibid*, p. 357

²⁷ For example King Edward II (1327), King Charles I (1649) and King James II (1688) were all deposed by Parliament

²⁸ Detailed account of the incident see Duker, W.F., The President’s Power to Pardon: A Constitutional History, 18 WM & Mary L. Rev. 475, (1977), pp. 487 - 95

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The King's action sparked 'constitutional confrontation' with Parliament which had come to rely on the impeachment power to ensure proper governance. As debate raged as to the legality of the action of King Charles II, those who believed the Danby pardon to be invalid looked poised to win the argument. But the King defused the crisis by dismissing Parliament. By so doing King Charles II won the battle but the Monarchs lost the war. This was so because Parliament enacted the Act of Settlement of 1701 which forbade pardons from being used to preempt impeachments. The Danby episode vividly showed the danger of giving the executive an unrestricted power to pardon.

3.3 Control of Royal Pardon in England

The annals of the pardon power are replete with suggestions of the power's propensity for abuse. As power is propensity for abuse there is always a need to control any power, including royal pardon power. The chronicles of royal pardon power in England however, does not show any abuse. The only incidence which was close to abuse of power was episode in relation to the impeachment of the Earl of Danby Thomas Osborne.

Originally the royal pardon power was absolute, being unlimited by any cause and the King often granted a pardon in exchange for money or military service. Thus for a long time the royal pardon power was absolute, giving the King authority to pardon or remit any treasons, murder, manslaughters or any kind of felonies.²⁹ Various Kings then expanded and consolidated the royal power; ignoring a series of attempts by Parliament to limit it.³⁰ But this was not taken by Parliament in good terms. Parliament feared that the King could, at any time in the future, abuse the power. For that a number of times Parliament tried unsuccessfully to limit the exercise of the royal pardon power. The attempts paid off when it finally succeeded after it passed three laws; the Bill of Rights of 1688, the Habeas Corpus Act of 1679 and the Act of Settlement of 1701. These laws were enacted in the aftermaths of the Osborne impeachment.

The Bill of Rights of 1688 deprived the Crown of its former power to suspend or disregard the operation of a given law. The Habeas Corpus Act of 1679 prohibited the royal pardon in cases in which persons were convicted of causing others to be imprisoned outside England and thereby placing them beyond the reach of English habeas corpus. It was the Act of Settlement of 1701 however, which actually placed limitations on the uses of the royal pardon power by the Monarchs of England. This is so because the Act of Settlement of 1701 inter alia forbade pardons from being used to preempt impeachment.³¹ The Act provided;

“That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.”

²⁹ Kalt, B. C., Pardon Me?: The Constitutional Case Against Presidential Self Pardons, Notes, *The Yale Law Journal*, Vol. 106: 779, (1996), p. 783

³⁰ Duker, W. F., op. cit, pp. 525-26

³¹ See 12 & 13 Will. 3, ch. 2, s. 3 (1700 – 01) (Eng.)

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By this provision it means the Monarchs in England could not use pardon power to subvert the impeachment process and thereby cover up his own misdeeds. In this way the Act of Settlement of 1701 thus, limited the exercise of the pardon power by the Monarchs of England, although the power of the Monarchs to pardon after sentencing was not correspondingly limited. Today the royal pardon power is a personal prerogative of the Crown which Monarchs exercise in England and Wales in the binding advice of the Secretary of State for Home Affairs.

4.0 Presidential Power of Pardon in USA

USA is a country which follows presidential system of government. It is the country which has written Constitution, the US Constitution of 1787. As there is President the presidential power of pardon is part of the constitutional law of USA, being explicitly provided in the US Constitution of 1787. The annals of the presidential pardon power in USA however, show that the power did not come in easy way. During the drafting of the US Constitution of 1787 at Pennsylvania in Philadelphia there was astringent debate on the extent of the presidential power of pardon.³² But the Framers of the US Constitution of 1787 finally agreed to include the presidential pardon power in the US Constitution of 1787. This was inserted in Article II (2) of the US Constitution of 1787 which provides that ‘the President shall have the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.’ By this provision the President of USA can grant pardon, reprieve or commutation.

The presidential power of pardon in USA is understood in the same way as it is understood in other countries. For example in the case of *United States v Woodrow Wilson*,³³ Chief Justice Marshall defined the pardon to mean an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. This definition fits well the already provided definitions.

4.1 Extent of Presidential Pardon in USA

The Framers of the US Constitution of 1787 saw it fit to vest the presidential pardon power in the President of USA. So in USA the President may grant pardon after commission of the crime but before institution of the proceedings or during pendency of the

³² The Records of the Federal Convention of 1787, edited by Max Farrand, Yale University Press, New Haven, Vol. II, (1966), p. 626

³³ 32 US (7 Pet.) 150, 160-61 (1833)

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proceedings or after conviction of the accused of the crime charged.³⁴ At times like this, the President of USA takes off his cap as the Commander in chief and puts on the role of Consoler in chief.³⁵ The pardon is granted to the deserving persons and for whatever offence. The President of USA may, therefore, grant pardon to accused of treason, murder, high crimes or misdemeanours. According to the debates of the Conventionalists of 1787, it was accepted that the President of USA must have such a wide power in relation to pardon. The Conventionalists agreed by stating that;

“The President of the United States has the unrestricted power of granting pardon for treason; which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt.”³⁶

The presidential power of pardon once pronounced in favour of the person restores civil rights which were lost as a result of the conviction. So in USA the presidential pardons restore the right to vote and the right to run for and hold public office. In the case of *Ex part Garland*,³⁷ the Supreme Court of USA stated;

“A pardon reaches both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it renounces the penalties and disabilities, and restores him to all civil rights; it makes him, as it were, a new man, and give him a new credit and capacity.”

But the pardon does not bar any civil legal actions against the person pardoned. So, person who receives a pardon for murder may, after his release from custody, be subject to a law suit for wrongful killing.

The presidential pardon power is unlimited. Foster, M stated that the pardon power vested by the US Constitution of 1787 in the President is broad, extending to every offence known to the law.³⁸ As such there is no legislative or judicial limitation for the President to exercise his presidential pardon power. This was stated by Chief Justice Warren Berger in the case of *Schick v Reed*,³⁹ where he wrote that the power flows from the Constitution, not from any legislative enactments, and that it cannot be modified, abridged or diminished by the Congress.

³⁴Foster, M. A., Presidential Pardon: Overview and Selected Legal Issues, Congressional Research Series, Legislative History, New York, (2020), p. 4

³⁵ Healy, G., The Cult of the Presidency: America's Dangerous Devotion to Executive Power, Cato Institute, Washington D.C, (2009), p. 205

³⁶ The Senate Judiciary Committee, Pennsylvania Review, the Power of the President to Grant a General Pardon or Amnesty for Offences Against the United States, *the American Law Register*, Vol. 17, No. 10, New Series Vol.8, (1869), pp. 532-589

³⁷ 71 US 333, 380-381 (1866) as quoted in Foster, M., Presidential Pardons: Overview and Selected Legal Issues, Congressional Research Service, (2020), p. 4

³⁸ Foster, M. A., op. cit

³⁹ 410 US 256

4.2 Procedure for the Presidential Power in USA

In exercising the power of pardon the President of USA is guided by the US Constitution of 1787 and the Code of Federal Regulations, which are annually published. According to Regulation 1.1 of the Code of Federal Regulations the President of USA may exercise presidential pardon power to any person if there is request from the person to the President. Accordingly, all requests for presidential pardon for federal offences are sent to the Office of the United States Pardon Attorney of the Department of Justice. Thus, the body which assists the President in exercising presidential power of pardon is the Office of the United States Pardon Attorney of the Department of Justice.

After receiving requests for pardons the Pardon Attorney then prepares recommendations on each of the request for the President of USA to determine. The Pardon Attorney is required to make recommendations on each of the request presented to him. Generally, the Pardon Attorney does not recommend for prerogative of mercy if the person requesting it is on probation, parole or supervised release.⁴⁰ Again if the person who requests pardon was convicted by the court martial his request must be accompanied with the recommendations by the Secretary of the Military Department that has original jurisdiction over the court martial trials.⁴¹ After the Pardon Attorney or Secretary of the Military Department as the case may be to prepare the recommendations on requests for pardon the recommendations shall be sent to the President of USA for final decision. The President of USA is not bound to follow the recommendations of the Pardon Attorney or the Secretary of the Military Department. Regulation 1.10 of the Code of Federal Regulations gives the President of USA discretion on exercise of presidential pardon. This provision reads;

“The regulations contained in this part are advisory only and for the internal guidance of Department of Justice personnel. They create no enforceable rights in persons applying for executive clemency, nor do they restrict the authority granted to the President under Article II, Section 2 of the Constitution.”

From the words of Regulation 1.10 of the Code of Federal Regulations exercise of presidential power of pardon by the President of USA is discretionary. The vivid example of the discretionary power of the President to grant pardon was seen, among many, in relation to pardoning of a postal thief. In 1897 Attorney General Grover Cleveland's last pardon went to a postal thief who he opined that he was not entitled to pardon. However, it was revealed that the prisoner had a wife and 8 children who are in a destitute condition and his wife had a stroke of paralysis, from which there is no hope of her recovery.⁴² Despite negative recommendation of the Attorney General the President granted pardon to the postal thief.⁴³

⁴⁰ Regulation 1.2 of the Code of Federal Regulations

⁴¹ Regulation 1.1 of the Code of Federal Regulations

⁴² (1896) ATT'Y GEN. ANN. REP. 187-88 (1896)

⁴³ (1897) ATT'Y GEN. ANN. REP. 187-88 (1897)

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Where the President of USA accepts the recommendations of the Pardon Attorney or of the Secretary of the Military Department as the case may be and grants pardon, the Pardon Attorney shall notify the person concerned and the case file shall be closed.⁴⁴ In case the President refuses to exercise the presidential power of pardon even after receiving positive recommendations from the Pardon Attorney or the Secretary of Military Department the Pardon Attorney shall likewise notify the person concerned and the case file shall be closed accordingly.⁴⁵ This implies that the decision of the President of USA in exercise of presidential power of pardon is final and conclusive.

4.3 Self Pardoning in USA

Article II (2) of the US Constitution of 1787 is silent on self pardon. The silence means however, self pardon in USA is possible. Self pardon was about to occurred in 1974 and 1992. In 1974 President Richard Nixon was accused of Watergate scandal. As his presidency approached to its end, his aides outlined his option, to pardon himself and then to resign. But he opted to resign and left his fate in the hands of President Gerald Ford.⁴⁶ As luck would dictate, President Gerald Ford pardoned him.⁴⁷ In 1992 President George Bush was involved in Iran–Contra suspects and Special Prosecutor Lawrence Walsh threatened to prosecute them all, probably President Bush as well. President Bush decided to pardon several of them leaving himself, who was the most prominent prosecutable figure.⁴⁸ Several commentators speculated that President Bush might pardon himself for his role in the scandal and many assumed that such an act would be valid.⁴⁹ One of the commentators stated that for the President to pardon himself would, and admittedly, be an unprecedented act but the Constitution does not forbid it.⁵⁰

5.0 The Presidential Power of Pardon in Tanzania

The President of Tanzania is in principle the chief executive of the whole country. His powers and functions are specified in the CURT of 1977 and other laws which are enacted by Parliament. For that the President of Tanzania, like that of the USA has no prerogatives but has only powers granted and functions enjoined by the CURT of 1977.

It is to be noted that by far the CURT of 1977 is akin to that of the USA. So the CURT of 1977 and the constitutional law of the country generally may be interpreted, construed and applied in like manner as the US Constitution of 1787. It means constitutional

⁴⁴ Regulation 1.7 of the Code of Federal Regulations

⁴⁵ Regulation 1.8 of the Code of Federal Regulations

⁴⁶ Kalt, B.C., op. cit, p. 778

⁴⁷ See Proclamation No. 4311, 39 Fed. Reg. 32, 601 (1974)

⁴⁸ Kalt, B.C., op cit

⁴⁹ James Gill, Walsh's Quarry, New Orleans Times – Picayune, Jan 1, (1993), B1

⁵⁰ Kalt, B.C., op cit, p. 779

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law of Tanzania is fundamentally different from that of England although Tanzania legal system draws so much water from England. The differences between the two Constitutions are very obvious. The CURT of 1977 is written whereas that of England is largely unwritten and Tanzania is a country which follows presidential system of government while England follows parliamentary system of government. That being the case it is not wise to proceed on the presumption that the powers of the President of Tanzania are those which are enjoyed by the British Monarchs. It is wholly misleading to presume that the prerogative of the British Monarchs and that of the President of Tanzania is coeval. But it is correct to the large extent to presume that presidential powers and privileges of the President of Tanzania are the same as those of the President of USA. It is therefore, submitted by this article that the right approach is to equate the CURT of 1977 and the US Constitution of 1787 and to argue that the powers and privileges of the President of the USA are the same as the powers and privileges of the President of Tanzania. One of such powers is the presidential power of pardon.

5.1 Scope of the Presidential Pardon in Tanzania

Presidential power of pardon in Tanzania is provided by Article 45 of the CURT of 1977. This provision reads;

“Subject to the other provisions contained in this Article, the President may do any of the following:

- (a) grant a 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 conditions,*
 - (b) grant any person a respite, either indefinitely or for a specified period, of the execution of any punishment imposed on that person for any 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 part of any penalty of fine or forfeiture of property belonging to a convicted person which would otherwise be due to the Government of the United Republic on account of any offence,*
- (2) Parliament may enact law making provisions for the procedure to be followed by the President in the exercise of his powers under this Article,*
 - (3) The provision of this Article shall apply to persons convicted and punished in Tanzania Zanzibar and to punishments imposed in Tanzania Zanzibar under law enacted by Parliament which applies to Tanzania Zanzibar, likewise such provisions shall apply to persons convicted and punished in Mainland Tanzania in accordance with law.”*

From the words of Article 45 of the CURT of 1977 three words are extremely material. These are punishment, sentence and offence.

The power enshrined in Article 45 of the CURT of 1977 may be used by the President to save a person from the punishment met by the courts after conviction of the offence charged. From Article 45 (1)(a) of the CURT of 1977 it is clear that the punishment which

has to be pardoned by the President of Tanzania must be in respect of an offence, and not for any simple breach of a condition on which a person has been granted. Consequently, unless the context otherwise requires, it is to be taken for granted that the word offence as has been used in Article 45 is in the same sense which has been given to it in the Penal Code.⁵¹ Section 5 of the Penal Code defines offence to mean an act, attempt or omission punishable by law. There is nothing in Article 45 to show that this meaning of the term offence is not intended in Article 45 of the CURT of 1977. Accordingly, the power of pardon has been granted to and the same can be exercised by the President of Tanzania only in respect of an act which, in eye of laws, is an offence.

The pardon is sometimes and in Tanzania known as prerogative of mercy.⁵² As stated above this can be granted by the President of Tanzania to the person who was convicted of any offence. According to Article 45(1)(a) of the CURT of 1977 the President of Tanzania can grant pardon to the person who has been convicted of any offence. This means the presidential power of pardon in Tanzania can be granted even to the convicts of capital offences like treason and murder. It was in exercise of this power that in 1972 Mwalimu Julius Nyerere granted pardon to Bibi Titi Mohamed who was convicted of treason offence.⁵³ In the case of *Hatibu Ghandhi and Others vs. R*,⁵⁴ among the person who was convicted of treason was Captain Zacharia Hanspoppe, who was later on in 1995 released after getting pardon from the President Tanzania. Again in 2017 President John Pombe Magufuli granted pardon to 61 death row convicts. These are clear indications that presidential power of pardon is not limited in terms of offences.

In Tanzania the persons who accept the pardon do not necessarily implicitly confess guilt. It means the person may accept pardon despite the fact that he denies being guilty of the offence convicted. Nguza Viking @ Babu Seya and his two sons were granted pardon by the President of Tanzania despite the fact that they did not confess committing the crime for which they were charged with and convicted of.⁵⁵ This is proved by the fact that despite being given pardon in December 2017 Nguza Viking @ Babu Seya and his two sons continued to prosecute their Application in the African Court on Human and Peoples' Rights until March 2018.

The power of the President of Tanzania to grant pardon is discretionary, final and conclusive and no Appeal can be made against the decision of the President in exercise of power to grant pardon. The pardon, remission and respite as the presidential power of pardon in Tanzania have been entrenched in the CURT of 1977 as a way to supplement judicial justice. This is because it is possible sometimes that through judicial justice a wrong person may be convicted and the real criminal who should be convicted may be discharged or acquitted. The conviction of four members of one family in the case of *Nguza Viking @ Babu Seya and Three Others*

⁵¹ CAP 16 RE 2019

⁵² Read marginal notes to Article 45 of the CURT of 1977

⁵³ See "Tanzania Treason Trial Entering Third Week," the New York Times, 13th July 1970, on line, <https://www.nytimes.com/1970/07/13/archives/tanzanian-treason-trial-entering-third-week.html>, accessed on 13th February 2019, at 2134 hours

⁵⁴ (1996) TLR 12

⁵⁵ See the case of *Nguza Viking and Two Others vs. the United Republic of Tanzania, Application No. 006 of 2015, the African Court on Human and Peoples' Rights, Arusha, (Unreported)*

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vs. the Republic,⁵⁶ raised outcry of many citizens of Tanzania and in most instances it was believed that the four were wrongly charged and convicted. In December 2017 President John Pombe Magufuli granted pardon to the family as a sign of social justice. The pardon is also one of the ways of decongesting the prisons in the country.

5.2 Self Pardoning Power in Tanzania

The President of Tanzania is granted the power of pardon with the view to save a person from the consequences of punishment adjudicated by inadvertence or mistake against that person by the courts which being a human institution is likely to error. This being the case, the question of the President granting pardon to a person who has not been convicted of an offence does not arise. If a person, who affirms that he is innocent, is nevertheless granted pardon by the President of Tanzania he can well retort that since he has not committed any offence, so the question of the President granting him a pardon does not arise at all.

In Tanzania it is conceived that the CURT of 1977 is silent on self pardoning. Again in Tanzania the incumbent President cannot be prosecuted for any offence as he has immunity.⁵⁷ This therefore, suggests that the President of Tanzania does not have self pardoning power. This view is taken basing on a legal position that in Tanzania, pardon is granted after a person has committed offence and has been convicted by the courts. Since the sitting President in Tanzania has immunity he cannot be convicted by the courts. This paper argues that the President of Tanzania therefore cannot pardon himself as he cannot be prosecuted and convicted by the courts. Thus the absence of specific provision in the CURT of 1977 allowing self pardoning implies that the CURT of 1977 proscribes self pardoning.

5.3 Procedure for Exercising Power of Pardon in Tanzania

In exercising the presidential power of pardon the President of Tanzania is guided by the CURT of 1977, the Presidential Affairs Act⁵⁸ and the Criminal Procedure Act.⁵⁹ Article 45(2) of the CURT of 1977 gives power to the Parliament to make law for the procedure to be followed by the President in exercising the presidential power of pardon. Pursuant to this the Parliament has enacted the Presidential Affairs Act which inter alia has provisions related to the exercise of power of prerogative of mercy cum the presidential

⁵⁶ *Criminal Appeal No. 56 of 2005, Court of Appeal, Dar es Salaam, (Unreported)*

⁵⁷ Article 46 of the CURT of 1977

⁵⁸ CAP 9 RE 2002

⁵⁹ CAP 20 RE 2019

power of pardon. Section 3(3) and (4) of the Presidential Affairs Act requires the President of Tanzania to obtain from or consult the Advisory Committee of Prerogative of Mercy (ACPM) before he exercises his powers conferred by Article 45 of the CURT of 1977.

The ACPM is a body which is established by section 3(1) of the Presidential Affairs Act. The major function of the ACPM is to advise the President of Tanzania on exercising of the power of pardon. The ACPM is entirely different and separate from other bodies which are established by other laws but which have somehow similar functions. For that the ACPM is different from the Parole Boards and the Community Service Committees which administer parole, community service or substituted sentence. The Parole Boards are established by the Parole Boards Act⁶⁰ while the Community Service Committees are established by the Community Service Committees Act.⁶¹ Likewise the ACPM is not appellate body for those who are not granted pardon by the President of Tanzania or who are not granted parole, community service or substituted sentence.

The composition of the ACPM is provided by section 3(1) (a), (b) and (c) of the Presidential Affairs Act. According to this provision the members of the ACPM are the Minister of the government, the Attorney General and other members who shall be not less than three and not more than five. All the members are appointed by the President of Tanzania. This paper suggests that the other members should be the Commissioner General of Prison Services, the Chief Medical Officer, the Director General of the Tanzania Intelligence and Security Service, the Chief of Defense Forces, the Chief Justice and the Commissioner for Social Welfare.

The Minister of the government is the Minister responsible for Constitutional and legal affairs. This is the member because exercise of prerogative of mercy is a constitutional and legal affair. The Attorney General is the member in order to render legal advice to the President and the Minister. The Commissioner General of Prison Services may be needed in order to advise the President of Tanzania on appropriate convicts to be considered for pardon, respite or remission. He is apposite person to give such advice as he is the one who keeps the convicts. The Chief Medical Officer may be needed to advice on health matters as some of the convicts are health cases. The Chief Medical Officer shall give good advice on the convicts to be considered for pardon, respite or remission basing of health history of the convict. The Director General of Tanzania Intelligence and Security Service and the Chief of Defense Forces are very important to advise the President of Tanzania based on national defense and security considerations. The convict to be granted pardon may be threat to the national security and defense. The Chief Justice is the chief of the judiciary and thus represents the judges who convicted the offenders. His opinion on a suitable person to be granted pardon by the President may be sound and is invited to give the position of the courts on the persons considered for pardon. The Chief Justice therefore may advise on complexity of the case weight of the evidence used to convict the person and other related legal and procedural issues in respect of the persons who are considered to receive pardon. The Commissioner for Social Welfare is the person responsible for provision of social welfare for

⁶⁰ CAP 400 RE 2002

⁶¹ Act No. 6 of 2002

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individuals, families and people with special needs. The Commissioner for Social Welfare is therefore important to advise the President on suitability of the person for grant of pardon basing on social welfare backgrounds of the person.

The meetings of the ACPM to deliberate on the advice to give to the President of Tanzania shall be convened by the President himself. Where possible all the meetings of the ACPM shall be presided over by the President of Tanzania.⁶² So in Tanzania the President effectively controls the whole process of presidential power of pardon. The President of Tanzania appoints the members of the ACPM, summons the meetings, presides over the meetings and determines the procedure.⁶³ This is so because there are no guidelines of procedures yet for the exercise of presidential power of pardon.⁶⁴ This paper argues that the scheme is so purposely designed since pardon power is considered as 'pure mercy function' and thus needs to be closely supervised by the President himself. More so even if the President of Tanzania controls the whole process it is important to have the ACPM so that to avoid abuse of power by the President. This means despite being weak as it may be argued the ACPM ameliorates possibility of the President of Tanzania to abuse his prerogative powers.

According to section 3(3) of the Presidential Affairs Act the President of Tanzania shall grant pardon, respite or remission to the convict of murder after obtaining advice from the ACPM. The obtaining of the advice prior to exercising of the power thereof is mandatory, failure of which shall render the exercise illegal. Although the President of Tanzania is bound to obtain advice of the ACPM before he pronounces pardon, respite or remission to any death row inmate or other convicts the President is not bound to follow the advice thereof. Section 3(3) of the Presidential Affairs Act reads that;

“Where any person has been sentenced to death (otherwise than by a 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 in his own deliberate judgment whether to exercise any of his powers under section 45 of the Constitution.**” (Emphasis added).

From the words of section 3(3) of the Presidential Affairs Act there are two major things which are important to note. First if the prerogative of mercy is to be exercised in respect of the person who was convicted by the court martial the ACPM shall not be involved. Instead the President of Tanzania shall have to receive advice from the Minister responsible for defense and national security. Second the President of Tanzania is not bound to follow the advice of the ACPM or of the Minister responsible for defense and national security. It means whatever advice the President of Tanzania receives from the ACPM or the Minister responsible for defense and national security as the case may be the decision as to whether to grant pardon, respite or remission remains in the

⁶² Section 3(1)(c) of the Presidential Affairs Act

⁶³ Section 3(5) of the Presidential Affairs Act

⁶⁴ See argument of Counsel Rweyongeza in the case of *Mbushuu alia Domini Mnyaroje and Another vs. Republic (1995) TLR 97, p. 107*

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discretion of the President himself, the discretion which, of course, shall have to be prudently exercised, giving regards to reasonable grounds.

While it is mandatory for the President of Tanzania to obtain the advice of the ACPM if pardon is to be exercised to the murder convicts, the President is not bound to seek and receive advice in exercising the power if the prisoner is other than murder convict.⁶⁵ So for other convicts the President of Tanzania may exercise his powers without even consulting the ACPM, let alone to follow its advice.

5.5 Commonplace of Presidential Pardon in Tanzania

Constitutionally the President of Tanzania has and may exercise presidential power of pardon. This power has been in the CURT of 1977 since 1984 following the fifth constitutional amendments.⁶⁶ While in USA the presidential pardon power is said to take atropism pace President John Pombe Magufuli is not reticent. The reason for him to be active in exercising presidential pardon power is because there is high rate of imprisonment of people by courts. Again it is a fact that imprisonment stigmatizes those convicted of crime.⁶⁷ One way to remove the stigma to the convicts is by releasing them on presidential power of pardon.

As such the pardon power has been exercised by all five Presidents of Tanzania (Mwalimu Julius Nyerere, Ali Hassan Mwinyi, Benjamin Mkapa, Jakaya Kikwete and John Pombe Magufuli) ever since independence in 1961 until now. Two major events within recent years in which President Magufuli granted pardon to the family members of Babu Seya and to the murder convicts, have underscored significance of the presidential power of pardon in Tanzania. However, despite widespread publicity over these two specific case instances, the pardon power in general still remains only superficially understood by most citizens. It is therefore the purpose of this article to be educative as to the practical evolution of the President's pardoning powers, and in so doing to ascertain the scope and legal implications inherent in such executive act of pardon.

6.0 Conclusion

From the above analysis it is fare to conclude this article by arguing that the presidential power of pardon is very wide. It seems it is the intention of the Framers of the Constitutions in the countries which follow presidential system of governments to provide for such plenary powers. It also seems that it was the intention of the Framers to provide such wide power without putting limitations to check its exercise. At times, the Framers seemed to think that impeachment is the appropriate remedy or check for abuse of the presidential pardoning power. This can be proved by the ways the US Constitution of 1787 and the constitutional law of England, in relation to

⁶⁵ Section 3(4) of the Presidential Affairs Act

⁶⁶ See Article 9 of the Fifth Constitutional Amendment of 1984, Act No. 15 of 1984

⁶⁷ Love, M. C., op cit, p. 1191

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pardoning power and impeachment are intertwined. Despite such checks which are impliedly provided by the impeachment, USA and Tanzania jurisprudences and experiences have shown that there is unbridled of the pardoning power. This then proves one thing, which is legal limitations on exercise of the presidential power of pardon are few. As a result there is a potential possibility of abuse of the power by the Presidents or head of States. One of the possible abuse may be self pardoning, which albeit its non-occurrence so far, there are more than plenty signs of possibility of its occurrence in a near future. Another possible abuse may be in relation to granting of pardon by the President or head of State to persons in order to protect themselves from possible legal jeopardy or embarrassment. Because of all this it is high time now than ever before for the Constitutions of the States to insert explicit provisions through constitutional amendments which shall provide for control, limitations and checks on exercise of the presidential power of pardon.

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