

EXERCISE OF POWER OF PREROGATIVE OF MERCY BY THE GOVERNOR OF A STATE IN NIGERIA- A CRITICAL OVERVIEW

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Abstract

This analysis investigates the constitutional mechanism of the prerogative of mercy as it is exercisable by a State Governor within the Nigerian federation, positioning it as a notable exception to the established legal principle of the finality of Supreme Court judgments. Drawing upon a thorough review of existing laws and judicial precedents, this study confirms that the gubernatorial power to grant clemency is derived directly from the Constitution. While this authority is fundamentally discretionary, its legitimate application is contingent upon the fulfillment of specific, mandatory preconditions.

These conditions stipulate that the power:

1. Applies exclusively to pardons for individuals convicted of offenses defined under a state's own legislation.
2. Can only be exercised following a formal consultation with a designated Advisory Council of the State on the prerogative of mercy, which must be established by a State law.

Furthermore, judicial rulings consistently affirm that the prerogative of mercy is applicable only *after* a conviction has been secured and

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***Related declarations are provided in the final section of this article.*

All available avenues of appeal have been exhausted. The guiding principle is that a pardon can only be granted for a wrong that has been legally established. Consequently, in any situation where a trial has not occurred, and therefore no conviction has been recorded, the prerogative of mercy cannot be lawfully invoked.

Recognizing that the prerogative of mercy is inherently susceptible to misuse, this paper concludes with the critical recommendation that the Governor's power to pardon must be wielded with extreme caution and in strict adherence to the due process of the law.

1.0 Introduction

The Federal Republic of Nigeria is structured as a federation comprising thirty-six distinct States, as enumerated within the Constitution. Each of these states operates with a significant degree of autonomy, maintaining its own separate legislative, executive, and judicial branches of government. The State legislature is tasked with creating laws for the peace, order, and effective governance of the State, while the complete executive authority of the State is vested in the office of the Governor.

Among the various executive functions assigned to a State Governor is the profound power to grant a prerogative of mercy. This particular power is significant not only for its legal implications but also because it carries a substantial potential for abuse.

This paper, therefore, undertakes a detailed examination of this clemency power. It seeks to clarify how this authority is meant to be exercised, to identify the specific stage within the judicial process at which it becomes available, and to analyze its overarching purpose and subsequent legal effects. A primary objective of this analysis is to clearly distinguish the Governor's power of prerogative of mercy from the parallel, but separate, clemency power held by the President and Commander-in-Chief of the Federal Republic of Nigeria.

By making recourse to foundational constitutional provisions and significant judicial decisions, this paper aims to properly explicate the current state of the law. In doing so, it will also seek to dispel some of the common misgivings and points of confusion that surround the grant of the prerogative of mercy by a Governor in Nigeria.

Accordingly, the paper is organized into the following distinct segments for clarity and logical flow.

2.0 Meaning of “prerogative of mercy”

In the Nigerian constitutional framework, the "prerogative of mercy" describes a formal arrangement that empowers the chief executive—either the President at the federal level or the Governor at the state level—to grant a pardon to individuals who have been convicted of offenses. This power, which may be exercised conditionally or unconditionally, is strictly limited to offenses that fall within the legislative competence of their respective legislatures (either federal or state).

The term "prerogative of mercy" is commonly used as a synonym for "pardon" or "clemency," and these terms are deployed interchangeably within this analysis.

It is informative to note that *Black's Law Dictionary* does not provide a singular interpretation for the specific phrase "prerogative of mercy." Instead, it defines the constituent components. It interprets "prerogative" as "An exclusive right, power, privilege, or immunity, usually acquired by virtue of office." It defines "mercy" as "compassionate treatment, as of criminal offenders or those in distress; especially imprisonment rather than death, imposed as punishment for capital murder."

The same dictionary defines "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..." This definition clarifies that the President has this power for federal offenses, while state governors possess it for state crimes. "Clemency" is similarly 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."

Within the Nigerian legal system specifically, the "prerogative of mercy" is best understood as the constitutional scheme that empowers the executive branch to grant these pardons.

While a pardon is analogous in some respects to an amnesty, the two concepts are not legally identical. The judicial decision in *Falae v Obasanjo* offered a crucial definition, stating 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, the prerogative of mercy allows the executive to "grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment." It functions as an act of official grace that exempts a convicted individual from the punishment that was legally imposed for a crime they committed, were prosecuted for, and were ultimately convicted of. The timing of this act can vary; in some instances, the individual may have already completed their sentence or paid an imposed fine. In other cases, the convict may still be an inmate at a Correctional Centre while actively serving their sentence.

In summary, the prerogative of mercy, or pardon, is an official act that formally forgives and releases the convict from the remaining legal consequences of their crime, including imprisonment, and can also facilitate the restoration of their civil rights.

In Nigeria, this power is constitutionally embedded for both the President (under *section 175* of the CFRN, 1999 as amended) and for State Governors (under *section 212*). This paper, however, is concerned specifically with the "prerogative of mercy" as granted or grantable by a State Governor.

3.0 Exercise of Executive Powers of a State by the Governor

For context, the Constitution of the Federal Republic of Nigeria (CFRN), 1999 as amended, in *section 3(1)*, creates the thirty-six States of the federation: "Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara".

Under *section 176* of the CFRN, 1999 as amended, each of these States is led by a Governor, who is designated as "the Chief Executive of that State".

The general framework for the executive arm of government is established in *section 5* of the Constitution. More specifically, *section 5(2)* details the executive powers of a State. It provides that these powers:

"(a) shall be vested in the Governor of that State and may... be exercised by him either directly or through the Deputy Governor and Commissioners of the Government of that State or officers in the public service of the State; and

(b) shall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has for the time being power to make laws.”

This grant of power is, however, subject to certain limitations. *Section 5(3)* mandates that the executive powers vested in a State must be exercised in a manner that does not:

“(a) impede or prejudice the exercise of the executive powers of the Federation;

(b) endanger any asset or investment of the Government of the Federation in that State; or

(c) endanger the continuance of a Federal Government in Nigeria.”

As will be detailed below, one of the most significant executive powers exercisable by the Governor under this framework is the power to grant a pardon.

4.0 Constitutionality and scope of power of Governor to exercise prerogative of mercy

The authority of a State Governor to grant a pardon, also known as the prerogative of mercy, originates directly from the provisions of *section 212(1)* of the CFRN, 1999 as amended. This section provides *verbatim* that:

“The Governor may -

(a) grant any person concerned with or convicted of any offence created by any Law of a State 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 that person for such an offence; or

(d) remit the whole or any part of any punishment imposed on that person for such any offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.”

This power is further qualified by *section 212(2)*, which enacts that:

“The powers 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 as may be established by Law of the State.”

An analysis of these provisions in *section 212* reveals several key points. First, only the Governor is constitutionally authorized to grant this prerogative of mercy; it is an executive pardon that is beyond the authority of any Commissioner or other State Official.

This power is, at its core, at the absolute discretion of the Governor. However, this discretion is not unfettered; it must be exercised in strict compliance with the mandatory precondition stipulated in *section 212(2)*—namely, “after consultation with such advisory council of the state.” The case of *FRN v Akali* established that there is no legal compulsion on the President or Governor to grant a pardon to anyone, 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, therefore, a residue of discretionary authority legally left in the hands of the executive.

Regarding the scope of this power, it is strictly limited to a person “convicted of any offence created by any Law of a State.” Consequently, a State Governor has no authority to grant a pardon to any person convicted of a federal offense (an offense created by an Act of the National Assembly). That power is the exclusive remit of the President of Nigeria, as outlined in *section 175(1)(a)* of the CFRN, 1999 as amended.

In addition, the types or species of pardon a Governor may grant can be (a) without conditions (free and total) or (b) subject to lawful conditions, as provided under *section 212(1)(a)*. Where a pardon is subject to conditions, the beneficiary must satisfy those stipulations.

In exercising this power, the Governor may also, as outlined in subsections (b), (c), and (d), grant a respite from execution, substitute a less severe punishment, or remit (waive) a punishment, penalty, or forfeiture. All these actions must, as previously noted, be with respect to offenses created by a Law of that State.

As an allied point, it should be highlighted that the prerogative of mercy must be granted in writing, not orally or by a simple “word of mouth” declaration from the Governor. The case of *FRN v Achida & Anor* (*supra*) affirmed that there should be an “Instrument of Pardon.” In that

case, the court considered whether the Instrument of Pardon was incompetent because it failed to state on its face that it was granted after the required consultation. The Court of Appeal reasoned that *section 168(1)* of the Evidence Act, 2011 raises a presumption of regularity. This presumption favored the Instrument of Pardon, implying "that the power was exercised by the Governor in due consultation with the Advisory Council on Prerogative of Mercy. It was for the Appellant to rebut the presumption."

6.0 Conditions precedent for exercise of prerogative of mercy by Governor

Although the authority to grant a prerogative of mercy to any person convicted of an offense under State Law rests within the Governor's discretion, the exercise of this discretion is strictly subject to adherence to the constitutional provisions that authorize the power.

To this end, *section 212(2)* is directive, mandating that the Governor's powers "shall be exercised by him after consultation with such advisory council of the state on prerogative of mercy as may be established by Law of the State."

From this text, two clear constitutional pre-considerations, or guidelines, for the exercise of the power of pardon can be unarguably deduced. These are:

- (a) A formal Advisory Council of Prerogative of Mercy must exist, having been established by a Law of the State.
- (b) The Governor is only empowered to exercise the prerogative of mercy after consulting with that specific Advisory Council.

The use of the word "shall" in *section 212(2)* makes this a mandatory requirement. It implies that any grant of prerogative of mercy by the Governor must be in accordance with, and never contrary to, the advice received from the duly established Advisory Council on Prerogative of Mercy of the State.

It is submitted that any failure, refusal, or neglect by a Governor to consult with this duly established Advisory Council *before* exercising the prerogative of mercy would render such an exercise unconstitutional, null, and void.

The decision in *FRN v Achida & Anor* (supra) elaborated on this, holding that the very essence of requiring consultation is to guide and guard the exercise of this power. This requirement saves

the power from "arbitrariness, impunity, abuse and political aggrandisement." It serves to prevent the power from being degraded into a mere avenue for dispensing political favors, ensuring that it is exercised only in cases that are genuinely deserving.

7.0 Appropriate stage at which pardon may be granted or grantable by the Governor

It is settled law that the prerogative of mercy can only be granted at a specific juncture: when a person has been tried and convicted by a Court of competent jurisdiction, and/or when no appeal against that conviction is currently pending.

Despite the inclusion of the phrase "any person concerned with or convicted of any offence" in *section 212(1)(a)* of the CFRN, 1999 as amended, it is not the intendment of the lawmaker that the executive (the Governor) should transform himself into the Attorney-General of the State. The Attorney-General has a distinct power under *section 211(1)(c)* of the CFRN, 1999 as amended, to discontinue any criminal trial he has instituted (a power known as *nolle prosequi*), without needing to provide reasons. Nor is it intended that the executive should imbue himself with the judicial functions that are clearly prescribed for the courts under *section 272* of the Constitution.

The rationale for this separation is fundamental: a person whose trial is still ongoing is, by constitutional right, presumed innocent. An innocent person cannot be pardoned, as a pardon inherently implies forgiveness for an offense. There must first be a conviction before a pardon can be granted.

In *FRN v Achida* (supra), the court held that a pardon by the Governor should not be "overreaching." It should properly come at the very end of the judicial process, after a final appeal in the Supreme Court, because a person is not adjudged guilty with finality until the last court has pronounced it so.

Therefore, to contemplate granting a pardon to an offender who has not yet undergone trial, or who has not fully passed through the justice system to its final conclusion, is to "unnecessarily short-circuit the criminal process." This would contravene the trial-based system anticipated by *sections 175* (for the President) and *212* (for the Governor).

Section 212(1)(a) of the CFRN, 1999 as amended, discloses an intention that the *ejusdem generis* principle (of the same kind) should be applied. Only by applying this principle can full effect be

given to the provision. Consequently, the words "grant any person concerned with or convicted of any offence..." must be construed to mean persons who have been *convicted* of offenses under a State Law.

It is the exclusive preserve and duty of the Judiciary to try offenders and, based on the evidence, either convict or exonerate them. It is only *after* this judicial function is complete that the discretionary power of the executive—to pardon, grant clemency, or commute a sentence—becomes available. The Constitution, in *sections 175(1)(a)* and *212(1)(a)*, certainly does not contemplate the executive interfering with the judicial process while it is still active.

To grant a pardon to an accused person who is still standing trial, and who is still presumed innocent, would amount to an unusual and extra-judicial interference by the executive in the function of the courts. To give such a wide interpretation to the provision would set a dangerous precedent, potentially leading society down a "very slippery slope" from which it might never recover.

In summary, the prerogative of mercy is an act of officially nullifying the punishment or other legal consequences of a crime *after* conviction and *after* the exhaustion of all appeals. One can only be pardoned for a wrong that has been established. There can be no pardon *in vacuo* (in a vacuum). Where there has been no trial, and therefore no conviction, the prerogative of mercy cannot be invoked. The only remedy available to an accused person still standing trial is the withdrawal of the charge by the state Attorney-General, known as a *nolle prosequi*.

Another critical point regarding the appropriate stage is that pardon cannot be granted to a person who has lodged an appeal, particularly a further appeal to the Supreme Court. The consensus attitude of the courts is that there can be no question of a pardon until the final appeal is concluded. This ensures there is no pardon until it is absolutely certain that the defendant has been *finally* convicted of the crime.

Judicial decisions from the apex court bear this principle out, including *Solola & Anor v State* and *Oloyede v The State*. In *Solola & Anor v State* (supra), it was held that a person convicted of murder and sentenced to death, whose appeal was dismissed by the Court of Appeal, is deemed to have a further appeal lodged at the Supreme Court. Until that final appeal is determined, the Head of State or Governor cannot, pursuant to *sections 175 or 212*, exercise the power of

prerogative of mercy. Likewise, such a person cannot be lawfully executed before their appeal is disposed of.

Furthermore, in the case of *Obidike v The State*, the Court, deciding on the propriety of granting a pardon to a convict of a capital offense while an appeal was pending, held that it is "not proper." A presidential (or gubernatorial) pardon should only come *after* the appeal has been heard and determined. If the prerogative of mercy is exercised while a convict's case is pending at *any* stage, such mercy is "nothing short of the back of a duck fowl; it cannot hold water."

In *Bello & ors v A-G Oyo State*, the Supreme Court held that where a convict sentenced to death has appealed that conviction, the sentence must not be carried out until the appeal has been determined. The execution of such a convict before the determination of their appeal would be unconstitutional and unlawful.

While *section 212* of the CFRN 1999 as amended confers the power of Prerogative of Mercy, allowing the Governor to pardon a person found guilty, this does not extinguish all other rights.

An appeal can still proceed even *after* a pardon has been granted. This was the central issue in *Dr. Obi Okongwu v The State*. The question on appeal was whether the appellant, who had been granted a pardon by the Governor after his conviction for contempt, could still appeal against that conviction.

The facts were that the Appellant, the Solicitor-General of Anambra State, was sentenced to 21 days imprisonment for contempt on February 11th, 1983. On that very same day, the Governor, exercising his power under *section 192(1)(d)* of the CFRN 1979 (which is *in pari materia* with the current *section 212*), issued an instrument granting a free pardon to the Appellant, who was then released.

Subsequently, the appellant filed an appeal against his conviction and sentence. When questioned on whether he could still appeal, the Court of Appeal concluded that the appellant was *not* precluded from lodging his appeal, the free pardon notwithstanding. It was held that a Governor could not, by a simple executive act, reverse a Court's decision. The power to reverse the conviction lay only with a higher Court.

The Governor could only, by the grant of pardon, relieve the appellant of "all pains, penalties and punishments whatsoever that from the said conviction may ensue." The pardon addresses the *punishment*, but the appeal addresses the *conviction* itself.

8.0 Implications of prerogative of mercy by the Governor

The following consequences legally flow from the grant of a prerogative of mercy or pardon to a person convicted of a state offense:

(a) Bar against Double Jeopardy: The pardoned individual cannot be tried again for the exact same offense. This is protected by *section 36(10)* of the CFRN 1999 as amended, which states: "No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence." This is the principle against "double jeopardy," as established in *Amedu v Federal Republic of Nigeria*. This principle ensures that once a person has been pardoned by the appropriate authority (or tried by a court), a bar to further prosecution is placed between him and that offense.

(b) Nullification of Consequences: As noted, a pardon is an act of officially nullifying the punishment and other legal consequences of a crime. An unconditional pardon effectively wipes or cleans the criminal records of the beneficiary. As held in *Falae v Obasanjo*, it "mitigates or obliterates the punishment... and restores the rights and privileges forfeited..." The effect is "to make the offender a new man (*novus homo*)."

(c) Forgiveness, Not Factual Erasure: It is crucial to understand that a pardon wipes away the *stigma* of the conviction, but it does not erase the *conviction itself* as a historical or factual event. A pardon does not contain the notion that the person never, in fact, committed the offense. It is, at its core, an act of forgiveness, not a declaration of factual innocence.

(d) Substitution of Punishment: A conditional prerogative of mercy can have the effect of substituting a less severe form of punishment (e.g., a life sentence) for a more severe one (e.g., a death sentence) that was judicially imposed.

(e) Exception to Judicial Finality: The prerogative of mercy functions as a recognized constitutional exception to the finality of the Supreme Court's decisions, which is otherwise consecrated under *section 235* of the CFRN, 1999 as amended. In *APC v Enwerem & Ors*, it was held that by virtue of *sections 6 and 235* of the Constitution, the Supreme Court is the highest

court in the land, and its decision is binding on all. The only exception to this finality is the power of prerogative of mercy held by the President and State Governors.

9.0 Limits of power of Governor to grant prerogative of mercy

Based on statutory provisions and established legal principles, the following limitations (though not exhaustive) constrain the Governor's power to exercise the prerogative of mercy:

(a) State Law Only: A Governor's pardon is only valid for convictions related to offenses created by a State Law. The Governor has no power to grant a pardon for any offense created by an Act of the National Assembly (federal law) or to persons convicted under army, naval, or air-force law by a court-martial.

(b) Distinction from *Nolle Prosequi*: A Governor's pardon is not synonymous with a *nolle prosequi*. The latter is a power of the Attorney-General to discontinue a trial *before* conviction, whereas a pardon can only be granted *after* conviction.

(c) Mandatory Consultation: The Governor's prerogative of mercy *must* be exercised only "after consultation with a duly established Advisory Council of Prerogative of Mercy," which itself must be created by a State law.

(e) Overriding Power: When properly exercised, the power of pardon is a potent legal instrument that can, in effect, override the final criminal decisions of the Supreme Court.

(f) Finality of the Pardon: A pardon, whether granted by a Governor or the President, is a final sovereign act of grace. It is not subject to review or reversal by any other person or authority, including the Attorney-General. It is hornbook law (a fundamental, well-established principle) that what has been constitutionally pardoned cannot be administratively "unpardoned." To suggest otherwise would impinge on constitutional hegemony and amount to anarchy.

(g) Inability to Reverse Judicial Decisions: A Governor must not use an executive act to reverse a court's decision (as distinct from its *consequences*). In *Dr. Obi Okongwu v The State*, the court described the Governor's grant of a free pardon on the very day of the conviction as an act of "rather indecent haste and pointless confrontation with the Court."

12.0 Conclusion and recommendations

The power of a Governor in Nigeria to grant a pardon remains a formidable and unfettered executive power, provided it is exercised in the specific manner prescribed by the applicable constitutional provisions. The judicial authorities interrogated within this paper are crystal clear that the principle of prerogative of mercy cannot be invoked arbitrarily or at the whim of the executive.

To prevent this executive pardon from being grossly abused, prematurely exercised without satisfying the conditions precedent, or wrongly utilized in a manner that negates the constitutional presumption of innocence or amounts to a naked usurpation of judicial powers, this paper offers recommendations.

It is strongly recommended that the Governor's prerogative of mercy to grant a pardon *must* be granted only after, and in accordance with, the consultation with the Advisory Council on Prerogative of Mercy, and not otherwise.

It is further recommended that the Courts must jealously guide their constitutional power of adjudication. Consequently, the judiciary should not hesitate to declare as unconstitutional, null, and void any premature or wrongful exercise of the power of prerogative of mercy by a Governor that violates the clear dictates of the Constitution.

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