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Grant of Presidential Pardon: Constitutionality, Implications and Limits

N.O. Obiaraeri[*]

Abstract

Prerogative of mercy by the President constitutes exception to the rule that judgment of the Supreme Court is final. However, the procedure or protocol for the exercise of this power in order not to either defeat the constitutional presumption of innocence or amount to naked usurpation of judicial powers is seldom understood. To resolve this legal conundrum, this paper deployed the doctrinal research method to critically examine constitutional provisions that authorise the President to grant pardon in addition to judicial decisions that arose therefrom. The paper established that the President is constitutionally empowered to grant pardon to persons convicted of offences created by Act of the National Assembly or persons concerned with offences against the army, naval or air-force law or convicted or sentenced by a court-martial. It was further established that pardon can only be granted after conviction or when there is no pending appeal. To do otherwise will amount to naked usurpation of judicial powers. As the use of prerogative of mercy can be subject of abuse, it was recommended that the power of pardon by the President must be exercised only after consultation with the National Council of State in accordance with due process of the law.

Keywords: appeal, mercy, pardon, prerogative, president

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1. Introduction

The recent grant of pardon by President Tinubu to some convicted persons, living and post-humous, has generated lots of public concerns and debates.[1] From the furor, it is without doubt that many Nigerians do not understand the foundation or source of the power of the President to grant pardon and how such power is exercised; when it should be exercised; and for what purpose it can be granted. Equally misconstrued is the protocol for exercise of that power; the persons who can benefit from the prerogative of mercy; at what stage or stages of criminal trial pardon is grantable; and the effect of grant of prerogative of mercy among other things. This development therefore presents a compelling need for an exhaustive consideration and scrutiny of the place of prerogative of mercy in the Nigerian justice ecosystem. Thus, this paper will discuss relevant constitutional

[*] LL. B (Hons.), B.L. (Hons.), LL.M, Ph.D. (Law), FHRI, FCAI, KJW; Professor of Law and Former Dean, Faculty of Law, Imo State University, Owerri, Nigeria; Nigerian Association of Law Teachers (NALT) Taslim Elias Awardee, 2017; Former Visiting Scholar and Fellow, Human Rights Institute, Columbia University, New York, NY, USA; E-mail: profnooobiaraeri@imsuonline.edu.ng; noobiaraeri@yahoo.com; Tel: +2348035524442

[1] State House, Presidential Villa, "PRESIDENT TINUBU PARDONS HERBERT MACAULAY, VATSA, LAWAN, GRANTS CLEMENCY TO 82 INMATES", available at https://statehouse.gov.ng/president-tinubu-pardons-herbert-macaulay-vatsa-lawan-grants-clemency-to-82-inmates/. Accessed 12/10.25.

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 grant of prerogative of mercy by a President under the Nigerian legal system. To facilitate grasp and intellectual order, the paper is further divided into the following segments: part 2 deals with the meaning of pardon; part 3 addresses the President's power to grant pardon under the 1999 constitution; part 4 focuses on the conditions precedent for exercise of prerogative of mercy by President; part 5 explains the consequence or effect of prerogative of mercy; while part 6 deals with the constitutional limits of the President's power to grant prerogative of mercy; part 7 discusses the criticisms and recommendations; and part 8 encapsulates the conclusion.

2. Meaning of pardon

The term pardon is used interchangeably with prerogative of mercy in this paper. 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 *Adeola v State*,[2] the Court of Appeal, per Ikyegh, JCA, struck at the core of this difference when he held as follows:

> Amnesty is an official statement allowing people who have been put in prison for crimes against the state to go free; while 'pardon' is an official decision not to punish somebody for a crime, or to say that somebody is not guilty of a crime (see Oxford Advanced Learner's Dictionary, 7th Edition, Pages 45 and 1058, respectively). The latter wipes out the conviction and sentence and in the event of a pending appeal the pardon renders the appeal academic and liable to be struck out; while the former (amnesty) does not extirpate the crime and conviction and sentence entered thereon. So it is, in my view, wise that the appeal was argued on the merit.

In *Falae v Obasanjo*,[3] the Court of Appeal, per Musdapher, JCA (as he then was) held as follows concerning the meaning of pardon:

> 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.

Pardon is an act of grace that exempts an individual from punishment for a crime 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. This formally forgives and releases the convict from legal consequences, including punishment like imprisonment, and can restore their civil rights. A pardon is different from amnesty, as amnesty applies to a group of people for past offences, while a pardon is granted to a single individual for their specific offense. It should also be noted that prerogative of mercy is clearly distinguishable with other prerogatives such as amnesty, condonation and n*olle prosequi*

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2 (2017) LPELR-42327(CA) (Pp. 16-17 paras. F).
3 (1999) 4 NWLR (Pt. 599) 476 at 495.

which lies exclusively in the bosom of the Attorney-General. Although these are all legal apparatuses used at one point or the other in criminal matters and exercised by the executive arm of government, they are not the same. However, only the scheme of prerogative of mercy or pardon is the subject matter of this paper. Discussions herein will be limited to or focused only on the power of the President to grant pardon.

3. The President's power to grant pardon under the 1999 Constitution

The executive arm of government is created under section 5 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.[4] Specifically, in section 5(1)(a), it is enacted that the executive powers of the Federation shall be vested in the President. The executive powers of the federation may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by the President either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation. Consequently, section 130(1) of the CFRN, 1999 as amended established the office of the President for the Federation who, under subsection (2) thereof, 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 power to grant pardon.

The power of the President to grant pardon otherwise called prerogative of mercy is traceable to the provisions of section 175 of the CFRN, 1999 as amended which provides *verbatim* as follows:

> (1) The President may -
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> (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;
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> (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;
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> (c) substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or
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> (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.
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> (2) The powers of the President under subsection (1) of this section shall be exercised by him after consultation with the Council of State.
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> (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 above provisions of section 175 of the CFRN, 1999 as amended, it stands to reason that only the President is constitutionally authorised to grant the prerogative of mercy. It is an executive

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[4] Hereinafter abbreviated and referred to as "CFRN".

pardon although it is beyond the power of any Minister[5] at the Federal level. Furthermore, power of the President to grant pardon is discretionary. This submission is made because the word "may" ("the President may") is used in sections 175(1) of the CFRN, 1999 as amended to qualify the exercise of the power of prerogative of mercy. In the case of *FRN v Nnajiofor*,[6] it was reiterated by the Supreme Court, per Saulawa, JSC, that "May" always means May. "May is a permissive or enabling expression: but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it. Following from the above decision of the apex Court, it is self-evident that the President cannot be compelled either by judicial compulsion or coercion by any individual, no matter how powerful, to exercise his prerogative.[7] In *FRN v Akali*,[8] it was held that there is no legal compulsion on 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.[9]

Without being too wordy, 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 provisions of section 175(1) and 175(3) of the CFRN, 1999 as amended, 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.

On the other hand, with respect to types or species of pardon that may be granted by the President, it may either be (a) without conditions or (b) subject to lawful conditions. Hence, under section 175(1)(a) of the CFRN, 1999 as amended, pardon may free (meaning total and without conditions attached) or subject to lawful conditions. The power of prerogative of mercy by the President may be exercised in three significant ways namely-

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5 *Saifullahi & Anor v FRN* (2017) LPELR-45136(CA).

6 (2024) LPELR-62599(SC) (Pp. 14-15 paras. D), In *Egbo v Laguma* (1988) 3 NWLR (Pt. 80) 109 and the English case of *Sheffield Corporation v Luxford* (1929) 2 KB 180, it was held that the meaning of the words Shall and May in statutes conferring a power has been a subject of diverse or conflicting interpretation. "May" is an enabling or permissive word. In that sense, it imposes or gives a discretion any or enabling power. But where the object of the power is to effectuate a legal right, "may" has been construed as compulsory or as imposing an obligatory duty. See *Orakul Resources Ltd & Anor v NCC & Ors* (2022) LPELR-56602(SC (Pp. 34-35 paras. B) per Garba, JSC.

7 In *Nigerian Navy & Ors v Labinjo* (2012) LPELR-7868(SC) (Pp. 16-17 paras. C) per Onnoghen, JSC (as he then was), it was held that it is a general principle of interpretation of statute that the use of the word "may" generally connotes permissive action though in exceptional circumstances it may mean mandatory or compulsory action.

8 (2018) LPELR-45237(CA).

9 See *FRN v Alkali* (2018) LPELR-45237(CA) (Pp. 60-69 paras. D-D) per Shuaibu, JCA.

(i) by way of grant to any person a respite, of the execution of any punishment imposed on that person for such an offence under section 175(1)(b) of the CFRN, 1999 as amended respectively. This is complete reprieve or pardon.

(ii) By way of substituting a less severe form of punishment for any person for such an offence under section 175(1)(c) of the CFRN, 1999 as amended (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 under section 175(1)(d) of the CFRN, 1999 as amended.

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 form or manner of exercising the power of pardon or prerogative of mercy is the execution of a written instrument. Thus, a pardon or prerogative of mercy must be in writing and not oral or by word of mouth. It must 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. However, in *FRN v Achida & Anor*,[10] it was held that there should be an "Instrument of Pardon" although it will be stretching it a bit too far to say that the Instrument of Pardon by the Governor of Sokoto State in issue in that case was incompetent for failing to say on its face that it was granted after consultation with the Sokoto State Advisory Council on Prerogative of Mercy. The Court of Appeal reasoned that this is because section 168 (1) of the Evidence Act, 2011 raises a presumption of regularity in favor of such an Instrument of Pardon, as in the instant case; "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".

4. Conditions precedent for exercise of prerogative of mercy by President

In a long line of decided cases like *Afolagbe v Awuni*,[11] *Niger Care Development Co Ltd v Adamawa State Water Board & Ors*,[12] and *A-G Kwara State v Adeyemo*,[13] it has been held that "a condition precedent is one which delays the vesting of a right until the happening of an event". However, curiously, in *FRN v Alkali*,[14] it was held that among other things the exercise of the power of pardon in the hands of the Chief Executive of a State is a political contrivance, which is rarely limited by legal considerations except where there are obvious and deliberate failures to adhere to clearly stated guidelines on the issues. This decision, with due respect, is not entirely correct. Much as it is correct that "the exercise of the power of pardon in the hands of the Chief Executive of a State is a political contrivance", it is not entirely correct that there are "clearly non-existent" guidelines on the issue. Rather, there exists clear constitutional pre-considerations or guidelines for exercise of the power of pardon either by the President or Governor both in the law and as sanctioned by judicial decisions.

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[10] (2018) LPELR-46065(CA) (Pp. 98-100 paras. E-E) per Abiru, JCA.
[11] (1997) LPELR 593.
[12] (2008) LPELR 1997.
[13] (2016) LPELR 41147.
[14] (2018) LPELR-45237(CA) (Pp. 60-69 paras. D-D).

Emphatically, the President cannot exercise prerogative of mercy without consultation with the Council of State. It is an express provision of section 175(2) of the CFRN, 1999 as amended that the President can only exercise the power of pardon "after consultation with the Council of State". Therefore, consultation with the Council of State must be before the grant of pardon and not after the pardon had been granted or upon no consultation at all. As the word "shall" is used, it is mandatory that the grant of prerogative of mercy by the President must be in accordance with, and never contrary to, the advice of the Council of State. Prior consultation with the Council of State on prerogative of mercy is a condition precedent which must be satisfied and shown to have been complied with. 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[15] 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.[16] This viewpoint is supported by the decision in *FRN v Achida & Anor* (supra) wherein it was held by a Full Panel of the Court of Appeal, per Abiru, JCA that the essence of the requirement for consultation is to guide and guard the exercise of the power and save it from arbitrariness, impunity, abuse and political aggrandisement. It is to prevent the power from being turned into an avenue for dispensing political favors and to ensure that it is exercised only in deserving cases.

On the other hand, prerogative of mercy can only be granted at the stage when a person has been tried and convicted by a Court of competent jurisdiction and or when no appeal against conviction is pending despite the use of the phrase "any person concerned with or convicted of any offence" in the respective provisions of the Constitution already cited. Jurisprudence has emerged that the words "any person concerned with..." in section 212(1)(a) and indeed section 175(1)(a) of the CFRN, 1999 as amended do not contemplate that an executive should constitute himself into the Attorney-General who is empowered under section 211(1)(c) or section 174(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.[17]

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. There used to be no common judicial interpretation on the stage at which prerogative of mercy may be exercised and particularly whether it can be granted before conviction (when trial was on-going). Initially, judicial opinions were divided about what canon of interpretation, whether literal interpretation or purposive approach should be used to interpret the word "or" used in the phrase "any person concerned with or convicted of any offence" in the respective provisions of section 212(1)(a) and indeed section 175(1)(a) of the CFRN, 1999 as amended. The contention was that wide and literal interpretation led to absurdity and adopting an isolated interpretation of the first limb of sections 175(1)(a) and 212(1)(a) of the CFRN, 1999 as amended only succeeded in ascribing a meaning to the provision which the drafts-person did not intend, to wit: granting the President or Governor of a State 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. It was also a

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15 For the membership of the Council of State, see Third Schedule, Part 1B (5) of the CFRN, 1999 as amended.
16 Third Schedule Part 1B (6)(a)(ii) of the CFRN, 1999 as amended.
17 *FRN v Achida & Anor* (2018) LPELR-46065(CA).

bone of contention that 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 begged for clear judicial resolution was whether it accorded with logic and common to forgive an innocent person or a guilty person?

Firstly, it was held by the Court of Appeal that pardon can be granted by a Governor before or after conviction in *Saifullahi & Anor v FRN*.[18] The stage at which the power of prerogative of mercy can be granted by a Governor came up again for judicial consideration by the regular panel of the Court of Appeal in *FRN v Alkali & Anor*.[19] In that case, the Governor of Sokoto State of Nigeria, had pursuant to an instrument of pardon dated the 29th day of September, 2016 granted pardon to the respondents herein at a time when they were undergoing trial for sundry offences all punishable under the Penal Code applicable in Sokoto State of Nigeria, and in which they were yet to be convicted by the Court below. At the Court below, trial had commenced and the Appellant's Counsel were calling their witnesses, when the Respondents through their Counsel filed a motion on notice dated 4th day of April, 2017 praying the Court *inter alia* for an order discharging them from the charges in the case on the grounds that they had been granted unconditional pardon by the Governor of Sokoto State. The motion on notice was argued and the trial Court granted it, discharging the respondents from the charges against them. Dissatisfied, appellant appealed to the Court of Appeal. The core of the very issues in this Appeal was the question of the proper interpretation of the powers of the Governor of a State under section 212(1)(a) of the CFRN, 1999 as amended. The majority decision of the regular panel of the Court of Appeal upheld the respondent's argument that the power of pardon extends to every offence known to law and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment after taking a careful look at the word "or" inserted before the two clauses. Significantly, in the dissenting judgment of Shuaibu, JCA, he held that prerogative of mercy as a legal concept cannot be set in motion unless and until there is a sentence of Court on a convicted person(s) which the mercy will act as a vehicle of mitigating or waiving the punishment. Where as in the instant case, the respondents' trial was on going, there cannot be a pardon granted to the respondents by the Governor of Sokoto State pursuant to section 212 of the CFRN 1999 as amended.

Conversely, the Full Panel of the Court of Appeal departed from the majority judgment in *FRN v Alkali & Anor* (supra) and in agreement with the minority judgment by Shuibu, JCA, held in *Dingyadi v FRN* that pardon cannot be granted before conviction.[20] The appeal in this case bordered similarly on the stage (trial was on-going) at which the power of a Governor to grant pardon can be exercised. It was an appeal against the Ruling of the High Court of Sokoto State delivered on the 29th day of June, 2017 wherein the Court discharged the Respondent of the charges against him in Case No. SS/33C/2009 on the grounds that he has been granted unconditional pardon by the Governor of Sokoto State pursuant to an Instrument of Pardon dated 29th day of September, 2016 Exhibit Pardon 1). The Respondent alongside others was standing trial before the Court for sundry offences all punishable under the Penal Code applicable in Sokoto State. After seven Prosecution Witnesses had testified for the Appellant, the Respondent brought a motion on notice praying the High Court to discharge him from the charge on the ground that he had been granted an

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18 Per Okojie, JCA in *Saifullahi & Anor v FRN* (2017) LPELR-45136(CA) (Pp. 19-29 paras. B).

19 (2018) LPELR-45237(CA). Contrast with *Solola* v *State* (2005) 2 NWLR (Pt. 937) 460 at 488 - 489 and *Okongwu v State* (1986) 5 NWLR (Pt. 44) 741 at 750.

20 (2018) LPELR-46061(CA).

unconditional pardon by the Governor of Sokoto State which the High Court in its ruling granted and discharged the Respondent from the charge. Being dissatisfied with the ruling of the Court, the Appellant appealed to the Court of Appeal.

On the question whether the trial Court was right when it discharged the respondent from the charges against him in the case on the grounds that he has been granted unconditional pardon by the Governor of Sokoto State when the Respondent had not been convicted of any offence by any Court, the Full Panel of the Court of Appeal held that the Exhibit Pardon 1 is of no moment as the Respondent has not been found guilty by a competent Court and as such the pardon does not hold any water.[21] Contributing in the unanimous judgment, Jauro, JCA, held that a person whose trial is ongoing and constitutionally presumed innocent cannot be granted pardon because an innocent person cannot be pardon for any offence. There must be a conviction before pardon can be granted.[22] Furthermore, in *FRN v Achida*,[23] the Full Panel of the Court of Appeal also held that pardon by the Governor 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.[24] Section 212(1)(a) of the CFRN, 1999 as amended discloses an intention of applying the *ejusdem generis* principle, as only by doing so can effect be given to that provision as a whole. Consequently, the words "grant any person concerned with or convicted of any offence created by any Law of a State..." must be construed to mean persons convicted of offences in any Law of Sokoto State similar to the indictments of the Respondents in the Commission of Inquiry Report and Government White Paper. Thus, the word "or" therein should be read as "and" to give meaning and effect to section 212(1)(a) of the CFRN, 1999 as amended and the spirit and intendment of the Constitution as a whole. 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. It is however the discretionary power of the executive thereafter to pardon, grant amnesty, clemency or reprieve convict, or even to commute his sentence thereafter. Certainly, sections 175(1)(a) and 212(1)(a) of the CFRN, 1999 as amended do not contemplate that the executive would interfere with this process. It therefore amounts to an unusual and extra-judicial interference by the executive of the judicial function of courts, whose duty/function is to try offenders for crimes committed against the State, for pardon to be granted to accused persons still standing trial, and in particular, still presumed innocent. To give such a wide interpretation to the provision is to set a dangerous precedent which could lead the society which permits such an action down a very slippery slope, the end of which cannot be imagined and from which it may never recover or even survive. In my considered view, such a wide interpretation of the provision, as suggested by the Respondents, and as applied by the lower Court would be both unnerving, perilous and against the spirit and intendment of the Constitution read holistically.

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21 (2018) LPELR-46061(CA) (Pp. 16-27 paras. A) per Ndukwe-Anyanwu, JCA.

22 (2018) LPELR-46061(CA) (Pp. 31-32, para. E-E).

23 (2018) LPELR-46065(CA).

24 It is also trite that in the interpretation of the Constitution and/or statutes and in construing the contents of documents, the word "or" can sometimes be construed to mean "and" so as to give meaning and effect to the statute. For instance, in the case of *Ndoma-Egba v Chukwuogor* (2014) 6 NWLR (Pt. 869) 382, 409, Uwaifo, JSC opined as follows: "In ordinary usage, the word "or" is disjunctive and "and" is conjunctive. But it is conceded that there are situations which would make it necessary to read "and" in place of "or" and vice versa. This may occur in order to carry out the intention of the Legislature... Such interpretation may be quite useful in order to avoid absurd or impracticable results."

In sum, a strict and narrow construction, and not a wide and liberal interpretation of the constitutional provision and the instrument of pardon by the Full Panel of the Court of Appeal in the decisions referenced above reveal that pardon is the act or an instance of officially nullifying punishment or other legal consequences of a crime after conviction and exhaustion of appeal. One can only be pardoned for a wrong. There can be no pardon in *vacuo*. Where there has not been a trial and therefore no conviction, the prerogative of mercy cannot be invoked. The only remedy open to an accused standing trial is a withdrawal of the charge against him by the state Attorney-General. Such a withdrawal of the case against the accused by the Attorney-General is known as a *nolle prosequi*.

Conversely, can a person who is already granted prerogative of mercy or pardon after his conviction, still appeal against the conviction? In *Dr. Obi Okongwu v The State*,[25] 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 interesting facts of that case were that the Appellant therein, who was the Solicitor-General of Anambra State, acting as the Defendant's Counsel in a civil suit No. AB/23/80: *Ilodibia v Okafor & Anor* sentenced to 21 days imprisonment on 11th February, 1983. On the same day, the then Governor of Anambra State in the exercise of the powers conferred on him by section 192(1)(d) of the CFRN 1979 (which is in *pari materia* with section 212 of the CFRN 1999), issued an instrument of pardon granting a free pardon to the Appellant. As a result of this instrument, the appellant was released from custody on the same day. The appellant however subsequently filed an appeal to the Court of Appeal against his conviction and sentence. On the question 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 that 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.

Another contentious issue is whether prerogative of mercy or pardon can be exercised in favour of a person who has lodged an appeal or further appeal to the Supreme Court? The consensus attitude of decisions of Courts of law is that there is no question of pardon until the final appeal is concluded. This means there is no pardon until it is certain that the defendant is finally convicted of the crime. Some of the many judicial decisions of the apex Court which bear this principle out are discussed below. 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*[26] 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 Head of State or the Governor of a State cannot pursuant to sections 175 or 212 of the 1999 Constitution, as the case may be, exercise his 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.

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[25] (1986) 5 NWLR (Pt. 42) 721.
[26] (2005) LPELR-3101(SC) (Pp. 25 paras. A).

In *Oloyede v The State*,[27] 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 exercised his right of appeal to the Supreme Court as provided by section 233 (2)(d) of the Constitution, 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.[28]

Furthermore, in the case of *Obidike v The State*,[29] 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."

In *Bello & ors v A-G Oyo State*,[30] it was held by the Supreme Court that where a convict sentenced to death in respect of which the power of pardon is exercisable by the President or the Governor has appealed against his conviction, the sentence should not be carried out until the appeal has been determined. Accordingly, “the execution of such a convict before the determination of his appeal would be unconstitutional and unlawful”. Section 212 of the CFRN 1999 as amended had conferred on the Governor of a State the power of Prerogative of Mercy. The Governor by virtue of the provisions above has the powers to pardon any person who has been found guilty of a crime to leave prison and or avoid punishment.

5. 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

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27 (2017) LPELR-47996(SC) (Pp. 16-20 paras. B-B).
28 *Oloyede v The State* (2017) LPELR-47996(SC) (Pp. 16-20 paras. B-B).
29 (2001) 17 NWLR (Pt. 743) 601.
30 (1986) LPELR-764(SC) (Pp. 24-25 paras. F). A person is entitled to a prerogative of mercy or pardon where the convict had exhausted all his right of appeal. See *Solomon Adekunle v A-G of Ogun State* (2014) LPELR 22569.

pardoned for a criminal offence shall again be tried for that offence." This is the principle of "double jeopardy".[31] In *Saifullahi & Anor v FRN*[32] it was interpreted by the Court of Appeal 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*,[33] 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*,[34] 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*,[35] 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.

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31 This principle was established in *Amedu v Federal Republic of Nigeria* (2009) LPELR-8212(CA) it was held, per Lokulo-Sodipe JCA, on the meaning of "double jeopardy".

32 (2017) LPELR-45136(CA) (Pp. 19-29 paras. B) per Okojie, JCA.

33 (1999) 4 NWLR (Pt. 599) 476 at 495.

34 32 U. S. (7 Pet) 150 (1833) at 159-60 cited in *Falae v Obasanjo* (No. 2) (1999) LPELR-6585 (CA).

35 (2022) LPELR-57816(SC) (Pp. 14 paras. E) per Jauro, JSC.

(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.

6. Constitutional limits of power of President to grant prerogative of mercy

From the statutory standpoint and coupled with principles of law, the following, though not exhaustive, can be aggregated as limits of the power of the President to exercise prerogative of mercy or pardon namely:

(a) Presidential pardon can only be granted following convictions for offence created by an Act of the National Assembly otherwise called federal offence. President cannot grant pardon over any offence created by any State law which is within the powers of a State Governor in terms provided in section 212 of the CFRN, 1999 as amended. Likewise, a Governor of a State cannot grant pardon either over any offence created by an Act of the National Assembly or to persons concerned with offences against the army, naval or air-force law or convicted or sentenced by a court-martial.

(b) Presidential pardon is not the same thing as nolle prosequi by the Attorney-General under section

(c) Pardon can only be granted after conviction, but not before conviction by a Court of competent jurisdiction or pending trial as it is not nolle prosequi that can be entered at any stage of the trial before conviction.

(d) Presidential pardon is exercised after consultation with the National Council of States. Only the President or Governor of a State are constitutionally authorised to grant the prerogative of mercy. It is an executive pardon although it is beyond the power of any Minister[36] at the Federal level or Commissioner at the State level.

(e) Power of pardon by the President is a very powerful legal instrument. It is the only power that can override the final decision of the Supreme Court in criminal cases. Section 230 of the CFRN, 1999 as amended provides that "Without prejudice to the powers of the President or of the Governor of a state with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court". Thus, a convict by the Supreme Court, which is the apex Court, may be set free via the scheme of prerogative of mercy by the President or Governor of a State.

(f) Pardon, whether by President or Governor of a State is final and not subject to review or authority by any person or authority including the Attorney-General who is the Chief Law Officer. 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. Criticism and recommendations

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[36] *Saifullahi & Anor v FRN* (2017) LPELR-45136 (CA).

Prerogative of mercy or pardon are sometimes seen as a mechanism for thwarting the law. A pardon as it were is a source of controversy. In extreme cases, some pardons may be seen as acts of corruption by officials in the form of granting effective immunity as political favours. Hence, in order for this constitutional scheme not to go overboard, it is recommended that, although the powers bestowed on the President and the Governor of a State are enormous, but there is a caution that such powers must be exercised judiciously and in accordance with the due process of the law. For the President or Governor to exercise this power of pardon, the condition precedent like in all cases must be met. For instance, it must be shown that this was after consultation with the Council of State or State Advisory Committee on Prerogative of Mercy respectively. The instrument of pardon must not be vague, imprecise and clearly ambiguous.

Furthermore, exercise of prerogative of mercy or grant of pardon must not be deployed as an affront to or naked usurpation of judicial powers. Exercise of the power of prerogative of mercy must never be recklessly or prematurely exercised to impinge on the doctrine of the separation of powers as enshrined in the Constitution which requires that all three arms of Government should exercise their functions and duties in such a way that acts as checks and balances on each other, thus maintaining the balance of power. Where one arm of Government is allowed to usurp the power or function of another arm, there will be resultant instability, confusion and even lead to anarchy. A President or Governor should not by an executive act reverse the Court decision.[37] In *Dr. Obi Okongwu v The State,*[38] the grant by the Governor of a free pardon to the appellant on the very day of his conviction, was described by the Court of Appeal as "rather indecent haste and pointless confrontation with the Court".

8. Conclusion

Exhaustive scrutiny of judicial interpretation of the provisions of the constitution on prerogative of mercy undertaken in this paper has put paid to any confusion, uncertainty or ambiguity over the extent of the power of the President to grant pardon. This power remains unfettered when exercised in the manner prescribed under applicable constitutional provisions. Judicial authorities interrogated in this paper are crystal clear that the principle of prerogative of mercy cannot be invoked arbitrarily and whatsoever the President does before the prosecution and sentence of the convict or while appeal against conviction is pending will not fall within the ambit of prerogative of mercy. In other to prevent executive pardon from being grossly abused or prematurely exercised without either satisfying conditions precedent for exercise of such power or wrongly exercised in such a manner that negates the constitutional presumption of innocence or in circumstances that will amount to naked usurpation of judicial powers contrary to the doctrine of separation of powers, it is recommended that Presidential Pardon must be granted only after consultation with the National Council of State in accordance with the due process of the law.

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[37] *FRN v Achida* (supra). In the case of *Dr. Obi Okongwu v The State* (supra), Ogundare, JCA (as he then was) exhorted as follows: "Similarly, too, the Constitution as it applied at all times material to this appeal, had enshrined in it the doctrine of separation of powers ... Any exercise of executive power by the Governor which interfered with the judicial powers would be unconstitutional. See also *Paul Unongo v Aper Aku & Ors* (1984) 11 SC 129 and *Kadiya v Solomon D Lar & Ors* (1984) 11 SC 209.

[38] (1986) 5 NWLR (Pt. 42) 721.