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A CRITICAL ANALYSIS OF EXERCISE OF THE PRESIDENTIAL POWER OF PARDON TO PRE- CONVICTED PERSONS IN TANZANIA

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Abstract:

Article 45(1) of the Constitution of the United Republic of Tanzania of 1977 grants the President authority to exercise the power of pardon. The provision stipulates a single condition for the President of Tanzania to exercise the power. The condition is the person in whose favour the pardon is granted must have been convicted and sentenced by the courts of law. Historically, Presidents of Tanzania used this power in favour of different persons. Nevertheless, no President has ever exercised the power in favour of a person prior to conviction and sentencing of that person. This article makes a critical examination on the constitutionality of the President Samia Suluhu Hassan to exercise the power in favour of Freeman Aikael Mbowe and three others jointly charged. This is because there were calls to pardon them which were made at the time when Freeman Aikael Mbowe and others were not yet sentenced for the charges they were facing. The article applied doctrinal research methodology and finds that constitutionally, the President of Tanzania has no power to grant pardon to pre-convicted persons. The article then recommends for the Presidents of Tanzania to be vigilant about abiding by the constitution before exercising presidential power of pardon.

Keyword:

President, Pardon Power, Limitation, Conviction, Punishment



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Introduction

In August 2021 Freeman Aikael Mbowe and three others were jointly charged with terrorism related offences in the High Court.¹ At that time, Freeman Aikael Mbowe was the leader of main opposition political party. The political party is *Chama cha Demokrasia na Maendeleo* (CHADEMA). For that, he was the official opposition leader in parliament of Tanzania. Soon after the accused persons were brought in the court baying started, pleading President Samia Suluhu Hassan to release Freeman Aikael Mbowe.² The baying came from religious leaders, opposition political leaders and even international corps. These groups had the opinion that the charges against Freeman Aikael Mbowe were political motivated. So, they urged President Samia Suluhu Hassan to release Freeman Aikael Mbowe. It is based on the bays which made the author to write this article. The intention of the article is to assess in which ways legally President Samia Suluhu Hassan could relieve Freeman Aikael Mbowe from the charge he faced in the court of law.

In Tanzania there are two ways in which legally could be used to relieve Freeman Aikael Mbowe. These are by exercising the *nolle prosequi* power and by exercising the presidential power of pardon. This article deals with the later because that is within the presidential power. The former is within the executive power which is exercised by the Director of Public Prosecutions (DPP). For that, the article assesses constitutionality and legality of President Samia Suluhu Hassan to exercise the pardon power to pre-convicted persons.

Before the incident of Freeman Aikael Mbowe there have been several instances of the exercise of the presidential pardon in Tanzania. Some of the incidents were judged to be fair and deserving. But others were criticized and described as a display of executive abuse of power. Howbeit, the exercise of pardon by President Samia Suluhu Hassan in favour of Freeman Aikael Mbowe would be the most controversial in Tanzania. This is because in strict constitutional law of Tanzania that would be violation of the constitutional provision governing the power of pardon as it is known in law.

This article is largely a descriptive effort designed to contribute a knowledge on the exercise of the pardon power in Tanzania. The article analyses the exercise of the presidential power of pardon in relation to the scenario of Freeman Aikael Mbowe. The exercise of the power to the advantage of Freeman Aikael Mbowe raised criticisms by constitutional fanatics as abuse of the power. Again, it is criticized as being violation of the Constitution of the United Republic of Tanzania of 1977.³ It is to be understood that the author does not have any ulterior motive against Freeman Aikael Mbowe and three others jointly charged. Instead, the author submits that to exercise the presidential power of pardon in their favour would violate the Constitution of the United Republic of Tanzania of 1977. It is to be borne in mind that President Samia Suluhu Hassan took oath to defend the Constitution of the United Republic of Tanzania of

¹ The case is cited as the *Republic vs. Freeman Aikael Mbowe and Three Others*, Economic Case No. 16 of 2021, High Court, (Corruption and Economic Crime Division), Dar es Salaam, (Unreported)

² In March 2022 the DPP had entered *nolle prosequi* and thus Freeman Aikael Mbowe and three others were discharged forthwith

³ CAP 2 RE 2002

1977.⁴ So, the exercise of the power of pardon in favour of Freeman Aikael Mbowe and three others would have two implications. First, it would violate constitutional provision governing pardon in Tanzania. Second, it would abuse oath of office which the President took before assuming office duties.

Perhaps because of the apparent simplicity, the general public does not quite grasp the complexity of how the presidential power of pardon works out in Tanzania. On some level, it is simply understood that to pardon someone is to excuse the consequences of a crime.⁵ This is only scratching the surface, however. Anyone wishing to fully understand the presidential power of pardon framework must learn more than that. It is important to learn more so that to understand about both the philosophy behind power and the mechanisms by which it works.⁶ This article will address these two areas of inquiries. First, the article will give historical roots of the pardon power. Second, the article will explain the mechanisms set for its exercise by the President of Tanzania. Thereafter, the article will analysis the scenario of Freeman Aikael Mbowe. The aim is to see if it would be appropriate for President Samia Suluhu Hassan to exercise the presidential power of pardon in his favour.

This article is divided in seven parts. Part, one provides for introduction of the nature of the problem under inquiry. It gives reaction of the general public to President Samia Suluhu Hassan after knowing of the case of Freeman Aikael Mbowe and three others. Part two gives an overview of the power of pardon which is exercised by Presidents. Here the article explains the meaning of the concept. Again, the Article gives historical context for the power of pardon. This part traces pardon as it developed from ancient Greece, Rome and then English. Part three provides for the power of pardon in England. Although historically the power of pardon originated in Greece and Rome, it is common knowledge that in America and Africa, it was introduced by the British colonial masters. So, it is significant to know how the power was exercised in England before it found its way to British colonies in America and Africa. Part four traces the exercise of the presidential power of pardon in the United States of America (USA). It is important to briefly know the position of the power in the USA because this country was once colonized by the British. Again, the USA follows presidential form of government like Tanzania. For that, Tanzania has a lot to learn from the USA when it comes to the presidential power of pardon. Part five deals with the presidential power of pardon in Tanzania. This part gives historical development of the power from colonial era to current position. The part also describes constitutional framework for the exercise of the presidential power of pardon in Tanzania. Part six covers critiques towards the constitutionality of the exercise of the presidential power of pardon to pre-convicted persons. The part uses the case of Freeman Aikael Mbowe and three others jointly charged as its point of reference. The part critically assesses if it would be appropriate for President Samia Suluhu Hasan to grant pardon to Freeman Aikael Mbowe and three others jointly charged. This pardon, if granted, would be exercised while the case was still pending in the court of law. In part seven, which is the last part, the article gives conclusions and recommendations.

⁴ See oath of allegiance taken by the President as it is prescribed in section 2(1) and the First Schedule to the Official Oaths Act, CAP 266 RE 2019

⁵ Crouch, J., (2009), *The Presidential Pardon Power*, the University Press of Kansas, Kansas, p. 9

⁶ Mandi, I. R., (2014), *Observations of the Law and Exercise of Prerogative of Mercy in Tanzania*, Nyerere Law Journal, p. 74

General Overview of the Power of Pardon

In any area of study consideration of the history of the subject matter is necessary for an appreciation of the background, growth and future of the subject matter.⁷ The power of pardon is no exception. But, before trying to give historical background, it is apposite to provide the meaning of the concept pardon. Black's Law Dictionary defines the word pardon as the act or an instance of officially nullifying punishment or other legal consequences of a crime.⁸ Again, it is argued that Marshall, the then Chief Justice of the United States of America (USA) once defined a pardon. According to him, pardon means an act of grace, proceeding from the power entrusted with the executive of laws.⁹ It is the power which exempts the individual, on whom it is bestowed, from the punishment the law inflicts on a crime he has committed.

The meaning of the term pardon given in the dictionary and case law above mention the word 'punishment.' These two meanings of the term pardon which carry the word punishment are the guiding meanings for this article. This means this article argues that a pardon is given or exercised in favour of a person who has been punished either by the court of law or any other authority with the power to punish a person.

It is argued that the power of pardon has its origin in ancient Greece and Rome.¹⁰ Thus, a brief consideration of pardon in ancient Greece and Rome is certainly worthwhile. This is because these places can illuminate the ways the power of pardon has been used in the past. In fact, the power of pardon understanding stretches back through time to the most ancient legal code known to man. This is known as the Code of Hammurabi. This Code has been in use by Babylonians since 18th century B.C.¹¹ Later on it found its ways to Greece and Rome. In Greece and Rome Kings therein granted pardon to various persons for different purposes.¹² So, while the monarchies of England had exercised the power to pardon for centuries, the power actually does not originate in England. Today, pardon is included in the written constitution of nearly all countries in the world. It is now accepted that the power of pardon is an established part of modern politics. However, its origin is of great antiquity.

The power of pardon has four different aspects in one-fold. It entails the power to commute (reduce) sentence and the power to pardon (totally waiver of sentence). It also includes the power to reprieve sentence (temporary postponement of the carrying out of a sentence especially a death sentence).¹³ A final unique form of the pardon is amnesty. Amnesty which comes from the Greek word *amnestia* is typically granted to a group rather than an individual.¹⁴ It is a form of pardon which is often given pre-conviction. It is usually rests on the judgment that the public welfare is better served by ignoring a particular crime than by punishing for it.¹⁵ Amnesty is often announced following the conclusion of a war.¹⁶ This means therefore that,

⁷ Akintunde, S. E., (2017), A Brief Overview of Legal Informatics, Institute of Legal Informatics, Hanover, p. 2

⁸ Garner, B. A., (2004), Black's Law Dictionary, 9th Edition, West Publishing Co., Dallas

⁹ See the case of *United States vs. Wilson*, 32 US (7 Pet) 150, 1833

¹⁰ Duker, W., F., (1977), The President's Power to Pardon: A Constitutional History, *William and Mary Law Review*, Vol. 18, p. 476

¹¹ Crouch, J., (Note 5)

¹² Ibid

¹³ Garner, (Note 8)

¹⁴ Ibid

¹⁵ Crouch, (Note 5), p. 20

¹⁶ Humbert, W. H., (1941), Pardoning Power of the President, Washington, D. C., American Council on Public Affairs, pp. 22-23

amnesty is a pardon which is exercised in favour of persons who committed war crimes.¹⁷ However, these are just the main reliefs of the power of pardon. Other less common reliefs include substitution of sentence, remission of fine or forfeiture and change of method of execution.

Pardon Power in England

The idea of pardoning criminal is traced to ancient Greece and Rome. Later on, the practice was adopted by the British monarchs.¹⁸ For that, the pardon power in both Greece and Rome established the framework for the pardon power in the British monarchies.¹⁹ This is even proved by William Blackstone who noted that the pardon power in England is derived from Rome.²⁰ The purpose was to allow the monarchies in England to show mercy towards their subjects. The pardon power, then known as the prerogative of mercy, first emerged in English law during the reign of King Ine of Wessex 668-725 A.D.²¹

By its nature the power of pardon was prerogative. It means that it was a privilege and exclusive power given to the monarch owing to his special status in the society.²² Thus, the modern-day power of pardon is a relic of the powers which Kings had in ancient days.²³ The King was not only the country's ruler or a normal head of state but he actually owned the country (the realm). Since the King owned the country, he owned all the people in the realm as well.²⁴ All public institutions including courts of law and prisons belonged to him. All judges, magistrates and civil servants were the King's servants serving at his pleasure. Thus, no one in the realm had a right to question him on the way he proffered mercy on his subjects.²⁵ The King was the ruler clothed with huge and uncontrolled powers.²⁶ Further, in his political capacity, the King was described as an infallible super human.²⁷ Besides the attribute of sovereignty, the law also ascribed to the King in his political capacity absolute perfection.²⁸ The King was considered to do no wrong. The King, moreover, was not only incapable of doing wrong, but even of thinking wrong. It means the King could never mean to do an improper thing. According to William Blackstone, the King could not display folly or weakness.²⁹

For those reasons, the power of pardon was discretionary power exercised by the King as he willed. There were no legal restrictions at all on the exercise of such power. On this account, John Locke once said prerogative power is nothing but the power of doing public good without a rule.³⁰ The King had complete liberty to grant unconditional or conditional reliefs. For example, in the 17th century and 18th century it was fashionable for the King to grant conditional

¹⁷ Yasmin, N., (2003), *Amnesty for War Crimes: Defining the Limits of International Recognition*, Vol. 85, No. 851, p. 583

¹⁸ Duker, (Note 10), p. 478

¹⁹ Moore, K. O., (1989), *Pardon: Justice, Mercy and the Public Interest*, p. 17

²⁰ Blackstone, W. (1969), *Commentaries on the Laws of England*, pp. 153-160, p. 3

²¹ Thorpe, B., (1840), *Ancient Laws and Institutes of England, Comprising Laws Enacted*, London, p. 46

²² Garner, (Note 8)

²³ Mandi, (Note 6), p. 78

²⁴ Barry, H., (1925), *The King Can Do No Wrong*, *Virginia Law Review*, Vol. 11, No. 5, p. 350

²⁵ Mandi, (Note 6), p. 72

²⁶ Carnoll, A., (2009), *Constitutional and Administrative Law*, Pearson Education Limited, Harlow, p. 247

²⁷ Barry, (Note 24) p. 354

²⁸ Blackstone, W., (Note 20)

²⁹ *Ibid*, p. 153

³⁰ Harrison, J., (2000), "Pardon as Prerogative in Federal Sentencing Reporter, Vol. 13, No. 34, Pardon Power and Sentencing Policy, November –December, p. 147

pardons. One of the conditions was requiring pardonees to vacate England and go to live in British colonies.³¹ So, the person could, after being granted pardon go to Australia, New Zealand or American. This was called banishment or transportation.³²

Moreover, it was the practice of the British King to issue prerogative of mercy during coronation and other public days. This means the power of pardon was an official gracious gift given to the subjects on Christmas day, the King's birthday and such other occasions.³³ Kings granted pardons and other forms of mercy during such celebrations because these acts of executive clemency are accepted with general favour.³⁴ They appeal to a natural sentiment and they are brought to public attention at a season when there was no mood for analysis and criticisms.³⁵

When England established colonies in Australia, America, Asia and Africa it endowed the colonial Governors with some form of the pardon power. So, British colonies all over the world incorporated prerogative of mercy in their laws. This power was exercised by the heads of state therein.³⁶ Again, prerogative of mercy or the power of pardon was even in colonies including Tanzania exercised on public holidays and celebrations. In Tanzania for example, the presidential power of pardon is more often exercised on national holidays like Union Day and Independence Day.

The Power of Pardon in the United States of America (USA)

When Great Britain colonized North America, the King delegated pardon power to local royal colonial Governors. However, the exercise of the power varied within each colony.³⁷ For example, in North Carolina Governors were given the power to pardon before judgment or after, all crimes and offences whatsoever.³⁸ After independence of American colonies in 1776 the power of pardon was adopted by the independent American colonies. It is to be borne in mind that, in 1776 the independent American colonies united to form the United States of America (USA). So, the USA is among the countries whose constitutions give the pardon power to their Presidents. In the USA the presidential power of pardon is exercised without sharing it with other organs. Again, the power therein is exercised without constitutional limitations. This is because the USA borrowed the power of pardon directly from the British legal tradition.

The presidential power of pardon in the USA is provided by Article II Clause 2 Section i of the Constitution of the United States of America of 1787. The pardon power as written in the Constitution of the United States of America of 1787 is seemingly limitless. However, the pardon power in the USA has only one specific exception. Article II Clause 2 Section i of the Constitution of the United States of America of 1787 states that;

³¹ Cowlisbaw, R., (1975), *The Conditional Presidential Pardon*, *Stanley Law Review*, p. 159

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ Avaliani, T., (2022), *Presidential Pardon Power as a Mechanism to Maintain Constitutional Order*, p. 132, available on <https://constcourt.ge/files/4/Avaliani2022-1.pdf>, accessed on 4th March 2024 at 1730 hours

³⁷ Chitty, J., (1920), *A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subjects*, p. 5

³⁸ Mandi, (Note 6), p. 74

The President.... shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment.

From the words of Article II Clause 2 Section i of the Constitution of the United States of America of 1787 it is clear that the power of pardon is one of the presidential powers in the USA. Again, it is clear that the Constitution of the United States of America of 1787 prescribes only one limitation for the President of the USA to use the power of pardon. The only limitation is prohibiting the President of the USA from issuing pardons in cases of impeachment. Outside this limitation the presidential power of pardon in the USA is plenary. This means the pardon power vested by the Constitution of the United States of America of 1787 in the President covers wide scope. It extends to all crimes which criminal law of the USA knows.³⁹ Pardon is sometimes, in the USA known as clemency, amnesty, remission or commutation.⁴⁰ Thus, the President of the USA has the power to grant clemency, amnesty, remission or commutation to any person therein.

In the USA the President may grant presidential pardon to a person even before the person has been officially charged or convicted. It means pardon in the USA is available at any time soon after the commission of the crime. The same can be exercised either before legal proceedings are taken, during pendency of the proceedings or after conviction.⁴¹ In the case of *Murphy vs. Ford*⁴² the plaintiff challenged presidential pardon exercised by President Gerald Ford in favour of President Richard Nixon. The ground of complaint was that the pardon was invalid granted to a person who had never been convicted. It means pardon was granted to a person who had never been formally charged with an offence against the USA. The Michigan District Court held that pardon in the USA extends to every offence known to law. The same may be exercised at any time, either before legal proceedings are carried out, during their pendency or after conviction and judgment.

The power of pardon in the USA reaches both the punishment prescribed for the offence and the guilt of the offender. This means the pardon releases the punishment and blots out the guilt of the pardonee. So, after pardon to be granted, in the eye of the law the pardonee is as innocent as if he had never committed the offence. This means by granting a pardon, the President of the USA nullifies legal consequences of that crime. This includes any restrictions on the pardonee's political and civil rights. It may also help the pardonee obtain licenses, bonding or employment. It means in the USA the pardon brings back political rights and freedoms of the pardonee taken away by conviction. The political rights and freedoms brought back include the right to vote and the right to hold public office. In the case of *Ex part Garland*,⁴³ the Supreme Court of the United States of America stated that;

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

³⁹ Foster, M. A., (2020), Presidential Pardon: Overview and Selected Legal Issues, Congressional Research Series, Legislative History, New York, p. 4

⁴⁰ See the Annually US Code of Federal Regulations

⁴¹ Foster, M. A., (Note 39)

⁴² 390 F Supp. 1372 WD Michigan 1975

⁴³ 71 US 333, 380-381 (1866) as quoted in Foster, (Note 39), p. 4

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.

The power of pardon in the USA is exercised in the option of the President alone. As such the decision of the President to grant pardon is final and conclusive. No appeal can be made against the decision of the President in exercise of such power. But in exercising the power, the President of the USA is guided by two major laws. The first law is the Constitution of the United States of America of 1787. The second law is the Code of Federal Regulations. The Code of Federal Regulation is a law which is annually published in the USA.

The Power of Pardon in Tanzania

Tanzania which was formerly known as Tanganyika was once colonized by the British. British colonial state in Tanganyika established colonial legal system therein. This was done by His Britannic Majesty of England to promulgate the Tanganyika Order in Council of 1920.⁴⁴ Among the features of the Tanganyika Order in Council of 1920 was the prerogative of mercy.⁴⁵ The prerogative of mercy is otherwise known as the power of pardon. So, the aspect of the British royal prerogative, called the prerogative of mercy has become part of the constitutional law of Tanzania. For that, the power of pardon which the Presidents of Tanzania exercise is a brainchild of colonial legal system. Since introduction of the presidency in Tanzania in 1962, all Presidents have exercised the presidential pardon power. Ever since its introduction in 1920 the power of pardon has been incorporated in all subsequent constitutions of Tanzania.⁴⁶

The exercise of the power of pardon by the President of Tanzania is taken to be an aspect of the judicial power of the President. The President of Tanzania may grant pardon to any person after conviction and sentence of the person for any crime.⁴⁷ In Tanzania pardon sometime is referred to as prerogative of mercy.⁴⁸ Accordingly, the President of Tanzania can therefore, exercise prerogative of mercy in favour of even the convicts of capital offence. Among the capital offences in Tanzania to which the Presidents may grant pardon are murder and treason. By using this power in 1977 President Mwalimu Julius Nyerere granted pardon to Bibi Titi Mohamed. Bibi Titi Mohamed was in prison serving life imprisonment after being convicted of treason offence.⁴⁹ In 1995 President Alli Hassan Mwinyi granted pardon to persons who were convicted of treason offence.⁵⁰ President Benjamin William Mkapa, President Jakaya Mrisho Kikwete, President John Pombe Magufuli and President Samia Suluhu Hassan also granted such multiple pardons. For example, in 2017 President John Pombe Magufuli exercised the power of pardon in favour of Nguza Vicking and three sons. The four members of one

⁴⁴ Vedasto, A. K., (2009), *The Basics of the Laws and Constitutions of Tanzania: 1920 to the Present*, Mkuki na Nyota Dar es Salaam, p. 7

⁴⁵ Mandi, (Note 6), p. 74

⁴⁶ See Article 55(1)(a), (b) and (c) of the Independence Constitution of 1961, Article 19(1) ((a), (b) and (c) of the Republic Constitution of 1962 and Article 22(1)(a), (b) (c) and (d) of the Interim Constitution of 1965

⁴⁷ Article 45(1) (a), (b), (c) and (d) of the Constitution of Tanzania of 1977

⁴⁸ Read marginal notes to Article 45, *ibid*

⁴⁹ On conviction of Bibi Titi and others, 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

⁵⁰ See the case of *Hatibu Gandhi and Others vs. Republic (1996) 12*

family were convicted by the Courts of Resident Magistrates of Dar es Salaam at Kisutu.⁵¹ They were sentenced to life imprisonment. These pardons were granted with some regularity typically to mark Union Day or Independence Day of Tanzania.

It is a common understanding that a person who accepts pardon confesses the crime for which he was charged with and convicted of. However, that position is different in Tanzania. This means to accept pardon in Tanzania does not mean confession of the crime and conviction either explicitly or tacitly. In Tanzania the person who accepts pardon may still deny being guilty of the offence with which he was charge and convicted of. In the case of *Yuves Malima Nyakina vs. Republic*,⁵² the applicant was charged with and convicted of house breaking. He was then sentenced to pay fine or in default to serving 12 months imprisonment. The applicant failed to pay the fine and thus, in May 2020 he was committed to prison. In December 2020 the applicant received a presidential pardon and was released from prison forthwith. Thereafter, the applicant filed application in the High Court of Tanzania (Mtwara Sub-Registry). The applicant asked the court to quash conviction and clear his criminal records pronounced by the lower court. This case proves that in Tanzania to accept the presidential pardon does not mean that the pardonee confesses guilty of the offence charged with and convicted of.

The power of pardon as prerogative of mercy has been ensconced in the constitutions of Tanzania in order to add judicial justice in the country. It was revealed that sometimes through judicial justice there is a possibility of mistakenly convicting innocent people. This was the opinion of the public in Tanzania with regard to the conviction of *Babu Seya* and his three sons. Soon after court judgment was delivered and conviction of the accused was pronounced there was outcry of many citizens. Majority of Tanzanians believed that the four convicts thereof were wrongly charged and convicted.⁵³ In December 2017 President John Pombe Magufuli granted pardon to the family. Presidential power of pardon is also one of the ways of decongesting the prisons in the country.

After considering the history and adoption of pardon power in the constitutional law of Tanzania the following part addresses one major question. The question addressed here is whether the President of Tanzania may grant pardon to pre-convicted persons? This question is answered by reviewing legal framework for exercise of the presidential power of pardon in Tanzania.

Legal Framework for Pardon in Tanzania

Article 45 (1), (2) and (3) of the Constitution of the United Republic of Tanzania of 1977 provides for the exercise of the presidential power of pardon in Tanzania. The language of Article 45 (1) of the Constitution of the United Republic of Tanzania of 1977 is not broad. It contains textual restrictions and one specific exception on the exercise of the presidential pardon power. The restriction is that the pardon must be exercised after the person has been convicted of and sentenced by any court of law. Article 45(1) of the Constitution of the United Republic of Tanzania of 1977 reads that;

⁵¹ *Nguza Vicking @ Babu Seya and Three Others vs. the Republic, Criminal Appeal No. 56 of 2005, Court of Appeal, Dar es Salaam, (Unreported)*

⁵² Misc. Criminal Application No. 37 of 2022, High Court, Mtwara, (Unreported)

⁵³ Rugazia, A., (2014), Life Imprisonment in Tanzania with the Aftermath of Babu Seya's Case: A Human Right Perspective, *Bloomberg Law Journal*, p. 2

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 part 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. (Emphasize is mine).

From the excerpt above, pardon in Tanzania is exercised in favour of a person who has been convicted and punished by the courts of law. It seems the Framers of the Constitution of the United Republic of Tanzania of 1977 were hesitant. They were sensitive to the danger of unleashing the President of Tanzania monarchical power. The Framers of the constitution were less entrusted the President with this unique and kingly power. So, the Framers of the Constitution of the United Republic of Tanzania of 1977 put that restriction.

In Tanzania the President may exercise power of pardon to any person who has been convicted and sentenced for any offence. The President of Tanzania may also substitute a lesser form of punishment or remit any penalty or forfeiture. The above provision confers extensive power of pardon on the President of Tanzania in relation to conviction and sentence for any offence. But the President of Tanzania cannot grant pardon before the person was convicted and sentenced to a specific punishment. This is because the power of pardon in Tanzania only reaches the sentence not the crime and not the conviction.⁵⁴ The history of grant of pardon by the Presidents of Tanzania to different pardonees proves this. All six President of Tanzania have granted pardon to persons after conviction and sentence, not before. This means to grant pardon to pre-convicted persons in Tanzania will prove high constitutional controversy. This article argues that pardoning Freeman Aikael Mbowe would be an assault on the Constitution of the United Republic of Tanzania of 1977. It would be the threat to the very structure on which the right to pardon is based. It is argued that way because, pleads wanted President Samia Suluhu Hassan to exercise pre-conviction pardon in favour of Freeman Aikael Mbowe. This is contrary to constitutional provision and practice in Tanzania.

The President of Tanzania is subject to the constitution and other laws of the land. This is provided by Article 26 (1) of the Constitution of the United Republic of Tanzania of 1977. According to this constitutional provision, every person in Tanzania has the duty to observe and to abide by the constitution and the laws of Tanzania. The President of Tanzania is also required to observe and to abide by the constitution and other laws of Tanzania. This is because in Tanzania no one is above the law, even the President.⁵⁵ As noted above Presidents of

⁵⁴ See submission of Counsel for the applicant in the case of *Yuves Malima Nyakina vs. Republic*, Misc. Criminal Application No. 37 of 2022, High Court, Mtwara, (Unreported) at p., 7

⁵⁵ See the words of Samatta, J. K in the case of *Mwalimu John Paul Mhozya vs. Attorney General*, (1996) TLR 130

Tanzania take oath to protect and defend the Constitution of the United Republic of Tanzania of 1977, among others. For that, President Samia Suluhu Hasan was and is expected to be far front in protecting and defending the constitution of Tanzania. One of the ways to protect and defend the constitution is to abide by it. So, President Samia Suluhu Hasan could not exercise the presidential power of pardon to pre-convicted persons.⁵⁶ This is so because the grant of pardon to pre-convicted person is violation of the constitution.

Critiques Against Pardoning Freeman Aikael Mbowe

Although the President of Tanzania may exercise the power of pardon, limitation on how the President uses the power deserves consideration. Technically, there are checks on the exercise of the presidential power of pardon in Tanzania. This means the constitution checks the President on how and when the President may exercise the power. Much of what politicians and the public at large take for granted is a result of informal norms as opposed to fixed laws. The government of Tanzania is built on the assumption that the President will respect constitutional provisions. But the presidential power of pardon is undermined when the President of Tanzania pardons a person in clear violation of the constitution. The following part provides opprobrium against granting pre-conviction pardon in Tanzania.

Requirement of Conviction and Sentence

Admittedly, the ability of the President of Tanzania to grant pardon is typically broad in terms of the offence and person. But the exercise of the power has significant constrain in terms of the stage of the case for the President to exercise the power. The expression ‘convicted’ and ‘punishment’ which are used in the pardoning provision have purposes. They imply that pardon may be granted to a person who has been tried, convicted and sentenced to a certain punishment. This means Article 45(1) of the Constitution of the United Republic of Tanzania of 1977 imposes a pre-emptory obligation on the President. The President is obliged to wait until conviction is met and sentence is imposed. In other words, the President of Tanzania is not allowed to grant pardon to pre-convicted persons. Therefore, any grant of pardon before conviction is pronounced and sentence is imposed is unconstitutional and void.

Clearly, President Samia Suluhu Hassan is bound by the words of Article 45(1) of the Constitution of the United Republic of Tanzania of 1977. This is so because as noted prior President Samia Suluhu Hasan took oath to defend the constitution. Again, President Suluhu Samia Hassan is bound by the words of Article 45(1) of the Constitution of the United Republic of Tanzania of 1977. This is because every person in Tanzania, including the President has the duty to observe and to abide by the constitution. This article submits that pardoning provision in Tanzania prohibits the President from pardoning pre-convicted persons. The presidential pardon power extends to persons after they are convicted and sentenced, not otherwise. This is different from the United States of America (USA). In the USA presidential power of pardon extends even to persons who have not yet been charged, convicted or sentenced.

It is settled law that in Tanzania the power of pardon is *sui generis* since constitutionally it is not shared with other two organs of the state. It means the exercise of the pardon power in Tanzania is not shared with the legislature and the judiciary. But then grant of pardon in Tanzania has limitation to its operation. The limitation is, it cannot be granted in favour of a person prior to conviction and sentencing of that person. The aim of the limitation is to prevent

⁵⁶ Article 45 (1) (a), (b), (c) and (d) of the Constitution of Tanzania of 1977

possible abuse by granting pardon to persons who the President favours. So, the presidential power of pardon cannot be exercised in favour of a person in any manner the President deems fit. Therefore, pardon in Tanzania cannot be granted to a person who is not yet convicted of and sentenced to serve a certain punishment.

Commission of Impeachable Offense by the President

There is a constitutional avenue to parliament of Tanzania if the President abuses the pardoning power. The constitutional avenue is impeachment of the President by the parliament of Tanzania. The President of Tanzania though may even pardon treason, murder or any other serious offence, cannot grant pardon to pre-convicted persons. Pardoning a person before he is sentenced is outrageously improper. This is what exactly President Samia Suluhu Hassan would do if she granted pardon in favour of Freeman Aikael Mbowe. This is so because the pardon would be granted before Mbowe was convicted of terrorism related charges he was charged with.

Pardoning Freeman Aikael Mbowe before he was sentenced by the court of law would be the first act of presidential pardon unique in Tanzania. No President of Tanzania had ever pardoned a person before the person was formally sentenced by the court of law. This pardon would be unique because the pardoning instrument would not specify the sentence for which he is pardoned. The recourse against the President who pardons a person before he is sentenced by the court of law is impeachment.⁵⁷ This is admittedly, a political rather than a criminal remedy.

The Freeman Pardon Paradox

Today, the presidential power of pardon is granted almost exclusively in innocuous cases. It is granted in cases where the merciful President will not suffer any political damage arising from clemency recipients. However, pardoning Freeman Aikael Mbowe would be the first pardoning paradox in Tanzania. This is because granting pardon to him before he was convicted of and sentenced would violate constitutional limits in Tanzania. It is so because the pardoning power is exercisable only after a person has been convicted and sentenced. Thus, pardoning Freeman Aikael Mbowe would particularly be perplexing. It would be perplexing considering the fact that the Presidents of Tanzania have exercised the power in some other years to persons who were already sentenced.

Again, pardoning Freeman Aikael Mbowe would be a paradox because it would be done for political advantage. It is a fact that Presidents have usual concern for political leverage. For that, each of the President of Tanzania has made at least one very controversial pardon decision for political advantage. President Mwalimu Julius Nyerere pardoned Bibi Titi Mohamed. President Ali Hassan Mwinyi pardoned Zakaria Hans Pope. President John Pombe Magufuli pardoned Nguza Vicking and his family members. These pardon decisions were big stories that earned considerable media attention and general public acerbic. In doing so, however, these Presidents were not violating the Constitution of the United Republic of Tanzania of 1977. This is because the pardons were granted in favour of the persons who were formally convicted and sentenced by the courts of law.

⁵⁷ See Article 46A (2)(a) of the Constitution of Tanzania of 1977

Again, acerbic response of the public to the above pardon decisions can be explained by three characteristics. First, the pardon recipients had stood trial for their offences and were convicted and sentenced by the courts of law. The presidential power of pardon to these pardonees was meant to exonerate them from the already pronounced sentences. Second, these pardonees were safe from direct electoral and political purposes. It means these pardons had no political risks. Third, each President granted pardon for self-interested reasons. The grant of pardon by President Mwalimu Julius Nyerere to Bibi Titi Mohamed had no political risks. This is because the President pardoned her remembering her great contribution towards struggles for independence of Tanganyika. This pardon therefore had public policy purpose justification. President Alli Hassani Mwinyi grants of pardon to Zakaria Hans Pope and others had no political risks. This is because President Alli Hasan Mwinyi granted it at his last time of his presidency. President John Pombe Magufuli granted pardon in favour of Nguza Vicking and his family to curry favour with the public who demanded it from President Jakaya Mrisho Kikwete.

The main argument of this article is that pardoning Freeman Aikael Mbowe would be abuse of the Constitution of the United Republic of Tanzania of 1977. It would be the pardon granted to win support from opposition political leaders. But by doing so, the President would violate the constitution. The perception of the critical thinkers would infer the grant of pardon to Freeman Aikael Mbowe intended to win political advantage. It would be perceived that the President granted the pardon to win the confidence of opposition political leaders. This is contrary to the intent of the Constitution of the United Republic of Tanzania of 1977. This article argues that pardoning pre-convicted persons would be using it to meet personal political interest. This would be contrary to what the Framers of the Constitution of the United Republic of Tanzania of 1977 had in mind. This is a paradox which President Samia Suluhu Hassan avoided to commit.

Exercise of Pardon for Political Gain

President Samia Suluhu Hassan would use the presidential power of pardon to Freeman Aikael Mbowe not merely as an act of grace or for public welfare. Instead, President Samia Suluhu Hassan would use that pardon as a political weapon. The President would use it to reward political oppositions and so to win them to her side. It is true that the President of Tanzania would abuse the presidential power of pardon for political gain. However, to exercise the power in clear violation of the constitutional provision for political gain is not acceptable. This is because to do so would be outrageous act to be done by the President of Tanzania.

It is well known that President Samia Suluhu Hassan like any other President has usual concern for political gain. To achieve this President Samia Suluhu Hassan has introduced reconciliation, resilience, reform and rebuild initiative. These four words are popularly known as the four Rs. The purpose of initiating the four Rs is to unify the nation. Thus, President Samia Suluhu Hassan may use pardon in order to exhibit implementation of the four Rs initiative. This means President Samia Suluhu Hassan might exercise presidential power of pardon in favour of Freeman Aikael Mbowe as a political weapon. This pardon would be exercised to reward political opposition and so to win them to her side along with the four Rs initiative. In doing so, however, the President would be violating the Constitution of the United Republic of Tanzania of 1977. This is because the constitution requires that pardon be granted in favour of the person who has already been convicted of and sentenced.

None Binding of the Advice of the Advisory Committee

In the course of exercising the power of pardon the President of Tanzania is guided by, among other laws the Presidential Affairs Act.⁵⁸ Accordingly, before granting pardon the President of Tanzania is bound by this law. The Presidential Affairs Act requires the President to obtain advice from the Advisory Committee of Prerogative of Mercy (ACPM). Again, the Presidential Affairs Act requires the President to consult the ACPM for advice.⁵⁹ The President of Tanzania therefore, grants pardon after receiving advice from the ACPM. The ACPM is established by section 3(1) of the Presidential Affairs Act. Its major role is to advise the President of Tanzania on suitable convicts to be granted pardon.

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 for the government, the Attorney General and other members who shall be not less than three and not more than five. This article submits that the other members may be the Commissioner General of Prison Services, the Chief Medical Officer and the Director General of the Tanzania Intelligence and Security Service. Others may be the Chief of Defense Forces, the Chief Justice and the Commissioner for Social Welfare. All these members of the ACPM are appointed by the President of Tanzania.

According to section 3(3) of the Presidential Affairs Act the President of Tanzania shall exercise the power of pardon after obtaining advice from the ACPM. Obtaining the advice prior to exercising of the power thereof is mandatory. Failure to obtain advice of the ACPM shall render the exercise illegal. But the President is not bound to follow the advice the ACPM. 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.** (Emphasize is mine).

From the excerpt of the law above there are two major things which are important to note. First, if pardon is to be granted in respect of the person who was convicted by the court martial the ACPM shall not be involved. The President of Tanzania shall have to receive recommendation from the Minister for Defense and National Security, instead. Second, the President of Tanzania is not bound to follow the advice of the ACPM or of the Minister for Defense and National Security. It means, whatever advice the President of Tanzania receives the final decision remains in the discretion of the President alone. This discretion, of course, shall be prudently exercised, giving regards to reasonable grounds.

The above position shows that it is mandatory for the President of Tanzania to obtain the advice of the ACPM if the power of pardon is to be exercised to murder convicts. However, if pardon is to be granted to other convict than murder condemns, the President is not bound to seek and

⁵⁸ This law was enacted pursuant to Article 45(2) of the Constitution of Tanzania of 1977

⁵⁹ Section 3(3) and (4) of the Presidential Affairs Act

receive advice.⁶⁰ So, for other convicts the President of Tanzania may exercise his powers without even consulting the ACPM, let alone to follow its advice. Freeman Aikael Mbowe and three others jointly charged fell in his category. President Samia Suluhu Hassan was not obliged to seek advice of the ACPM. Again, President Samia Suluhu Hassan was not bound by whatever advice the ACPM might give. President Samia Suluhu Hassan was therefore, a sole decider on grant of pardon to Freeman Aikael Mbowe.

Inapplicability of Amnesty in Tanzania

President Samia Suluhu Hassan could as well not use amnesty as one of the forms of the presidential power of pardon in favour of Freeman Aikael Mbowe and three others. In Tanzania the presidential power of pardon is in four forms, which are prerogative of mercy (pardon), commutation, remission and respite to the convicts.⁶¹ Elsewhere, power of pardon includes amnesty. Howbeit, the Constitution of the United Republic of Tanzania of 1977 is silent on amnesty. For that, this article submits that power of pardon in Tanzania does not cover amnesty. Again, even if the pardon power in Tanzania includes amnesty the same could not be granted in favour of Freeman Aikael Mbowe and three others. This is because Freeman Aikael Mbowe and others were not charged with war crimes. Freeman Aikael Mbowe and three others were jointly charged with terrorism related offences.

Even the definition of amnesty given by Black's Law Dictionary does not favour Freeman Aikael Mbowe and other either. This is because the definition of amnesty given by Black's Law Dictionary has two words which go against Freeman Aikael Mbowe. The two words therein are 'guilty' and 'political offence.'⁶² At the time of plead to President Samia Suluhu Hassan to relieve Freeman Aikael Mbowe he was not yet convicted. Since Mbowe was not yet convicted, he was not yet declared guilty of the offence charged with in the court. This means Freeman Aikael Mbowe and three others were not yet 'guilty of the crime' charged with. Even Freeman Aikael Mbowe himself had never pleaded guilty of crime charged in the court of law. Again, President Samia Suluhu Hassan could not exercise pardon in the form of amnesty in favour of Freeman Aikael Mbowe and three others. This is because these persons were not charged with 'political offence' (treason, sedition and rebellion).⁶³ Instead, they were charged with terrorism related offences. Therefore, amnesty was not applicable in favour of Freeman Aikael Mbowe and three others.

Conclusion

Clearly, the approach adopted by President Samia Suluhu Hassan in the scenario of Freeman Aikael Mbowe was not harsh and not confrontational. The approach was rather lineate and consistent with constitutional ideals. It was therefore preferable by the constitutional fanatics. If President Samia Suluhu Hassan exercised power of pardon in favour of Freeman Aikael Mbowe that would be abuse of the power. This is because to grant pardon in favour of a pre-convicted person would be exercise of the power in clear violation of the constitution. This would exhibit the argument that in Tanzania the power of pardon is granted without constitutional control and checks. In Tanzania pardon is uncontrolled in terms of whom one and for which offence to pardon. However, it is controlled in terms of timing to exercise it. By

⁶⁰ Section 3(4) of the Presidential Affairs Act

⁶¹ See Article 45(1)(a), (b), (c) and (d) of the Constitution of Tanzania of 1977

⁶² Garner, (Note 8)

⁶³ See definition of amnesty given by Garner, (Note 8)

timing, it means the President of Tanzania cannot grant pardon to a person who has not yet been sentenced by the courts of law. This control was designed to provide a check on grant of pardon by the President of Tanzania. This means, although presidential power of pardon is the most sacred and prerogative of the President there is to be checks. The check is designed to avoid injustice and abuse in the quest for equity. Without control and checks, the ability of the President of Tanzania to use pardon fairly and dispassionately will not be possible. This means the exercise of power to a large extent would depend on personal integrity but without sense of responsibility. So, while the President of Tanzania is allowed wide latitude in the exercise of the power of pardon, the prescription of some limitations is also necessary. This, of course, cannot absolutely prevent abuse of the power of pardon. But it goes a long way in curbing the incidence of abuse. For that, acumen of President Samia Suluhu Hassan not to grant pardon in favour of Freeman Aikael Mbowe is highly recommended. The article explored the political environment created by the scenario of Freeman Aikael Mbowe. The article also explored the option of President Samia Suluhu Hassan for handling the predicament created by the scenario. The article concludes that the President made a difficult decision. However, the President did not grant pardon in favour of Freeman Aikael Mbowe for the right reason. If President Samia Suluhu Hassan granted the pardon that would be granted for personal reasons. That would be highly controversial pardon grant to opposition political leaders. It would be pardon granted in apparent violation of the Constitution of the United Republic of Tanzania of 1977. Finally, the article recommends for the members of the public to educate themselves on legal positions before calling for the leaders to act upon. It is only by so doing that Tanzania will be counted as the country which follows the Rule of law.

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