



# UNIVERSITY OF LUSAKA

**SCHOOL OF LAW**

**A CRITIQUE OF THE USE OF THE PREROGATIVE OF MERCY IN ZAMBIA VIS A  
VIS THE INDEPENDENCE OF THE JUDICIARY AND THE FIGHT AGAINST  
CORRUPTION**

**BY:**

**NIZA CHIRWA**

**LLB19217873**

An obligatory essay submitted to the University of Lusaka in partial fulfillment of the requirements for the award of the Bachelor of Laws (LLB) Degree

2023

## DECLARATION

I, **NIZA CHIRWA**, do hereby declare that this dissertation titled **“A CRITIQUE OF THE USE OF THE PREROGATIVE OF MERCY IN ZAMBIA VIS A VIS THE INDEPENDENCE OF THE JUDICIARY AND THE FIGHT AGAINST CORRUPTION”** which is hereby submitted to the School of Law at the University of Lusaka as part of the requirements for the award of the Bachelor of Laws (LLB) degree, is solely of my own and that it has, to the best of my knowledge, not yet been presented for any academic purposes in Zambia or elsewhere. Other people’s work and sources used in the study have been acknowledged. I hereby declare that I have read and understood the regulations governing the submission of the Bachelor of Laws Degree (LLB) dissertation including those relating to length and plagiarism, as contained in the rules of the University and that this dissertation conforms to those regulations.

Signature.....

Date.....

**SUPERVISOR’S RECOMMENDATION**

I, **KAWAMA MWAMFULI**, do recommend that the dissertation titled ‘**A CRITIQUE OF THE USE OF THE PREROGATIVE OF MERCY IN ZAMBIA VIS A VIS THE INDEPENDENCE OF THE JUDICIARY AND THE FIGHT AGAINST CORRUPTION**’ authored by **NIZA CHIRWA**, STUDENT NUMBER LLB19217873 was done under my supervision, be admitted by the University. I have checked it carefully and I am satisfied that it meets the requirements related to format as laid down by the University Regulations governing directed research.

.....  
**HON. KAWAMA MWAMFULI**

**(Supervisor)**

.....  
**(Date)**

## **DEDICATION**

This dissertation is dedicated to my Parents, Mr Garrison Chirwa and Mrs Mable Chirwa.

## **ACKNOWLEDGEMENTS**

First and foremost, i would like to thank the Lord Almighty for guiding me throughout my law school journey, may his name be praised.

I would like to pay special gratitude to my dear parents for all the sacrifices they made throughout this journey, I love you.

I would further like to thank my supervisor, Hon. Kawama Mwamfuli, for the guidance, correction and support towards the success of this dissertation.

I'm grateful to Ms. Mwaka Chizinga, Mrs. Kaswalale Mwauluka, Mrs Chola and all the lectures from the University of Lusaka for the knowledge I acquired all through this amazing journey.

I would also like to thank my siblings, Iton Chirwa and Natasha Chirwa.

And lastly, I would like to extend my gratitude to all my friends, namely, Precious Nkhuwa, Ryan Mbula, Godfrey Banda, Cornelius Bwalya, Neema Cheyo, Alice Ndamikwa, Wezi Muletambo, Jonathan Kashita, Jeff Dube, Davy Sisii and all those I haven't mentioned.

## **Table of Contents**

DECLARATION.....	ii
RECOMMENDATION.....	iii
DEDICATION.....	iv
ACKNOWLEDGEMENT.....	v
<b>1.0 GENERAL INTRODUCTION.....</b>	<b>1</b>
<b>1.1 BACKGROUND OF STUDY.....</b>	<b>2</b>
<b>1.2 BACKGROUND TO THE PROBLEM.....</b>	<b>3</b>
<b>1.3 STATEMENT OF THE PROBLEM.....</b>	<b>4</b>
<b>1.4.0 GENERAL OBJECTIVE.....</b>	<b>5</b>
<b>1.4.1 SPECIFIC OBJECTIVES.....</b>	<b>6</b>
<b>1.5 RESEARCH QUESTIONS.....</b>	<b>6</b>
<b>1.6 SIGNIFICANCE OF STUDY.....</b>	<b>6</b>
<b>1.7 SCOPE OF THE STUDY.....</b>	<b>7</b>
<b>1.8 DEFINITION OF TERMS AND ACRONYMS.....</b>	<b>7</b>
<b>1.9 LITERATURE REVIEW.....</b>	<b>7</b>
<b>1.10 METHODOLOGY.....</b>	<b>12</b>
<b>1.10.1 RESEARCH APPROACH.....</b>	<b>12</b>
<b>1.10.2 RESEARCH DESIGN.....</b>	<b>12</b>
<b>1.10.3 RESEARCH TYPE.....</b>	<b>12</b>
<b>1.10.4 STUDY POPULATION.....</b>	<b>12</b>

<b>1.10.5</b>	<b>SAMPLE SIZE.....</b>	<b>13</b>
<b>1.10.6</b>	<b>SAMPLING TECHNIQUES.....</b>	<b>13</b>
<b>1.11</b>	<b>DATA COLLECTION.....</b>	<b>13</b>
<b>1.12</b>	<b>DATA ANALYSIS.....</b>	<b>13</b>
<b>1.13</b>	<b>ETHICAL CONSIDERATIONS.....</b>	<b>13</b>
<b>1.14</b>	<b>TIMETABLE WITH INTENDED TIMELINE.....</b>	<b>13</b>
<b>CHAPTER 2.....</b>		<b>15</b>
	<b>AN ANALYSIS OF ZAMBIA'S LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING THE CRITERIA FOR THE APPLICATION OF PRESIDENTIAL PARDON.....</b>	<b>15</b>
<b>2.0</b>	<b>INTRODUCTION.....</b>	<b>15</b>
<b>2.1</b>	<b>DEFINITION AND NATURE OF PRESIDENTIAL PARDON.....</b>	<b>15</b>
<b>2.2</b>	<b>HISTORICAL BASIS OF THE POWER OF PARDON.....</b>	<b>16</b>
<b>2.3</b>	<b>THE LEGAL AND INSTITUTIONAL FRAMEWORK OF PRESIDENTIAL PARDON IN ZAMBIA.....</b>	<b>16</b>
<b>2.4</b>	<b>THE CONSTITUTION OF ZAMBIA 1991.....</b>	<b>16</b>
<b>2.5</b>	<b>THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016.....</b>	<b>17</b>
<b>2.5.1</b>	<b>ADVISORY COMMITTEE ON PREROGATIVE OF MERCY.....</b>	<b>18</b>
<b>2.6</b>	<b>ARE PRESIDENTIAL PARDON POWERS NECESSARY.....</b>	<b>18</b>
<b>2.7</b>	<b>THE EFFECTS OF THE GRANT OF A PARDON.....</b>	<b>21</b>
<b>2.8</b>	<b>CONCLUSION.....</b>	<b>23</b>
<b>CHAPTER 3.....</b>		<b>24</b>

PRESIDENTIAL PARDON AND EROSION OF JUDICIAL INDEPENDENCE.....	24
<b>3.0 INTRODUCTION.....</b>	<b>24</b>
<b>3.1 DEFINITION OF JUDICIAL INDEPENDENCE.....</b>	<b>24</b>
<b>3.2 THE DOCTRINE OF SEPARATION OF POWERS IN RELATION TO THE INDEPENDENCE OF THE JUDICIARY.....</b>	<b>25</b>
<b>3.2.1 EXECUTIVE BRANCH.....</b>	<b>25</b>
<b>3.2.2 LEGISLATIVE BRANCH.....</b>	<b>25</b>
<b>3.2.3 JUDICIAL BRANCH.....</b>	<b>26</b>
<b>3.3 THE ROLE OF THE JUDICIARY IN SOCIETY AND THE CONCEPT OF THE RULE OF LAW.....</b>	<b>26</b>
<b>3.4 JUDICIAL INDEPENDENCE IN ZAMBIA.....</b>	<b>27</b>
<b>3.4.1 FUNCTIONAL INDEPENDENCE OF THE JUDICIARY.....</b>	<b>28</b>
<b>3.4.2 FINANCIAL INDEPENDENCE OF THE JUDICIARY.....</b>	<b>28</b>
<b>3.5 THE USE OF PRESIDENTIAL PARDON AND ITS IMPACT ON THE INDEPENDENCE OF THE JUDICIARY.....</b>	<b>29</b>
<b>3.6 CONCLUSION.....</b>	<b>31</b>
<b>CHAPTER 4.....</b>	<b>33</b>
PRESIDENTIAL PARDON AND ITS EFFECT ON THE FIGHT AGAINST CORRUPTION.....	33
<b>4.0 INTRODUCTION.....</b>	<b>33</b>
<b>4.1 DEFINITION OF CORRUPTION.....</b>	<b>33</b>
<b>4.2 TYPES OF CORRUPTION.....</b>	<b>34</b>
<b>4.3 EFFECTS OF CORRUPTION ON A NATION.....</b>	<b>35</b>



<b>4.4 THE IMPACT OF PRESIDENTIAL PARDON ON THE FIGHT AGAINST CORRUPTION.....</b>	<b>37</b>
<b>4.6 CONCLUSION.....</b>	<b>39</b>
<b>CHAPTER 5.....</b>	<b>40</b>
<b>CONCLUSION AND RECOMMENDATIONS.....</b>	<b>40</b>
<b>5.0 INTRODUCTION.....</b>	<b>40</b>
<b>5.1 GENERAL CONCLUSIONS.....</b>	<b>40</b>
<b>5.2 SUMMARY OF CHAPTERS.....</b>	<b>40</b>
<b>5.7 RECOMMENDATIONS.....</b>	<b>42</b>
<b>BIBLIOGRAPHY.....</b>	<b>44</b>

## **TABLE OF STATUTES**

The Anti Corruption Act No. 3 of 2012

The Constitution of Zambia Act No. 2 of 2016

The Constitution of Zambia Chapter 1 of the Laws of Zambia

The Constitution of Kenya (2010)

The Kenyan Power of Mercy Act No. 21 of 2011

## **ABSTRACT**

This thesis is premised on the prerogative of mercy vis a vis the independence of the judiciary and the fight against corruption. The study focuses on the laws in Zambia which provides for the prerogative of mercy powers and how the use of this power has impacted on the independence of the judiciary and the fight against corruption. The purpose of this research was to ascertain how the exercise of the mercy power has impacted on the independence of the judiciary and the fight against corruption in Zambia.

The methodology of this research is as follows; this research was a qualitative mode of research as data was collected from both primary and secondary sources which include, local and foreign legislation, textbooks, journal articles, internet sources and text books. The design of this research is blended between historical and narratives. The research is couched as a descriptive one as it shall describe how presidential clemency has impacted on the independence of the judiciary and the fight against corruption. The data collected was analyzed using narrative data analysis.

The major findings of the research were that Zambia does not have laws that protect an abuse of the use of the prerogative of mercy powers. And as such, it has been very easy to misuse this power by successive presidents because of lack of laws to make the holder of power accountable. This has resulted in the eroding of judicial independence and the fight against corruption through the use of this power.



# CHAPTER ONE

## 1.0 INTRODUCTION

The prerogative of mercy, also known as executive clemency or pardon power, “is the authority of the ruling executive, president or monarch to forgive a criminal, or commute a criminal sentence.”<sup>1</sup> Dicey describes it as, “the residue of discretionary or arbitrary authority which, at any given time, is legally left in the hands of the Crown.”<sup>2</sup> This usually happens when the President sets a convicted person free from the offence (s) committed before the expiry of the sentence imposed by the court.

The mercy power is important in every democratic dispensation in that it allows the president to forgive offenders for their wrong doings. Another positive effect of pardon is to decongest prisons which have been overcrowded lately. When this happens, it will help to promote a health and safety environment for the prisoners. Pardon is also a good means of redressing the wrong done to a wholly innocent person convicted in a court of law either rightly or wrongly. In the case of **Ex parte Grossman**<sup>3</sup> it was stated as follows;

*“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of criminal law. The administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies to vest in some authority, other than the court, power to ameliorate or avoid particular judgments. It is a check entrusted to the executive for special cases.”*

---

<sup>1</sup> Mumba Malila ‘*The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption*’ p6

<sup>2</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn, MacMillan (1959)

<sup>3</sup> 267 US 87: 69 L Ed 527

From the above it can be seen and observed that one of the justification for presidential pardon is to afford an innocent person who was convicted wrongly, the chance to get out of prison. This is surely a positive effect of presidential pardon.

However, despite all the positive effects that presidential pardon has to offer, it also has some negative effects. In recent times this mercy power has become an issue in that the beneficiaries of this power are mostly individuals who are connected to the holder of this power. "This has been seen as circumventing the justice system by, almost indiscriminately, issuing official pardons to convicts of the executive's choice."<sup>4</sup>

Qualitatively, most of the individuals who have been pardoned in the last ten years in Zambia have unwarrantedly benefited friends of the president and some politically aligned prisoners, making the mercy power appear as if it were designed to further personal ends rather than for the benefit of the public.<sup>5</sup> This has been disappointing and a concern for many observers given that in the exercise of the mercy power, the president has the benefit of advice from the Prerogative of Mercy Committee.<sup>6</sup>

It should be noted that this mercy power is not subject to any checks and balances and has since been prone to abuse. The question is therefore whether or not this mercy power has impacted on the independence of the judiciary and the fight against corruption.

## **1.1 BACKGROUND OF STUDY**

The prerogative of mercy power has been exercised since Zambia got independence. Successive presidents of Zambia have invoked the pardon power, citing various reasons. These have ranged from the need for reconciling the nation and decongesting prisons. President Kaunda pardoned 1000 prisoners including those convicted of planning to overthrow Kaunda's government in 1980. The second President, Frederick

---

<sup>4</sup> Mumba Malila '*The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption*'

<sup>5</sup> Mumba Malila '*The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption*' p1

<sup>6</sup> Article 96 of the **Constitution of Zambia** (Amendment ) Act No 2. of 2016

Chiluba, issued pardons regularly while in office. A notable instance of the exercise of the pardon power by President Chiluba was on 24 January 1997, when 600 inmates were pardoned.

In February 2004, Levy Mwanawasa, the third Republican President pardoned numerous prisoners during his tenure as President and commuted many death sentences including the soldiers who were convicted of plotting to overthrow President Chiluba in 1997. President Rupiah Banda and president Micheal Sata also exercised this pardon without restraint. Likewise, the sixth president, Edgar Lungu did equally issue pardons at almost every commemorative national holiday. The notable ones are the pardon of General Kanene, Chishimba Kambwili, Saidi Banda, Mathew Mohan and Keith Mukata to mention but a few.

From the above, it can be seen that every Zambia's President has invoked the mercy power citing various positive reasons. However, this power has been seen to undo and weaken the effects of judicial decisions and has diminished the deterrent effect of punishment. It has also been seen as encouraging corruption because most politically connected individuals who are convicted of corruption end up being pardoned. When the corrupt are pardoned the fight against corruption is undermined. All this is due to lack of proper criteria that is used in invoking this power.

## **1.2 BACKGROUND TO THE PROBLEM**

The power to pardon convicts in Zambia vests in the President. The president may exercise this power on the recommendation of the Advisory Committee on the prerogative of mercy pursuant to **Article 97 (1)**<sup>7</sup> of the Constitution of Zambia. The Advisory Committee is established by **Article 96**<sup>8</sup>, it provides that "the Advisory committee on prerogative of mercy which consists of people appointed by the President will advise the president on an action to be taken in relation to a person convicted of an offence by a court or court martial." The Constitution of Zambia also provides for the

---

<sup>7</sup> Act No. 2 of 2016

<sup>8</sup> *ibid*

independence of the judiciary under **Article 122**<sup>9</sup> of the Constitution. This entails that the judiciary must not be subject to control or its decision to be interfered with by any person.

From the above provisions it can be seen that the president exercises the prerogative of mercy power on the advice of the prerogative of mercy committee. However, their advice is not binding on him and the members of the committee are appointed by the president. This leaves the mercy power prone to abuse.

### **1.3 STATEMENT OF THE PROBLEM**

The use of the power pardon is a serious indictment on the independence of the judiciary. It is a groundless, gratuitous and needless interference with some judicial outcomes properly determined by the courts. It pre-empts and nullifies the decision of the judiciary which is supposed to be independent and thereby rendering it impotent. When the president who is the head of the executive branch of government interferes with the decision of the court by pardoning convicted persons without the involvement of the judiciary, it undermines the functions of the judiciary and its independence. When this happens, it makes the judiciary not to be independent thereby leading to a breach of **Article 122**<sup>10</sup> of the Constitution of Zambia, which provides for the independence of the judiciary. It follows therefore that any decision made by the court should be respected by any person in order to preserve the independence of the judiciary. When the president pardons a convicted person without the involvement of the makers of the decision, it undermines their powers and goes against the doctrine of separation of powers which entails that every branch of government should be independent and free from any interference from any person or branch of government. **Malila** observes that presidential pardon sidestep and weaken the effects of judicial decisions, and in the process, demoralize their makers, victims of crime and their families, witnesses and

---

<sup>9</sup> Act No. 2 of 2016

<sup>10</sup> *ibid*



other players in the criminal justice system, not least, investigators, prosecutors and prison personnel. It can, above all, diminish the deterrent effect of punishment”<sup>11</sup>

Equally, the use of the mercy power on persons convicted of corruption also has a negative impact on the fight against corruption. Corruption is a disease that every country in the world keeps fighting because of the impact it has on a country. Hence, there is a need to make sure that persons convicted of this negative vice called corruption should serve their sentence without any interference by the president through the exercise of the pardon powers. However, qualitatively in Zambia, most of the politically aligned individuals who were convicted of corruption were pardoned by the holder of power. Among them were former ministers, **Austin Liato**, **Chishimba Kambwili**, **Moses Muteteka**, **Maxwell Mwale**, and former Zambia Air Force Commander **Christopher Singogo**. This has the ability to promote impunity among those in government to commit crimes knowing that they will procure a pardon and be set free. When this happens, the fight against corruption is undermined thereby promoting lawlessness and sending a bad signal to the public. **Udofa** posits that, “the mercy power has been used to protect public officials charged with high trust violations of the law and misappropriation of public monies.”<sup>12</sup>

From the foregoing, it can be observed that despite all the positive effects of presidential pardon, it undermines the independence of the judiciary by interfering with its decisions. Presidential pardon also has the ability to undermine the fight against corruption considering the fact that persons convicted of corruption end up being pardoned.

---

<sup>11</sup> Mumba Malila ‘*The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption*’

<sup>12</sup> Udofa, I. ‘*The Abuse of Presidential Power of Pardon and the Need for Restraints*’ 2018 *Beijing Law Review*, 9, 113-131

#### **1.4.0 GENERAL OBJECTIVE**

The aim of this research is to analyze the use of Presidential pardon in Zambia and how it has impacted on the independence of the judiciary and the fight against corruption.

#### **1.4.1 SPECIFIC OBJECTIVES**

1. To analyse Zambia's legal and institutional framework governing Presidential Pardon.
2. To examine how Presidential Pardon has impacted on the independence of the judiciary.
3. To analyze how the use of Presidential pardon on people convicted of corruption has affected the fight against corruption.

#### **1.5 RESEARCH QUESTIONS**

1. What is the legal and institutional framework that governs Presidential Pardon in Zambia?
2. How has the use of Presidential pardon impacted on the independence of the Judiciary?
3. How has the use of Presidential pardon on persons convicted of corruption affected the fight against corruption?

#### **1.6 SIGNIFICANCE OF STUDY**

The importance of this study is to analyze the legal and institutional frame work with regards to the use of presidential pardon in Zambia. The study also seeks to bring out how the use of presidential pardon has impacted on the independence of the judiciary

and the fight against corruption. This study shall endeavour to bring out what must be done in order to preserve the independence of the judiciary in the exercise of the mercy power. The study will also show how exercising the mercy power on individuals convicted of corruption has an impact on the fight against corruption.

## **1.7 SCOPE OF THE STUDY**

The study will cover the examination of provisions in the Constitution of Zambia which addresses the subject of presidential pardon. The study will also look at various pieces of writings from different scholars both from within Zambia and abroad.

## **1.8 DEFINITION OF TERMS AND ACRONYMS**

**Clemency**, “The power of the President or a governor to pardon a criminal or commute a criminal sentence.”<sup>13</sup>

**Corruption**, “The act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; a fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others.”<sup>14</sup>

**Judiciary**, “The branch of government responsible for interpreting the laws and administering justice.”<sup>15</sup>

## **1.9 LITERATURE REVIEW**

**Malila** opines that “the vast power of clemency is nearly limitless in its potential for abuse. It will continue to promote impunity and weaken democratic procedures while

---

<sup>13</sup> Bryan A. Garner, **Black's Law Dictionary** (8th ed. 2004)

<sup>14</sup> *ibid*

<sup>15</sup> Bryan A. Garner, **Black's Law Dictionary** (8th ed. 2004)

fostering cronyism unless it is stopped sooner. Whatever one's perspective on Zambia's use of the presidential pardon power, one thing that is certain is that it sets the ground for periodic crippling blows against not only court verdicts, but also the battle against corruption and a levelled political field. He opines that presidents in different countries have given the pardon power different weights. There are several examples of public officials charged with high trust violations of the law and misappropriation of public monies who have been protected by the use of the pardon power. Simultaneously, men who have committed minor offences but lack the financial means or political clout to speak for them languish in bars and are rarely considered for forgiveness.”<sup>16</sup> This position is agreed upon by **Udofa**<sup>17</sup>, **Goodrich**<sup>18</sup>, **Chowdhury**<sup>19</sup>, **Goldstone**<sup>20</sup> and **Dicey**<sup>21</sup>. Therefore, this study shall be the same as the research above as it affirms the fact that presidential clemency has impacted on the independence of the judiciary and the fight against corruption.

**Ng'andu**<sup>22</sup> posits that, “It is clear from the established procedure that the power of clemency is discretionary and that the President is not even obliged to follow the recommendation of the Advisory Committee. Moreover, the person applying for clemency is not given an opportunity to state his case with the aid of a lawyer.” “It is clear that such a procedure is not suitable for remedying any defects that may have occurred during the trial. This procedure needs to be reviewed so as to accord each person seeking clemency an opportunity to present his or her case to the Advisory Committee rather than letting the decision be arrived at in secrecy.” This study will be different from the research above as it shall seek to bring out how the use of presidential clemency has impacted on the independence of the judiciary and the fight against corruption.

---

<sup>16</sup> M Malila, ‘The Use of Presidential Clemency in Zambia: Reflections on its impact on the independence of the Judiciary and the fight against corruption’ (2021)

<sup>17</sup> , I. ‘The Abuse of Presidential Power of Pardon and the Need for Restraints’ 2018 *Beijing Law Review*, 9, 113-131

<sup>18</sup> James P. Goodrich ‘Use and Abuse of the Power to Pardon’ (1921) Vol 11 *Journal of Criminal Law and Criminology* p341

<sup>19</sup> M Jashim Ali Chowdhury *President's 'Lockean' Prerogative of Mercy: A Lawful Lawlessness?* (2010) p48-49

<sup>20</sup> <https://www.ibanet.org/article/465431E6-8846-4A89-BA0A-6A8B85E5ED1D>

<sup>21</sup> A.V Dicey and J.W.F Allison, *Law of the Constitution*, (Oxford University Press 2013)

<sup>22</sup> [https://www.biicl.org/files/2305\\_country\\_report\\_zambia\\_ngandu.pdf](https://www.biicl.org/files/2305_country_report_zambia_ngandu.pdf); “The death penalty in Zambia

**Besa** states that, “the presidential pardon system has a long history and has undergone significant changes over the centuries, and that it has thus remained in use as a system for distributing justice and equity rather than a private right of the president to grant mercy at his arbitrary will. When used effectively and in accordance with the law, it can replace the strict criminal law rules as a means of adapting to changing times and values.”<sup>23</sup> This study is different from the above research as it seeks to analyze the effect presidential pardon has on the independence of the judiciary and the fight against corruption.

**Leslie Sebba** stated a number of points with regards to Presidential pardon. She stated that, in the modern world, there are a variety of reasons for abolishing the pardoning power, including democratisation of political power on the one hand and progress in prison reform on the other.<sup>24</sup> Nonetheless, in nearly every jurisdiction, this institution is a fundamental part of the constitutional framework. The head of state or top executive continues to have the majority of decision-making authority. The most prevalent approach, which is mostly found in Communist nations, entrusts executive or presidential power to a body.<sup>25</sup>

**Ekwenze** opines that, “presidential pardoning powers are a necessary soothing balm.”<sup>26</sup> This study will take different views with regards to whether presidential pardon is a necessary soothing balm in Zambia.

**Davidson** posits that, “the president has sole jurisdiction over pardons, and his exercise of this power is broad and unrestricted by any set standards or criteria. The president's pardon power can be broad, conditional, or limited to just commuting a sentence. It may not violate other parts of the Constitution, but it is not subject to congressional oversight. While the president has nearly unrestricted ability to pardon, either unconditionally or conditionally, or to commute a sentence, the legal effect of a pardon is far more

---

<sup>23</sup> Arifi Besa ‘*The Legal Reasoning Of The President's Right To Issue Pardons*’ (2017) Vol 12 Seeu Review pp.32

<sup>24</sup> Leslie Sebba ‘*The Pardoning Power-A World Survey*’ (1977) Volume 68 *Journal of Criminal Law and Criminology* 120

<sup>25</sup> Leslie Sebba ‘*The Pardoning Power-A World Survey*’ (1977) Volume 68 *Journal of Criminal Law and Criminology* 120

<sup>26</sup> S. A.M. Ekwenze, ‘*Presidential pardon and prerogative of mercy; a soothing balm necessary for social justice*’ (June 19, 2014) Available at <http://ssrn.com/abstract=2541929>

limited.”<sup>27</sup> This study is different from Davidson research as it shall focus on the impact presidential clemency has on the independence of the judiciary and the fight against corruption.

**Joseph Azize**<sup>28</sup>, in contrast, wrote that the prerogative of mercy is “considered an extra ordinary avenue of appeal and that should be more widely known in order that it not only continue, but that it be more widely invoked.”<sup>29</sup>.

**M Jashim Ali Chowdhury** stated; “While the constitution typically governs the pardoning authority, its use necessitates the use of a pre-constitutional power, the right to self-impose and suspend the rule of law”<sup>30</sup>

He further states that led that among executive powers, the pardoning power has the most gleaming aspect of sovereignty. When the head of state exercises the pardoning power, he proclaims an exception and nullifies the actions of other departments of government. This sacred obligation is anticipated to be carried out solely for the sake of greater justice, not for the sake of political expediency or inconvenience..<sup>31</sup>

The above research above differs from the research being carried out in that it will focus on whether the use of the prerogative of mercy in Zambia has an impact on the independence of the judiciary and the fight against corruption.

**Sakala** in her dissertation titled ‘**the crayons and criteria of presidential pardon in Zambia: A study with lessons from Kenya**’ stated that, “prerogative of mercy not only affects the judicial system but also the victims and the people of the country. Therefore, because the victims and the public are affected, their interests must be protected by the law. The law should provide a criteria and procedure for the way in which the prerogative of mercy is exercised due to the potential threat it may have to the safety of

---

<sup>27</sup> Michael J. Davidson ‘*The President’s Pardon Power*’ 2020 *Military Review* p136

<sup>28</sup>Joseph Azize, ‘*The Prerogative of Mercy in NSW*’ (2007) 1 Public Space: *The Journal of Law and Social Justice*

<sup>29</sup>Ibid

<sup>30</sup>M Jashim Ali Chowdhury *President’s ‘Lockean’ Prerogative of Mercy: A Lawful Lawlessness?* (2010) p48-49

<sup>31</sup>Ibid

the general public.”<sup>32</sup> This research is different from the above research as it shall seek to examine the impact presidential clemency has on the independence of the judiciary and the fight against corruption.

**Zunduna** in her research paper titled ‘**A critique of the legal framework on the prerogative of mercy in Zambia vis a vis rule of law and separation of powers: A comparative study with Kenya**’ opines that, “there is no qualification for pardon eligibility. In essence, as long as a person has been convicted; no further requirement has been set out under the law. Appeals or requests cannot be made to the president, [recommendations can only come from advisory committee] for him to pardon certain people based on certain circumstances such as major contributions to society or admission of guilt at trial.”<sup>33</sup> This research shall build up on the research above by analyzing how presidential clemency has affected the independence of the judiciary and the fight against corruption.

**Duker** states that, “The President's motivations for using the power cannot be questioned by Congress or the courts. Although in a democracy, nothing should be higher than the rules, the American system has one constitutionally sanctioned exception to this noble notion. Power is handed to the executive alone, and it is entrusted without restriction. The only regulation controlling the use of the power is that it must not be used against the public interest, despite the fact that he alone has the authority to define the public interest.”<sup>34</sup> This research is different from the research above as it shall analyze how the use of presidential pardon has impacted on the independence of the judiciary and the fight against corruption.

---

<sup>32</sup> Thandiwe Sakala; ‘**the crayons and criteria of presidential pardon in Zambia: A study with lessons from Kenya**’ (UNILUS LLB Dissertation, 2021)

<sup>33</sup> Mutinta Zunduna; **A critique of the legal framework on the prerogative of mercy in Zambia vis a vis rule of law and separation of powers: A comparative study with Kenya**’ (UNILUS LLB Dissertation, 2022)

<sup>34</sup>William F. Duker ‘*The President's Power to Pardon: A Constitutional History*’ (1976-1977) Vol 18 *William & Mary Law Review* 535”

**Chipola**<sup>35</sup> posits that, “the prerogative of mercy as an extra judicial remedy and its main purpose is to function as a corrective institution for miscarriages of justice, thus serves as a ‘post-conviction.’”

**Hossain and E-Alam**<sup>36</sup> posits that, “clemency has its own significance. It is the last shelter of judicial mistake. The necessity of granting mercy can’t be denied. That is why almost every country exercises this power. But it must be kept in mind that this power is exercised for justice and not for injustice. So this power is to be exercised very cautiously and fairly.”

**Greentree**<sup>37</sup> argues that the prerogative of mercy should be retained as it is a necessary and appropriate power of the Executive as they offer chances for redemption.

## **1.10 METHODOLOGY**

### **1. Research Approach**

The study shall utilize the qualitative research approach, this approach has been utilized because the study aims to investigate the impact of presidential clemency on the independence of the judiciary and the fight against corruption. Within this study, issues to do with the exploration of legal tenets and phenomenon will be the main focus while utilizing descriptions of works, concepts and ideas on the subject matter.

### **2. Research Design**

This research will utilize the narrative and historical designs as a guiding framework for collecting, interpreting and analyzing data.

### **3. Research Type**

---

<sup>35</sup>BakoChipola; Capital Punishment in Zambia and the Presidential prerogative of mercy (UNZA LLB Dissertation 2004)

<sup>36</sup> Hossain and E-Alam, **A Legal Analysis of the Presidential Prerogative of Mercy in Bangladesh**

<sup>37</sup> Catherine D. Greentree, **Retaining The Royal Prerogative of Mercy in New South Wales** (UNSW Law Journal)



This study will be descriptive as it shall describe how presidential clemency has impacted on the independence of the judiciary and the fight against corruption.

#### **4. Study Population**

The population for this study will be drawn from Zambia. As of 2010 the population for Zambia stood at thirteen million.<sup>38</sup>

#### **5. Sample Size**

Although the sample size is supposed to be calculated based on the study population stated above, this study will include 10 people selected from the population.” The sample size has been provided for by the course guidelines.<sup>39</sup>

#### **6. Sampling Techniques**

This research subjects will be sampled using purposive sampling technique.

### **1.11 DATA COLLECTION**

Data for this study will be collected using mostly desk research, that is, using google and books by eminent scholars.

### **1.12 DATA ANALYSIS**

The data collected for this study will be analyzed using narrative data analysis method.

### **1.13 ETHICAL CONSIDERATIONS**

In order to conform with research ethics requirements, first, permission will be sought from the unilus research ethics committee, second, permission will be sought from organizations, third, permission will be sought from individual research subject. The

---

<sup>38</sup> CSO (2010)

<sup>39</sup> L400, 2022

researcher will endeavour to follow academic writing principles like referencing and acknowledgement of other people’s work.

#### **1.14 TIMETABLE WITH INTENDED TIMELINE**

<b>ACTIVITY</b>	<b>DATE</b>	<b>DURATION</b>
<b>Submission and Completion of Chapter 1</b>	<b>30<sup>th</sup> December 2022</b>	<b>1 Month</b>
<b>Submission of Chapter 2 to supervisor</b>	<b>30<sup>th</sup> January 2023</b>	<b>1 Month</b>
<b>Submission of Chapter 3 to supervisor</b>	<b>28<sup>th</sup> February 2023</b>	<b>1 Month</b>
<b>Submission of Chapter 4 to supervisor</b>	<b>31<sup>st</sup> March 2023</b>	<b>1 Month</b>
<b>Submission of Chapter 5 to supervisor</b>	<b>28<sup>th</sup> April 2023</b>	<b>1 Month</b>
<b>Submission of first draft</b>	<b>5<sup>th</sup> May 2023</b>	<b>1 Week</b>
<b>Submission of Dissertation to Course Coordinator</b>	<b>19<sup>th</sup> May 2023</b>	<b>1 Day</b>

**CHAPTER TWO**

**AN ANALYSIS OF ZAMBIA'S LEGAL AND INSTITUTIONAL FRAMEWORK**

**GOVERNING THE CRITERIA FOR THE APPLICATION OF PRESIDENTIAL**

**PARDON**

**2.0 INTRODUCTION**

This chapter will endeavour to analyze the legal and institutional framework that governs presidential pardon in Zambia. This will be done by analyzing the provisions of the constitution that pertains to presidential pardon. This chapter will as well elaborate on whether presidential pardon powers are necessary. Further, the chapter shall adumbrate on the effects of the grant of pardon.

**2.1 DEFINITION AND NATURE OF PRESIDENTIAL PARDON**

The pardon power is the power vested in the executive. It gives an opportunity for the holder of power to pardon criminal or commute sentence. Marshall defines it as a gesture of kindness that "releases the recipient from the penalty the law imposes for a crime he has committed."<sup>40</sup> According to Blackstone, the Royal Prerogative refers to the authority that the King holds exclusively for himself, as opposed to that which he holds jointly with any of his subjects."<sup>41</sup> You can define the prerogative of compassion in

---

<sup>40</sup> United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833)

<sup>41</sup> W. Blackstone, Commentaries on the Laws of England, Clarendon Press (1979)

Zambia by replacing the term "King" in these definitions with "President". In Zambia, the prerogative of mercy powers is vested in the president who is the head of the executive. The president has been given the power to forgive persons who have been convicted by the court. It acts as an act of grace on the person this power is bestowed.

The bearer of the power exercises authority that may not be the most imposing of powers granted to the country's chief executive officer when granting any pardon. In actuality, it is the greatest kind-hearted power that may be used without evident or apparent limitations. It has a wide range of discretion, the ability to overturn court orders, and the least chance of being legally challenged. Clemency powers have not yet been the focus of any notable legal challenges in Zambia, despite being a topic of passing criticism from the bench.<sup>42</sup>

## **2.2 HISTORICAL BASIS OF THE POWER OF PARDON**

Almost every nation has legislation granting the executive the authority to pardon offenders.<sup>43</sup> Duker observes that in the British tradition "the prerogative of mercy made its debut on the statutory rolls of the Anglo-Saxon monarchs during the reign of King Ine of Wessex (668 -725 A.D).<sup>44</sup> In Zambia the power to pardon exists. It exists from the country's independence and is traceable to the pardon power in Britain, the former colonial power. Thus, Zambia's pardon power comes from the British tradition.

## **2.3 THE LEGAL AND INSTITUTIONAL FRAMEWORK OF PRESIDENTIAL PARDON IN ZAMBIA.**

Various parliamentary acts mention the presidential pardon. The president of Zambia has the authority to pardon inmates because the constitution is the ultimate law of the

---

<sup>42</sup> 6 See, for example, *Alex Njamba v. The People* (Reportable Judgment No 1 of 2020)

<sup>43</sup> A. Nowark, 'Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective', 49(4) *University of Michigan Journal of Law Reform* (2015) 817-51

<sup>44</sup> W. F. Duker, 'The President's Power to Pardon: A Constitutional History', 18 (3) *William and Mary Law Review* (1977) 475-538 at 476

state. This first appeared in Zambia's constitution in 1991. The provision regarding the presidential pardon had minor adjustments when Act No. 2 of 2016 was adopted.

## **2.4 THE CONSTITUTION OF ZAMBIA 1991**

According to **Article 59**<sup>45</sup> of the constitution the president was given the power to pardon. The said Article stated that, *“Any person convicted of an offense may receive a pardon from the President, either unconditionally or subject to legal requirements.”* The President was also given the power to remit or substitute a less severe punishment that the person was suppose to undergo. However, the criteria of the pardon power was not set out in the constitution. This left the pardon power open to abuse as no criteria was provided. This shows how weak the provision to do with the pardon power was in the 1991 constitution.

Further, **Article 60**<sup>46</sup> stated that, *“A committee of advisors on the prerogative of compassion will be established, and its members will be chosen by the president.”*

The advisory council for the prerogative of compassion is created by the aforementioned provision. The clause grants the president the authority to appoint committee members. In order for the president to use his pardoning authority, the committee gave advise to him regarding those who had been convicted. But the President was not required to heed their recommendations. Everything is incorrect because the president was granted discretion to choose the members of the advisory committee. In that there was a likelihood of the members of the advisory committee to recommend people to the president who were in good books with him. You can't have a president given powers to pardon persons on the advice of the committee and the president is given powers to appoint the members of the said committee. In addition, the advice rendered to the president was not even binding on him which entails that the president can simply overlook the advice of the committee and performs this power in accordance with his wants.

---

<sup>45</sup> Ibid

<sup>46</sup> Act No. 1 of 1991

## 2.5 THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016

The Constitution of Zambia, Act No. 1 of 1991, was amended in 1996, but there were no changes to the provisions that pertain to presidential pardon. However, in 2016, minor changes were made. **Article 97**<sup>47</sup> states that, *“The President has the discretion to unconditionally or conditionally pardon someone who has committed an offense based on the advice of the Advisory Committee.”* This altered how people thought about the power of mercy. According to Zambia's Constitution, Act No. 2 of 2016, the president may only grant a pardon with the committee's recommendation. This specific article did not allow the president to pardon on the opinion of the advisory council under the constitution of 1991. This amendment is commendable because it prevents the abuse of the pardon powers by allowing an independent body to have a say in the procedure to provide some regulation in determining which criminals may be eligible for release from prison while taking into account any possible threat to society.

### 2.5.1 ADVISORY COMMITTEE ON PREROGATIVE OF MERCY

**Article 96**<sup>48</sup> of the constitution states that, *“A group of people chosen by the president will serve on an advisory committee on the prerogative of mercy.”* When advising the president on who should be pardoned, the advisory committee has a neutral role to play. This is so because the committee's members are diverse and unrelated to the case. The constitution's **Article 96 (3)**<sup>49</sup> states, however, that *“a member of the Advisory Committee shall hold office at the pleasure of the President.”* This means that the president has control over the members of the committee in that they only hold office at the president's pleasure. This entails that the members of the committee will always want to be loyal to the president since holding office for them is at his pleasure. In addition, no criteria is set out to determine who is qualified to belong to the committee.0

---

<sup>47</sup> Act No. 2 of 2016

<sup>48</sup> *ibid*

<sup>49</sup> *ibid*

## 2.6 ARE PRESIDENTIAL PARDON POWERS NECESSARY?

Malila observes that “the power of pardon is an extraordinary remedy for what would otherwise be insoluble or intractable legal conundrums and perversions.”<sup>50</sup> Ekwenze calls it “a necessary national soothing balm.”<sup>51</sup> It remains to reason whether this claim can be justified. There are various reasons for the justification of presidential pardon.

Firstly is that presidential pardon acts as a necessary safety valve given lawmaker’s inability to anticipate the specifics of every crime and the circumstances surrounding each offender.<sup>52</sup> In their law-making role, it is not unusual for parliaments to give in to public clamour, especially by civil society organizations and social pressure groups, on legislating against some prevalent social vices in society such as drug trafficking and sexual offences. The tendency is for parliamentarians to respond favourably and impose very stiff punishment for certain offences.<sup>53</sup> In situations where the law prescribes the mandatory minimum sentence for a proven offence, the courts oftentimes consider themselves unable to do otherwise than to follow the letter of the law even if they are sympathetic to the convicted person’s peculiar circumstances.” This has been the case in Zambia. In the **People v. Captain Steven Lungu and Others**,<sup>54</sup> for example, “*the Supreme Court of Zambia stated that they had played their part in the conviction of the defendant and that the only alternative left for the defendants was to request a presidential pardon.*” In such circumstances, where judges unable to assume a human face in the light of laws which clearly cause injustice, the pardon power permits presidents to soften the punishment.

The second justification for the use of pardon powers, finds expression in the epigram by Alexander Pope, that to ‘err is human, to forgive divine’.<sup>55</sup> The claim here is that

---

<sup>50</sup> *ibid*

<sup>51</sup> Solomon A.M.Ekwenze, ‘Presidential pardon and prerogative of mercy: a soothing balm necessary for social justice’ (June 19, 2014) Available at SSRN: <http://ssrn.com/abstract=2541929> visited on 6 January 2022

<sup>52</sup> M Malila, **The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against**

<sup>53</sup> *ibid*

<sup>54</sup> Supreme Court of Zambia 2003 (unreported)

<sup>55</sup> Alexander Pope, *An Essay on Criticism* (1688-1744), Creative Media Partners (2018)

judges are not infallible; courts can, and do make mistakes in their decisions. It is not infrequently the case that some convictions may be premised on a misapprehension of the facts surrounding the commission of an offence or on perjured evidence, or sheer human error. There are perhaps no better examples to illustrate the injustice of judicial mistake than the cases of the Guildford Four and the Maguire Seven.

The Guildford Four were four men falsely convicted in 1975.<sup>56</sup> They confessed committing the crimes under extreme strong-arming by police. Following their conviction for murder and other charges they were sentenced to life imprisonment. Years later all the convictions were overturned after it was established that their confessions were inadmissible and the convictions thus 'unsafe and unsatisfactory'. They were released in October 1989.

The Maguire Seven were charged with possessing nitroglycerine allegedly passed to the Irish Resistance Army. Their conviction and sentence in 1976 were served by the surviving six. As inquiry confirmed that their convictions were unsound and were quashed in 1991.<sup>57</sup>

The two cases above exemplify the severe dangers that lurk in entrusting the courts and the finality of their processes, ignoring human infallibility. Perhaps this is why in the case of **Ex parte Grossman**,<sup>58</sup> the court stated that, "*The purpose of executive clemency is to provide relief from excessive punishment or obvious errors in the administration or application of the law.*"

A third, and probably more understandable justification for the existence of pardon powers, has to do with public peace and security. It is argued that the pardons enable the furtherance of public welfare goals. Hamilton notes that;

---

<sup>56</sup> G McKee and R Franey, *Time Bomb*, Bloomsbury Publishing (1988)

<sup>57</sup> D. Pallister, 'An injustice that still reverberates', *The Guardian*, London 19 October 1999

<sup>58</sup> 267 US 87: 69 L Ed 527



*In seasons of insurrection or rebellion there are critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the Commonwealth.*<sup>59</sup>

These views found expression in Zambia during the food riots of June 1990 that left dead at least 27 people. The riots came at the back of deep-rooted dissatisfaction with the one party state of President Kaunda and a public agitation for a return to multiparty politics. The political climate was potentially explosive and a coup was attempted on 30 June 1990. Kaunda had to take a number of measures calculated to calm the situation. He pardoned a number of political prisoners and granted amnesties to some other to set the necessary reconciliatory tone for discussions leading to a return to multiparty democracy. The politically volatile situation was thus diffused and a climate conducive to political dialogue toward pluralism set.<sup>60</sup>

A fourth, and probably less compelling, argument is that external pressure could, in some cases, motivate the use of pardon powers.<sup>61</sup> If an example were required, one would look no further than Zambia's eastern neighbour. In May 2010, late President Bingu Mutharika of Malawi pardoned the homosexual couple of Steven Monjeza, and Tiwonge Chimbalanga, who were arrested after celebrating their engagement and were subsequently convicted of gross indecency and unnatural sexual acts and handed 14 years jail terms by a court in Blantyre. Human rights organizations and aid organizations put pressure on the government to free them.<sup>62</sup> President Mutharika eventually gave in to the demands and pardoned the duo.

---

<sup>59</sup> Alexander Hamilton, *The Federalist*, Independent Journal (1938)482

<sup>60</sup> M Malila, **The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against**

<sup>61</sup> *ibid*

<sup>62</sup> British pop star and AIDS campaigner, Sir Elton John, wrote an open letter to President Mutharika in the *Guardian* newspaper (UK) in early 2010, pleading for the release of the duo, stating that "their trial and harsh sentencing will have a perilous effect on our continuing efforts to combat AIDS in Malawi and potentially reverse the gains we have achieved."

A fifth reason, cited to justify the use of pardon powers, is that of overcrowding in prisons. When in April 2016, former president Edgar Lungu pardoned 525 prisoners the justification given by his press aide was the need to “decongest prisons.”<sup>63</sup>

## 2.7 THE EFFECTS OF THE GRANT OF A PARDON

It is very easy to think and tempting to believe that the effect of a presidential pardon is a complete erasure of the conviction and its consequences. In Zambia, a member of parliament then was pardoned following his conviction. He retained his seat as a member of parliament. The reason was that he was constitutionally entitled to do so.<sup>64</sup> This is due to the fact that a pardon erases any offence committed by the person.

Additionally, prior to the multiparty elections in 1991, the late lawyer Edward Shamwana received a pardon. He immediately returned to his law practice, having been reissued with a practicing certificate. A pertinent question arising is whether the example of these two public personalities are definitive of the real effect of a pardon.

That a pardoned convict is discharged from prison and relieved from further punishment for the offence is beyond peradventure. But what is the real effect of a pardon on his other rights such as the right to hold office of honour and trust; to hold a valid practicing certificate as a lawyer; his credibility as a witness; his record as a first or second offender in the event that he is again charged with a crime? Above all, what is the status of his ‘guilty’ pronounced by a court of law?

It is self-evident that the prerogative of mercy often leads to a number of results some of which seem astoundingly absurd. They include the following. First, that the person pardoned cannot again be prosecuted for that offence. **Article 18(6)**<sup>65</sup> of the Zambian

---

<sup>63</sup>Lusaka Times, 8 April 2016 [www.lusakatimes.com](http://www.lusakatimes.com)

<sup>64</sup> Steven Masumba was MP for Mufumbwe Parliamentary Constituency. The explanation was contained in a letter to Zambian Voice Executive Director, Chilufya Tayali, dated 13 February 2015. See <https://www.lusakatimes.com/2015/03/15/steven-masumba-was-pardoned-and-he-is-free-to-attend-parliament/>

<sup>65</sup> Act No.1 of 1991

constitution, provides that a person who has been pardoned for a criminal offence shall not be tried for that offence. If a person has already been tried and convicted and later pardoned, he cannot again be tried for the same offence. This is due to the rule against double jeopardy. Following a legitimate acquittal or conviction, a procedural defense prevents a person from being tried on the same or similar charge or facts. A peremptory plea of *autrefois acquit* (already acquitted) or *autrefois convict* (previously convicted) may be lawfully raised when an attempt is made to retry such a person.

The idea that a presidential pardon has a purgative impact on the offender once it is granted is another one that is frequently accepted. It transforms the criminal into a *novus homo* (a new man) who is guilt-free, this was stated in the case of **Edward Jack Shamwana v Levy Patrick Mwanawansa**.<sup>66</sup>

Further, in the leading US case of **Ex parte Garland**<sup>67</sup> it was stated that;

“In the eyes of the law, the criminal is as innocent as if he had never committed the crime because a pardon relieves the punishment and erases the guilt.”<sup>68</sup>

From the above, it can be seen that presidential pardon makes a pardoned person a new being. It restores all civil rights the person may have lost due to the conviction, such as the right to hold public office. A person is treated as innocent as if he had never committed any crime.

## 2.8 CONCLUSION

This chapter has endeavoured to analyze the legal and institutional framework with regards to the pardon powers in Zambia. In doing so, the chapter has endeavoured to discuss the historical basis of presidential pardon. The chapter has gone further to look at various provisions from the constitution of Zambia, which pertains to presidential pardon powers. The chapter has distinguished the provisions of Chapter one of the laws

---

<sup>66</sup> (1993 - 1994) ZR 149 (HC)

<sup>67</sup> Ex-parte Garland 71 US 333,380 (1866)

<sup>68</sup> *ibid*

of Zambia to that of Act no.2 of 2016 in relation to pardon powers. The chapter has also elaborated on the necessity of the pardon powers. Further, the chapter has adumbrated on the effects of the grant of the pardon powers.

## **CHAPTER THREE**

### **PRESIDENTIAL PARDON AND EROSION OF JUDICIAL INDEPENDENCE**

#### **3.0 INTRODUCTION**

The goal of this chapter is to discuss the idea of judicial independence. It will next analyze the doctrine of separation of powers in regard to the independence of the judiciary after defining the idea of judicial independence. Additionally, it will define the rule of law and the function of the judiciary in society. The concept of judicial independence as it is outlined in Zambia's constitution will next be discussed. Finally, it will elaborate on how Zambia's judiciary's independence has been harmed by the use of presidential pardons.

#### **3.1 DEFINITION OF JUDICIAL INDEPENDENCE**

The philosophy of rule of law and separation of powers, which calls for the observance of the law and the division of state control among the executive, judiciary, and legislative, provides the foundation for the idea of judicial independence. The doctrine of separation of powers is typically enshrined in a written constitution, and it ensures that

all three branches of government are independent from one another in how they carry out their duties to the public.<sup>69</sup>

There are numerous ways to define judicial independence. However, two ideas that personify the idea stand out. Judges must act impartially and apply themselves freely based on their comprehension of the facts and law that are put in front of them. Secondly, the judiciary should function independently from the other branches of the executive and legislative branches. The first principle represents the idea of the rule of law, and the second principle represents the idea of the separation of powers.

### **3.2 THE DOCTRINE OF SEPARATION OF POWERS IN RELATION TO THE INDEPENDENCE OF THE JUDICIARY**

The doctrine of "separation of powers" is derived from Montesquieu, it is a concept that entails that the three arms of government must work independent from each other. The reason for this is to prevent an abuse of the law.

It follows that the same person should not form part of more than one of the three organs and no organ should interfere in the works of another. It was further stated in the case of **Chishimba Kambwili v The Attorney General**,<sup>70</sup> that *"in order to promote democracy and accountability, the idea of separation of powers calls for a system in which each of the three departments of government operates or functions independently of the others."* The judiciary must therefore be autonomous and not be subject to any influence or control in order to support the theory of separation of powers. The three branches of government are listed below;

#### **3.2.1 EXECUTIVE BRANCH**

---

<sup>69</sup> NJ McNally 'Addressing the tension between judicial independence and judicial accountability' 2010 3; PA 3Gerangelos The Separation of powers and legislative interference in judicial process: Constitutional principles and limitations (2009) 30.

<sup>70</sup> [2020] ZMCC 2

**Article 90**<sup>71</sup> of the Constitution of Zambia provides that, “*The Zambian people are the source of the Executive's power, which must be used for the good of the people and in accordance with social justice principles.*”

The executive is granted administrative powers under **Article 91**<sup>72</sup> of the constitution. The executive is in charge of applying legislation. In doing so, the executive has a duty to uphold the rule of law by acting in conformity with the constitution. The president, vice president, cabinet members, and the attorney general, who serves as an ex officio member, make up the executive branch.

### **3.2.2 LEGISLATIVE BRANCH**

According to **Article 61**<sup>73</sup> of the constitution, the people of Zambia are the source of the legislative power, which must be used fairly.

**Article 62**<sup>74</sup> states that (1) *The President and National Assembly make up Zambia's parliament.* This indicates that the legislative branch has been given the power to enact laws. In doing so, parliament is obligated to uphold the constitution and pass legislation that are consistent with the rule of law. A person or entity other than parliament is also not permitted to make laws unless the constitution specifically authorizes it.

### **3.2.3 JUDICIAL BRANCH**

In every democratic regime, the court is one of the most significant branches. Its duties include interpreting the law and ensuring that justice is done. According to **Article 118**<sup>75</sup> of the constitution, the people of Zambia are the source of judicial authority.

Additionally, **Article 119 (1)**<sup>76</sup> states that *the courts have the authority to exercise justice and that they must do so in accordance with the Constitution and other laws.*

---

<sup>71</sup> Act no. 2 of 2016

<sup>72</sup> *ibid*

<sup>73</sup> *ibid*

<sup>74</sup> *ibid*

<sup>75</sup> *ibid*

<sup>76</sup> Act no. 2 of 2016

From the foregoing, it can be seen that the judiciary derives its authority from the people of Zambia. Further, in the dispensation of justice the judiciary is guided by the constitution and the principles of equity. The judiciary has the authority to interpret laws and in so doing, the judiciary is mandated to follow the constitution which is the supreme law of the land and other pieces of legislation. The judiciary comprises of the chief justice, deputy chief justice, judges and magistrates.

### **3.3 THE ROLE OF THE JUDICIARY IN THE CONCEPT OF THE RULE OF LAW**

The administration of justice and, in particular, the protection, promotion, and enforcement of human rights in a democratic society are fundamentally governed by the court. The judiciary is essential in ensuring that those who violate human rights are prosecuted, those whose rights have been violated seek effective redress, future victims of human rights violations are safeguarded, and everyone accused of a crime is given a fair trial.

The judiciary plays a crucial role in the concept of rule of law. Bubala Chibbonta opines that *“since it upholds the law, neither the executive branch of government nor the general populace nor the judges should have any influence over it.”* The judiciary is granted the power to interpret the law in a particular situation, to impose punishment, and to assess proposed legislation to see if it is consistent with the prevailing legal standards under the rule of law, including constitutional rights.<sup>77</sup> The judiciary makes sure that everyone obeys the law and if anyone comes in conflict with this law then they must face the consequences of their actions. That is why the judiciary is a very important branch of every democratic dispensation and as such the need to protect the independence of the institution.

It is important to note that the judiciary's role in society is quite broad and not just limited to what has been said. Therefore, it is crucial for a society to have a judiciary that is free from any interference or pressure so that the basic liberties and rights of each person

---

<sup>77</sup> Bellamy, R(ed) (2004) The rule of law and the separation of powers Ashgate: Dartmouth.

are better protected. This calls for judicial officials who can carry out their duties in an objective, competent, and independent manner without fear or favour.<sup>78</sup> .

### **3.4 JUDICIAL INDEPENDENCE IN ZAMBIA**

The independence of the judiciary is a very important concept of constitutionalism and the rule of law. It ensures that the judiciary is independent without any form of interference from any person or body. It is beyond dispute that to sustain a democracy in the modern world, there is a strong and independent judiciary which does not succumb to threat from any person or body.<sup>79</sup> Once the judiciary is corrupted it means that the justice system in a country will be corrupted. That is why it is very important to protect and uphold the integrity and independence of this institution.

The constitution of Zambia provides for two different limbs of judicial independence, namely, functional independence of the judiciary and financial independence of the judiciary. These shall be discussed below;

#### **3.4.1 FUNCTIONAL INDEPENDENCE OF THE JUDICIARY**

This basically entails that the judiciary ought always to be independent in the administration of justice. It means that the judiciary must enjoy complete independence without any person or body interfering with its functions pursuant to **Article 122**<sup>80</sup> of the constitution. It guarantees the judiciary's operational independence. That is, only the law and the constitution will be applied to the judiciary. It continues by stating that nobody or anything should impede the judiciary's ability to act independently. The constitution further states that no one in a position of authority may obstruct a judge or other judicial official from carrying out their duties. In addition, the constitution requires that everyone

---

<sup>78</sup> Sakala, JB 1999 'The role of the judiciary in the enforcement of human rights in Zambia' unpublished PhD thesis, University of Zambia

<sup>79</sup> Everyone is entitled to a fair and public hearing by an independent tribunal . . .' (art. 10 Universal Declaration of Human Rights)

<sup>80</sup> Act no.2 of 2016



holding public office, including the president, uphold the independence and honor of the court.

### **3.4.2 FINANCIAL INDEPENDENCE OF THE JUDICIARY**

The financial independence of the judiciary entails that the judiciary should be a self accounting institution pursuant to **Article 123**.<sup>81</sup> The constitution is instructive in that the judiciary shall be a self accounting institution and deal directly with the ministry of finance. It is also a requirement that the judiciary should be adequately funded to enable it carry out its functions effectively.

### **3.5 THE USE OF PRESIDENTIAL PARDON AND ITS IMPACT ON THE INDEPENDENCE OF THE JUDICIARY**

The threat posed by pardon powers to the independence of the judiciary reside not in the mere exercise of the power, but in three other factors, namely first, the apparent failure to appreciate the extent to which pardoned convicts lose their rights, rather than gain them; second, the evident inability to acknowledge the justice protective function of the power of pardon itself; and finally the absence of inbuilt trigger mechanisms in the law to monitor possible misapplication of the power. This position, it is suggested, finds resonance in many other jurisdictions too.<sup>82</sup>

It is not uncommon for the exercise of the presidential pardon power to raise consternation and attract criticism. Many constitutions that give the power of pardon do not prescribe the specific circumstances for which the power is reserved, nor do they provide adequate safeguards against its abuse. Malila opines that, *“The use of the pardoning power has come to be seen as a grave challenge to the separation of powers*

---

<sup>81</sup> ibid

<sup>82</sup> Mumba Malila *‘The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption’*

*and the rule of law, at times appearing to be an unwarranted, gratuitous, and unnecessary interference with some judicial decisions made legally by the courts.*<sup>83</sup>

Critics may argue that presidential pardon does not affect the independence of the judiciary because at the time that presidential pardon is being considered, the sentence of the court has already been passed and the work of the judge or magistrate has come to an end. However, it is important to note that in as much as the work of the judge or magistrates ends when sentence is passed, it is evident that when the president comes in to pardon those who have been convicted by the judge or magistrate, it undermines the judiciary and affects its independence. The rule of law must be upheld by all the three branches of government and as such there is need for non interference of judicial decisions properly determined by the court in order to uphold the rule of law and separation of powers. It follows therefore that presidential pardon steps on the rule of law and separation of powers because it allows the decision that has been passed by the judiciary to have no effect on the pardoned convict. That is why Malila observes that *“when cases are dealt with by the courts up to the highest level, a message of finality is conveyed that the court’s verdict is final and binding and there should generally be no scope for interfering.”*<sup>84</sup>

More worryingly pardon powers have been used to free people from prison while their appeals are pending hearing. The pardoning of former Deputy Minister Masumba, is a case in point.<sup>85</sup> His pardon came just days before his appeal was scheduled for hearing in the Supreme Court.

Similar to this, on July 15, 2015, former President, Edgar Lungu commuted to life in prison all 332 death row inmates.<sup>86</sup> An awkward situation was created for the courts as many of the pardoned prisoners had pending appeals before them. The convicts had neither applied for, nor accepted the pardons. Among them was the convicted aggravated robber, Alex Njamba. At the hearing of his appeal, the State prosecutor

---

<sup>83</sup> *ibid*

<sup>84</sup> *ibid*

<sup>85</sup> Lusaka Times, 8 April 2016 > <http://www.lusakatimes.com>

<sup>86</sup> Chambo Nguni, ‘From death row to life: 322 prisoners saved from noose’, *Zambian Daily Mail*, 2 August 2015. The commutation was done was on 19 July 2015

raised a preliminary issue as to whether the Supreme Court had jurisdiction to hear the appeal granted that the prisoner had his death sentence commuted to life imprisonment by the President. She argued that to entertain the appeal would be to interfere with the presidential pardon and would violate the principle of separation of powers. The prisoner's counsel expressed complete ignorance at the presidential pardon and maintained that the prisoner right of appeal against conviction and sentence was unaffected. The Court stated that *"We have always been alive to the fact that court process must end before a convict can embark on a journey to ask for mercy, therefore to argue that we have no jurisdiction to hear this appeal on the ground of separation of powers is misplaced."*<sup>87</sup>

More recent, after the 2021 general elections, president Lungu pardoned a number of well known individuals who were convicted for the offence of murder. Among those were, Saidi Banda, Mathew Mohan and former minister Keith mukata. The president also pardoned Chishimba Kambwili who was convicted for the offence of forgery and uttering false document even though he had appealed against both the conviction and sentence.<sup>88</sup>

From the above, it can be seen that the presidential pardon power has been used by the executive to undo judicial decisions. In some cases this has aroused trepidation and even tension between the executive and judiciary.<sup>89</sup> As an illustration, President Kenneth Kaunda released the party's young leader who had been imprisoned for criminal contempt in 1967. This gesture, which was a literal smack in the face to the judges, infuriated them. Only after consulting with Dr. Kaunda were they calmed down.<sup>90</sup>

It can therefore be opined that the use of presidential pardon in Zambia is prone to abuse. Persons who have committed crimes and have been properly convicted end up being pardoned. This has impacted on the independence of the judiciary by undoing

---

<sup>87</sup> Reported Judgment No. 1 of 2020

<sup>88</sup> <https://www.lusakatimes.com/2021/08/21>

<sup>89</sup> Mumba Malila *'The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption'*

<sup>90</sup> Robert I Rotberg, 'Tribalism and Politics in Zambia,' in William Tordoff (ed.) *Politics in Zambia* (University of California, 1974)

judicial decisions properly determined by the courts. Malila observes that *“unless sooner checked, presidential pardons will continue to facilitate impunity, self political aggrandisement and to undermine democratic processes and the independence of the judiciary.”*<sup>91</sup>

### **3.6 CONCLUSION**

This chapter has endeavoured to define the concept of judicial independence by establishing that judicial independence entails the non interference of judicial functions by any person or body. Further, it has discussed the doctrine of separation of powers in relation to judicial independence. In so doing, the chapter has brought out the three arms of government and their roles as provided for under the constitution of Zambia. The chapter has also discussed the independence of the judiciary in Zambia. In so doing, it has brought out two limbs of judicial independence, that is, functional independence and financial independence of the judiciary. Furthermore, the chapter has elaborated on the role of the judiciary in society and the rule of law. And lastly, the chapter has endeavoured to explain how the use of presidential pardon has impacted on the independence of the judiciary in Zambia.

---

<sup>91</sup> ibid

**CHAPTER FOUR**  
**PRESIDENTIAL PARDON AND ITS EFFECT ON THE FIGHT AGAINST**  
**CORRUPTION**

**4.0 INTRODUCTION**

It is well known that corruption is a significant obstacle to the growth of many nations, and Zambia is no different. The corruption issue in Zambia is described as chronic by

Transparency International in its National Integrity Assessments reports.<sup>92</sup> Corruption undermines democratic institutions, slows down economic progress, and fuels political instability, as highlighted in the UNDP Report Tackling Corruption, Transforming Lives (2008).<sup>93</sup> By skewing electoral procedures, subverting the rule of law, and establishing bureaucratic muck whose only purpose is to collect bribes, it undermines the basis of democratic institutions. Due to corruption, foreign direct investment is discouraged, and small enterprises within the nation frequently struggle to overcome the necessary "startup costs" as a result. Unfortunately, as former UN Secretary General Kofi Annan noted, *"corruption hurts the poor disproportionately by diverting resources intended for development, undermining a government's capacity to provide basic services, feeding inequality and injustice, and deterring foreign investment and aid."*<sup>94</sup>

This chapter shall define the term corruption. Thereafter, it shall discuss the different types of corruption. The chapter will then elaborate on the effects of corruption on a nation. Further, It shall then conclude by looking at the impact of the exercise of presidential pardon on persons convicted of corruption.

#### 4.1 DEFINITION OF CORRUPTION

According to the **Anti-corruption Act**,<sup>95</sup> *"Corruption is described as the use or abuse of a public office for one's own gain or benefit, as well as the seeking, receiving, gaining, providing, promising, or offering of satisfaction in exchange for a bribe or other personal incentive."* Gratification is "any corrupt payment, whether in cash or in kind." This includes anything other than a casual present that was received by improper use or abuse of public funds or property, including rewards, discounts, bonuses, or pecuniary gains of any kind."

---

<sup>92</sup> <https://www.transparency.org/en/national-integrity-system-assessments>

<sup>93</sup> United Nations Development Program (UNDP), Tackling Corruption, Transforming Lives: accelerating Human Development in Asia and the Pacific (2008).

<sup>94</sup> *ibid*

<sup>95</sup> Act No. 3 of 2012

From the above, it can be opined that corruption is a situation which gives an undue advantage to a person over others through a form of bribe, soliciting or obtaining a corrupt payment. It encompasses actions on the part of officials, whether they be politicians or civil workers, in which they improperly and unlawfully benefit themselves or those close to them by abusing the public power or office.

## **4.2 TYPES OF CORRUPTION**

According to the anti corruption commission of Zambia, corruption maybe categorized in three groups, namely, petty corruption, grand corruption and political corruption. These will be illustrated below;<sup>96</sup>

### **(i) Petty Corruption**

This is typically defined by modest bribes, such as payments given to public officials to favor clients when providing public goods and services. People are directly impacted by petty corruption because they feel obligated to spend some of their income on paying bribes in order to obtain services. Petty corruption is something that people encounter on a daily basis. Petty corruption by definition typically affects lower-level employees of an institution. Another definition of it is "bureaucratic corruption."<sup>97</sup>

### **(ii) Grand Corruption**

In the form of commissions, this requires enormous sums of money. This is particularly clear when contracts are awarded, goods and services are procured through public procurement, illegal curtailment schemes are used, or illegal commercial dealings

---

<sup>96</sup> <https://www.acc.gov.zm/about-corruption/>

<sup>97</sup> *ibid*

involving substantial sums of money are undertaken. It involves high level decision-makers deciding on sizeable public services and goods.<sup>98</sup>

### **(iii) Political Corruption**

This is the abuse of authority for personal gain by leaders of state, ministers, and senior government officials. In order to gain political favor or an advantage, it frequently entails using public funds to finance the activities of political parties and bribing the people with presents of cash, clothing, food, alcohol, plots of land, etc.<sup>99</sup>

From the above it can be seen that corruption is in stages. There is one which involves small bribes which is called petty corruption. Another type is one that involves high amounts of money which is grand corruption. Lastly, there is one which involves public officials such as ministers, top government officials and it is called political corruption because the perpetrators of this type of corruption are politicians.

## **4.3 EFFECTS OF CORRUPTION ON A NATION**

The majority of developing nations, including Zambia, continue to have citizens who live in abject poverty. This isn't because there aren't government initiatives to raise people's living standards; rather, it's because public servants who are given access to vast amounts of funding to help people behave badly. It is unacceptable to allow any form of corruption or related crime. It is no longer possible to overlook corruption's terrible repercussions, and the struggle against it must be viewed as a personal challenge. Here are a few negative effects of corruption on a country.

### **(i) Public and private sector dysfunctionality**

---

<sup>98</sup> <https://www.acc.gov.zm/about-corruption/>

<sup>99</sup> *ibid*



Dysfunction is the result of a series of corrupt actions. The cost, time, and unfairness of acquiring goods and services increase, regardless of whether they are provided by the public or private sectors. If bribes can be successfully provided to police, doctors, and civil servants, those who are most successful at extracting these monies advance at the expense of more honest coworkers and competitors who would do better on merit. Additionally, businesses are less motivated to provide superior services and goods if they can undercut rivals by securing political favors. Instead of promoting innovation and efficiency, state-owned businesses and sectors are designed to benefit government officials.<sup>100</sup>

**(ii) Poverty and inequality**

Corruption may cause poverty and inequality especially to citizens of a developing nation like Zambia. This is because Corruption enriches a few corrupt people at the expense of the majority.”<sup>101</sup>

**(iii) Undermines the rule of law**

When bribes are paid to law enforcement officers, respect for the law and rule of law is lost. The rule of law is an important factor to a just and orderly society. It is therefore important to protect this rule of law so as to prevent any effect it may bring to society when it is lost.

From the foregoing, it is clear that corruption is a dangerous disease that must be fought at all cost. This is because of the negative effects it has on society and the general citizens. Corruption must not be taken casually because it has the ability to bring a nation down. It follows therefore that the fight against corruption must not be undermined at all cost by any person or arm of government.

#### **4.4 THE IMPACT OF PRESIDENTIAL PARDON ON THE FIGHT AGAINST**

---

<sup>100</sup> ibid

<sup>101</sup> <https://www.acc.gov.zm/what-is-corruption/>

## CORRUPTION

The prerogative of mercy has recently been viewed to undermine the fight against corruption in Zambia and the world at large. Mostly presidential pardon has been used to free the politically connected individuals who were convicted for various corrupt offences. When persons who have been convicted of various corrupt practices are pardoned, it sends a bad picture to the institutions tasked with the fight against corruption. It should be noted however that the law as it is allows the president to pardon whoever he wants which includes persons convicted of corruption. However, in as much as the president has the discretion to pardon any person convicted of any offence, there is a need for the holder of power to restrain himself from pardoning persons convicted of corruption because of the negative effects it has on a nation. Malila opines that *“pardons can be given as quid pro quo for corrupt and illegitimate undertakings. When the corrupt are pardoned, the fight against graft is undermined, resulting in a fuelling of a cycle of sleaze that impeaches any claim that there is the political will to do battle with criminal vices.”*<sup>102</sup>

Further, Udofa posits that, “There are numerous instances of public officials who were shielded by the exercise of the pardon power after being accused of high-trust criminal offenses and theft of public funds.”<sup>103</sup>

This shows that politicians sometimes use the pardon power to free themselves of various corrupt offences. Furthermore, after the release from prison of former minister Austin Liato for various corrupt offences, **Transparency International Zambia** issued a statement that;

*“We consider the government's propensity to free former ministers who have been convicted of crimes in Zambian jails as a sort of political manipulation and a mockery of the legal system. The Executive must understand that the pardons being granted*

---

<sup>102</sup> Mumba Malila *‘The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption’*

<sup>103</sup> Udofa, I. *‘The Abuse of Presidential Power of Pardon and the Need for Restraints’* 2018 *Beijing Law Review*, 9, 113-131

*represent an abuse of power that is undermining our society's fundamental principles of justice and order. It conveys the idea that crime and corruption are profitable so long as one supports the government.*"<sup>104</sup>

According to Anafi Likwanya, "people will not take the battle against corruption in the country seriously if criminals who were convicted owing to corruption are pardoned before their jail term finishes. The major goal of not pardoning corrupt offenders, he continued, is to foster an atmosphere where everyone will be afraid to engage in any corrupt activities. When this is accomplished, the war against corruption will be advanced, and everyone will receive a loud and clear message."<sup>105</sup>

Transparency International (TI) expressed regret that the pardoning of Joshua Dariye and Jolly Nyame "has discredited the work of the Economic and Financial Crimes Commission (EFCC) and validated criticism of the Buhari government's anticorruption campaign as nothing more than "a means to settle political scores and pardon those in its camp."<sup>106</sup> The comments were made following President Buhari's pardoning of the two governors.

Similarly, the pardoning of ex-Bayelsa state Governor Diepreye Alamieyeseigh was condemned by many activists in Nigeria. They said that the decision is a major blow to efforts to curb corruption in Nigeria.<sup>107</sup>

From the foregoing, it can be seen that the pardoning of persons convicted of corruption has been condemned not only in Zambia but across the globe. The rationale is that anyone who loots public resources should not be subject to a pardon. Corruption affects everyone especially the poor and hence anyone involved in this vice should serve their jail sentence in full in order to uphold and promote the fight against corruption. On the other hand if the corrupt are pardoned it promotes impunity among those holding public

---

<sup>104</sup> Mumba Malila *'The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption'*

<sup>105</sup> <https://www.faceofmalawi.com/2020/12/04/malawi-prison-service-asked-not-to-pardon-corruption-convicts/>

<sup>106</sup> <https://www.cfr.org/blog/state-pardon-former-governors-puts-nigerias-anticorruption-drive-jeopardy>

<sup>107</sup> <https://www.bbc.com/news/world-africa-21769047>

office in the sense that they will involve themselves in corrupt activities with the view that they will be pardoned as long as they are connected to the holder of power. The pardoning of corrupt convicts undermines the fight against corruption and leads to a waste of resources that were used in the prosecution of these corruption cases. It sends a bad picture to the judiciary and the institutions tasked with the fight against corruption in that as long as one renders support to the holder of power, that person has a high likely hood of being pardoned. This has the ability to demoralize the different players involved in the fight against corruption because their effort in curbing corruption is been watered down by the prerogative of mercy powers.

#### **4.5 CONCLUSION**

This chapter has attempted to define corruption as a behavior on the part of authorities, whether they be politicians or civil workers, in which they unjustifiably and illegally profit themselves or those close to them by abusing the public trust or office. The three sorts of corruption that followed were political corruption, big corruption, and petty corruption. The many repercussions of corruption on a nation have also been covered. And lastly, it has concluded by elaborating on how the exercise of presidential pardon on persons convicted of corruption has impacted on the fight against corruption.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 INTRODUCTION**

The chapter summarizes the information presented in the dissertation's earlier chapters. It attempts to give a summary of the trends that have been seen in the application of the prerogative of compassion powers in relation to the independence of the judiciary and the fight against corruption.

#### **5.1 GENERAL CONCLUSIONS**

This study sought to examine the law governing the prerogative of mercy in Zambia, its use and abuse by successive presidents. The study discovered that the law that governs prerogative of mercy powers is weak and as such is prone to abuse. Further, the prerogative of mercy power has benefitted certain individuals who are connected to

the holder of power. Individuals who are more deserving languish in prison because they have nobody to speak for them.

The study has identified that the current use of the prerogative of mercy in Zambia has an impact on the independence of the judiciary. In that when the president exercises the mercy power, it nullifies the decision of the court and thereby rendering the court impotent. The study has further discovered that the use of the mercy power on individuals convicted of corruption has a negative effect on the fight against corruption. In that when the corrupt are pardoned it demoralizes the different players tasked with the fight against corruption and thereby rendering their effort meaningless.

## **5.2 SUMMARY OF CHAPTERS**

This thesis consists of five chapters which analyses the problem in relation to the use of presidential pardon in Zambia and its effect on the independence of the judiciary and the fight against corruption.

## **5.3 CHAPTER ONE**

The issue was noted in the first chapter. This chapter focused on the three study goals that had been explained in the previous three chapters. Additionally, this Chapter highlighted the importance of the study. This chapter came to the conclusion that the existing law on the right to mercy is unsound and open to abuse. Additionally, it was stated that the current application of the mercy power has an effect on the judiciary's independence and the fight against corruption..

## **5.4 CHAPTER TWO**

This chapter concentrated on the institutional and legal structure related to the prerogative of mercy. This chapter revealed that the Zambian constitution from 1991

gave the president the authority to pardon. The provision regarding the presidential pardon had minor adjustments when Act No. 2 of 2016 was adopted. The chapter concluded that every democratic regime need the right to show mercy. However, abuse must be prevented. A grant of pardon, it said in its conclusion, makes a person a new being, that is, as if they never committed any crime.

### **5.5 CHAPTER THREE**

The concept of judicial independence was the main topic of this chapter. It was discovered that the Zambian Constitution guarantees the functional and financial independence of the judiciary, respectively, as two facets of judicial independence. The chapter also examined how the exercise of the prerogative of mercy has affected the judiciary's independence. It was discovered that the use of the prerogative of compassion in Zambia has a detrimental effect on the independence of the judiciary since it invalidates the judgment of the court, which leaves the judiciary powerless.

### **5.6 CHAPTER FOUR**

The chapter focused on investigating how the use of the prerogative of mercy on persons convicted of corruption has impacted on the fight against corruption. It was found that in as much as the president is free to pardon whoever he wants, the use of the mercy power on corruption convicted persons undermines the fight against corruption. It was concluded that in order to uphold and promote the fight against corruption, the president should restrain himself from pardoning persons convicted of corruption in order to promote the fight.

### **5.7 RECOMMENDATIONS**

Having highlighted the inadequacies of the laws that govern the prerogative of mercy in Zambia. The author will proceed to make recommendations. The recommendations will be mainly bordered on how Zambia can improve its laws with regards to the prerogative of mercy with the aim of protecting the independence of the judiciary and the fight against corruption.

### **5.7.0 AMENDMENT OF THE CONSTITUTION**

The constitution must be amended so as to provide for comprehensive provisions which pertain to the mercy powers. This is taking into account that the constitution is the supreme law of the land and it is what validates other laws.

### **5.7.1 INCORPORATION OF THE COMPOSITON OF ADVISORY COMMITTEE**

There is a need to expressly state who should be part of the committee. As the current legal framework leaves much to be desired and it is prone to abuse. It is important to have a strong and impartial committee that will advice the president fairly.

### **5.7.2 RECOMMENDATIONS OF THE COMMITTEE**

To specify the effect or impact of the suggestions and advice from the Advisory Committee, a legal provision is required.

### **5.7.3 THE INVOLVEMENT OF THE JUDICIARY**

In order to promote the independence of the judiciary, there is a need to involve the judiciary in the exercise of the prerogative of mercy. This will promote the independence of the judiciary in that judges will be given an opportunity to opine on whether a particular prisoner should be pardoned depending on the facts and circumstances of their case.

### **5.7.4 RESTRICTION OF THE MERCY POWER**

The mercy power should be restricted to some offenses and other offenses should be non pardonable. Cases like corruption, murder, rape, defilement, aggravated robbery and other serious offenses should not be subject to a pardon. This will promote the fight



against corruption and promote the national values in our society. It will also serve as way of deterring persons involved in these serious crimes.

## **BIBLIOGRAPHY**

### **CASES**

Alex Njamba v The People (Reported Judgement No. 1 of 2020)

Chishimba Kambwili v The Attorney General [2020] ZMCC 2

Clement Moonga and another v The People (SCZ Appeal No. 234/2017)

Edward Jack Shamwana v Levy Mwanawasa (1994) S.J 93 (H.C)

Ex parte Grossman 267 US 87

Masiye Motels Limited v Rescue Shoulders and Estate Agency Limited (Ex-parte Nsunka Kalobwe RabbinSambo and Victor Kaluba Chilekwa) SCZ Appeal No.187/2007

Milford Mambo & others v The People (2016/CC/R001 (2017)

O' Donoghue v. United States 289, US 516, 1933

Savenda Management Services Limited (Gregory Chifire) Alleged contemnor v Stanbic Bank Limited (Appeal No. 37 of 2017)

United States v. Wilson, 32 U.S.

## **BOOKS**

Bellamy, R (ed) (2004) The rule of law and the separation of powers Ashgate: Dartmouth.

Bryan. A. Garner 'Black's Law Dictionary' (8th ed. 2004)

Dicey A V and Allison J W F, **Law of the Constitution**, (Oxford University Press 2013)

International Commission of Jurists (ICJ) International principles on the independence and accountability of judges, lawyers and prosecutors: A practitioners' guide (2004).

Maravall, JM & Przeworski, A (eds) (2003) Democracy and the rule of law Cambridge: Cambridge University press

Mulenga B, **Constitution, Governance and Democracy** (Minion Press, 2011)

Robert I Rotberg, 'Tribalism and Politics in Zambia,' in William Tordoff (ed.) Politics in Zambia (University of California, 1974)

Winstone Chanda A, **Constitutional Law in Zambia: Cases and Materials** (Press)

## ARTICLES

A Novak, '**Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the USA**' (2016) 49 University of Michigan Journal of Law Reform

Arifi Besa '**The Legal Reasoning of The President's Right To Issue Pardons**' (2017) Vol 12 Seeu Review

Alexander Hamilton, *The Federalist*, Independent Journal (1788)482

Alexander Pope, **An Essay on Criticism** (1688-1744), Creative Media Partners (2018)

Chowdhury M J, '**President's 'Lockean' Prerogative of Mercy: A lawful lawlessness**' (2012) 15 (p23-49) The Chittagong University Journal of Law

Catherine D. Greentree, **Retaining The Royal Prerogative of Mercy in New South Wales** (UNSW Law Journal)

D. Pallister, '**An injustice that still reverberates**', *The Guardian*, London 19 October 1999

D Pascoe and M Manikis, '**Making sense of the Victim's role in clemency decision making**' (2020) 26 (1) 3-28 *International Review of Victimology*

Dr. Michael J. Davidson '**The President's Pardon Power**' (2020) *Military Review*

Chambo Nguni, '**From death row to life: 322 prisoners saved from noose**', *Zambian Daily Mail*, 2 August 2015. The commutation was done was on 19 July 2015

Hossain and E-Alam, **A Legal Analysis of the Presidential Prerogative of Mercy in Bangladesh**

James P. Goodrich '**Use and Abuse of the Power to Pardon**' (1921) Vol 11 *Journal of Criminal Law and Criminology*

Joseph Azize, **'The Prerogative of Mercy in NSW'** (2007) 1 Public Space: **The Journal of Law and Social Justice**

Justice Dr. Mumba Malila **'The Use of Presidential Clemency in Zambia: Reflections on its Impact on the Independence of the Judiciary and the Fight against Corruption'**

Leslie Sebba **'The Pardoning Power-A World Survey'** (1977) Volume 68 *Journal of Criminal Law and Criminology*

M Jashim Ali Chowdhury **President's 'Lockean' Prerogative of Mercy: A Lawful Lawlessness?'** (2010)

M Jashim Ali Chowdhury **President's 'Lockean' Prerogative of Mercy: A Lawful Lawlessness?'** (2010)

NJ McNally **'Addressing the tension between judicial independence and judicial accountability'** 2010 3; PA Gerangelos **The Separation of powers and legislative interference in judicial process: Constitutional principles and limitations** (2009)

M. Ndulo (**Review of the Anti corruption legal framework in Zambia** (2014)  
United Nations Development Program (UNDP), **Tackling Corruption, Transforming Lives: accelerating Human Development in Asia and the Pacific** (2008).

Nowak A, **'Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective'** (2015) 49(4) *University of Michigan Journal of Law Reform* 817-51

RB Mzikanda **'The role of the judiciary in safeguarding the principle of separation of powers in a democratic state'** 2006

Udofa, I **'The Abuse of Presidential Power of Pardon and the Need for Restraints'**  
2018 *Beijing Law Review*, 9

William F. Duker 'The President's Power to Pardon: A Constitutional History' (1976-1977) Vol 18 William & Mary Law Review

## INTERNET SOURCES

Steven Masumba was MP for Mufumbwe Parliamentary Constituency. The explanation was contained in a letter to Zambian Voice Executive Director, Chilufya Tayali, dated 13 February 2015. See <https://www.lusakatimes.com/2015/03/15/steven-masumba-was-pardoned-and-he-is-free-to-attend-parliament/>

<https://diggers.news/local/2018/12/31/mukuka-begs-lungu-to-exercise-prerogative-of-mercy-on-sinjela/>

<https://presidential-power.net/?p=11495>

<https://diggers.news/local/2018/12/31/mukuka-begs-lungu-to-exercise-prerogative-of-mercy-on-sinjela/>

S. A.M. Ekwenze, 'Presidential pardon and prerogative of mercy; a soothing balm necessary for social justice' (June 19, 2014) Available

<http://ssrn.com/abstract=2541929>[http://www.news.cn/english/2021-10/23/c\\_1310264394.htm](http://www.news.cn/english/2021-10/23/c_1310264394.htm)

<https://www.africanews.com/2019/11/11/zambia-president->

<https://www.cfr.org/blog/state-pardon-former-governors-puts-nigerias-anticorruption-drive-jeopardy>

<https://www.acc.gov.zm/about-corruption/>

<https://www.lusakatimes.com/2018/12/24/president-lungu-pardons-593-prisoners-gregory-cifire-and-derrick-sinjela>

<https://www.lusakatimes.com/2018/12/24/president-lungu-pardons-593-prisoners-gregory-cifire-and-derrick-sinjela>

<https://www.transparency.org/en/national-integrity-system-assessments>

<https://www.news24.com/news24/columnists/guestcolumn/opinion-of-presidential-pardons-no-need-to-interfere-with-npas-work-20191016>

<https://www.bbc.com/news/world-africa-52807727>

<https://www.faceofmalawi.com/2020/12/04/malawi-prison-service-asked-not-to-pardon-corruption-convicts/>

[https://www.biicl.org/files/2305\\_country\\_report\\_zambia\\_ngandu.pdf](https://www.biicl.org/files/2305_country_report_zambia_ngandu.pdf)

<https://www.lusakatimes.com/2021/08/19/president-lungu-pardoned-60-inmates-including-those/>

<https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/pmj-pej.pdf> accessed at 13:50  
19th October 2021

[https://www.kas.de/c/document\\_library/get\\_file?uuid=4990bd18-d7e5-3606-f173-6d0418ec8d27&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=4990bd18-d7e5-3606-f173-6d0418ec8d27&groupId=252038)

<https://www.google.com/amp/s/pardonandparole.uslegal.com/conditional-pardon/%3famp>

<https://africog.org/wp-content/uploads/2015/10/Implementation-of-Chapter-Six-of-the-Constitution-of-Kenya-20101.pdf>

## **DISSERTATION AND OBLIGATORY ESSAYS**

Bako Chipalo, Capital Punishment in Zambia and the Presidential Prerogative of mercy (UNZA LLB Dissertation 2004)

Bubala Chibbonta “A comparative analysis of judicial independence in Zambia and South Africa: Security of tenure, appointment and removal procedures” (Dissertation, University of Pretoria) 2010

David Ochieng’ayuo, An Appraisal of the Power of Mercy Act (Moi University School of Law) ANNEX CAMPUS FLB: 213

Mutinta Zunduna; **A critique of the legal framework on the prerogative of mercy in Zambia vis a vis rule of law and separation of powers: A comparative study with Kenya** (UNILUS LLB Dissertation, 2022)

Sakala, JB 1999 'The role of the judiciary in the enforcement of human rights in Zambia' unpublished PhD thesis, University of Zambia

Thandiwe Sakala; **'The crayons and criteria of presidential pardon in Zambia: A study with lessons from Kenya'** (UNILUS LLB Dissertation, 2021)