For mercy to be fair to all

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Article 93 of the Constitution regulates the prerogative of mercy. It usurps the functions of the courts of criminal jurisdiction by subjecting their decisions to governmental review.

This provision authorises the President to administer pardons, amnesties or respites and substitute punishments by a lesser form of punishment and remissions. Although granted by the President, it is not his own individual decision but he is constitutionally compelled to act on the advice of the Cabinet or a minister acting under the general authority of the Cabinet.

A request for the exercise of the prerogative of mercy is invariably addressed to the President. When he receives it, such request is normally referred to the minister responsible for justice for advice.

The Constitution is very scant in detail about the procedure to follow. However, the Justice Minister would normally consult the Attorney General and the Commissioner of Police and any other public officer or public body concerned in the matter. However, the Constitution does not oblige the minister or Cabinet to consult anybody. So there is scope to supplement, through ordinary law, the provisions of the Constitution in this respect.

Moreover, there are Cabinet policies based on past practice regulating the exercise of the prerogative of mercy, which guide the Cabinet and the minister how to act in such cases.

Article 93 deals with the prerogative of mercy under four headings.

The first empowers the President "to grant to any person concerned in or convicted of any offence a pardon, either free or subject to lawful conditions". A free pardon means an unconditional pardon while a limited or conditional pardon or commutation of sentence is a pardon granted subject to the imposition of one or more lawful conditions.

A pardon, with or without conditions, can be exercised by the President both in the case of an accused person undergoing criminal proceedings and a person already found guilty by a criminal court and sentenced.

In the first case, if the President decides to grant a pardon once the criminal proceedings are still ongoing, the criminal action will stop immediately. If the person has been convicted, s/he will not need to continue to serve that punishment even though the conviction as such is not erased. If s/he is in jail or in detention, s/he is immediately released.

Hence, it is the effects of the conviction that are removed not the conviction itself unless, of course, it is revoked by a judgment of a competent court.

The term "person concerned" can apply to anybody: one need not be charged in court for article 93 to apply.

When a pardon is given, it might be subjected to a number of conditions. The standard condition would be that s/he should give evidence in court and such evidence should respect the truth and that s/he should cooperate fully with the prosecution in arriving at the truth. If the person does not abide by any of these lawful conditions the pardon may be revoked.

The second instance where a prerogative of mercy can be exercised is to "grant to any person a respite, either indefinite or for a specified period, of the execution of any sentence passed on that person for any offence".

Here, it is a person found guilty by a criminal court but the punishment is delayed or postponed by that court and does not come into force on the day of passing of judgment. For instance, the court can authorise a person to pay a fine within six months from date of sentence.

In the third case, the President may "substitute a less severe form of punishment for any punishment imposed on any person for any offence". It might happen that the punishment meted out on a person might have been decreased in the meantime and the President applies the new decreased punishment to the person concerned.

Article 39(8) of the Constitution states that "no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time it was committed".

In the fourth case, the President may also "remit the whole or part of any sentence passed on any person for an offence or for any penalty or forfeiture otherwise due to the State on account of any offence".

The President can pardon any penalty or forfeiture either in whole or in part. Remission, therefore, amounts to a reduction, or the complete revocation, of the sentence. This is the case of an amnesty.

A whistleblower may have committed a criminal offence but decides to speak up. In this case, s/he might have to be pardoned in terms of article 93 of the Constitution.

The Whistleblower Bill, which has been before Parliament since 2010, clearly states in clause 5 that the whistleblower may still be prosecuted, unless article 93 is applied, where such whistleblower was "the perpetrator or an accomplice in the improper practice which constitutes a crime or contravention under any applicable law, prior to the disclosure".

> **The prerogative of mercy is a vestige of the past that flouts the principles of natural justice**

There may also be cases whether the whistleblower, although s/he blows the whistle, is not necessarily involved in the criminal offence in question.

What is noteworthy about the constitutional provision is that, contrary to criminal offences which are tried by an independent and impartial court and in public, all proceedings in connection with the prerogative of mercy are held behind closed doors.

The consultation carried out, if and when this is done, is normally limited to government ministries, departments, agencies and/or the public administration which, in some form or another, are or were involved in the criminal proceedings or subsequent thereto. The persons consulted tend to be all ex parte consultees with their own interest to defend in those proceedings.

There is no legal requirement for the Government to consult, not even the Attorney General and/or the Commissioner of Police. The public is never consulted whether an amnesty should or should not be given and in which circumstances or under what conditions.

There is a complete interference by the Executive in the workings of the courts because it is, after all, the courts' decisions that are normally disturbed when pardons, amnesties and remissions are granted.

In the case of the courts, there are quite a number of guarantees that have to be respected to ensure due process of law.

The executive arm of the State – contrary to the judiciary – does not hear all the parties to the case. Nor does it respect due process of law. This makes the Cabinet or the Justice Minister far from ideal to carry out this executive review function of criminal court judgments.

For instance, when there are victims involved in the commission of an offence, such persons are not consulted by Cabinet or the minister. This makes an eventual Cabinet decision tainted by bias, prejudice and partiality.

This procedure is therefore far from being transparent and all inclusive. In Gavin Gulia v Dione Borg et, the Court of Appeal, on July 7, 2006, was very critical of the prerogative of mercy, stating that it allows the Executive to play the role of the judiciary and meddle in the judgments delivered by the judiciary when there is no judicial mistake or any humanitarian reason or the need of a pardon so that a person may give evidence in court against another person.

I would also add that there is no respect for the separation of powers doctrine.

Certain key actors in society are totally ignored insofar as they do not form part of public administration. Sometimes, an offence does not concern simply the police and the offender but has a wider societal impact and may concern victims and civil society who would have their own views on the matter. Yet, these have no say in the exercise of the prerogative of mercy. This makes its exercise discretionary, unfair, secretive and partial. Its exercise is far from being complete, impartial, neutral, open, transparent and accountable.

Of course, the prerogative of mercy is a vestige of the past that flouts the principles of natural justice once not all the parties to the criminal proceedings are necessarily heard. It should be a Council of State that should advise the President to grant or withhold such prerogative of mercy after all stakeholders involved in the judicial procedures and interested parties are consulted.

Again, if a court is seized of a case, the presiding judge would abstain if s/he was somehow involved in the proceedings.

In the case of Cabinet, a minister might somehow be involved in those proceedings. It could be that the offence was perpetrated by a public officer, employee, contractor or consultant within his/her ministry or the minister might have been somehow involved in the investigation or subsequent prosecution of another person, even if the minister is not the suspected person or alleged offender.

The Constitution does not require him/her to withdraw from the Cabinet meeting discussing the advice to be given to the President even if rules of good ethical behaviour and openness in government should guide Cabinet accordingly in the absence of a legal provision requiring abstention.