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Presidential pardon(s) in Uganda

Abstract: In the Constitution of Uganda, there are two circumstances in which a person may be granted a pardon. A pardon may be granted to a person before he/she has been prosecuted for an offence. Thus, Article 28(10) of the Constitution provides that '[n]o person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.' A pardon can also be granted to a person after he/she has been convicted of an offence. This is under Article 121(1)(a) which provides that the President, on the advice of the Advisory Committee on the Prerogative of Mercy, may 'grant to any person convicted of an offence, a pardon either free or subject to lawful conditions.' On the basis of Article 121, the President has pardoned hundreds of prisoners without imposing any condition(s). As a result, they are often released from prison immediately. These could be classified as free or unconditional pardons. However, Ugandan legislation is silent on the grounds on which a free pardon may be granted and whether a free pardon expunges a conviction. Relying on case law and legislation from countries such as South Africa, the United Kingdom, Australia, New Zealand and Canada, the author argues that since Ugandan legislation does not provide that a free pardon should only be granted to a person who was wrongfully convicted of an offence, a free pardon does not expunge a conviction. Under Article 121(6), the President's pardon powers do not extend to those convicted by a Field Court Martial. However, in *Uganda Law Society and Another v Attorney General*, the Constitutional Court held that Article 121 is applicable to cases where the offenders were convicted by a Field Court Martial. It is argued that this reasoning is contrary to the drafting history of Article 121(6). It is also argued that Article 121(6) is only applicable in cases where the Field Court Martial was operating during an armed conflict. The Constitutional Court held that a prisoner has a right to petition the President to exercise the prerogative of mercy. It is argued that this view is neither supported by Article 121 nor any legislation. It is also argued that section 102 of the Trial on Indictments Act which provides for the role of the Minister in the prerogative of mercy process is contrary to Article 121(5) of the Constitution and should be interpreted to bring it in conformity with the Constitution or be declared unconstitutional. Parliament may have to amend or enact legislation to expressly stipulate whether a free pardon expunges a conviction.

Keywords: Uganda, presidential pardon, free pardon, conditional pardon, prerogative of mercy, Article 121 of the Constitution, Field Court Martial

1. Introduction

The Constitution of Uganda provides for two circumstances in which a person may be granted a pardon. First, Article 28(10) provides that '[n]o person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.' Second, Article 121(1)(a) provides that the President, on the advice of the Advisory Committee on the Prerogative of Mercy, may 'grant to any person convicted of an offence, a pardon either free or subject to lawful conditions.' Thus, a combined reading of Articles 28(10) and 121 shows that there are two types of pardons: a pardon before a person is convicted of an offence and a pardon after a person has been convicted of an offence. In the second category, a pardon is either free or conditional. The President has, on the basis of Article 121, pardoned hundreds of prisoners. However, unlike in some countries such as the United States of America,[1] where it is always clear when conditional or free pardons are granted, in Uganda it is not always clear. Media reports and official statements (from prison authorities) on presidential pardons are silent on whether or not conditions are imposed on those who have been pardoned. However, what is clear is that once pardoned, the offenders are released from prison.[2] These could be classified as free or unconditional pardons. Article 28(10) is silent on the person(s) with the power to grant a pardon in question. Relying on the drafting history of Article 28(10), the author argues that a pardon thereunder can only be granted by the President. Article 121(4) draws a distinction between a free pardon and a conditional pardon. However, unlike in some countries such as South Africa,[3] Canada,[4]

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[1] Harold J. Krent, "Conditioning the President's Conditional Pardon Power" *California Law Review,* vol. 89, no. 6 (2001): 1665–1720; Note "The President's Conditional Pardon Power" *Harvard Law Review*, vol. 134 (2021): 2833–2854.

[2] It is reported that in January 2024, the President pardoned 13 offenders and in April 2020, he pardoned 833 offenders. See "Confirmed: President Museveni pardons ex-NSSF MD Jamwa, 12 others" 18 January 2024, The Independent, accessed July 14, 2024 https://www.independent.co.ug/confirmed-president-museveni-pardons-ex-nssf-md-jamwa-12-others/.

[3] Section 327 of the Criminal Procedure Act, Act 51 of 1977.

[4] Section 748(3) of the Criminal Code (R.S.C., 1985, c. C-46) provides that 'Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.' In *Canada (Minister of Citizenship and Immigration) v. Saini (C.A.)*, 2001 FCA 311 (CanLII),

New Zealand,[5] and Australia[6] where legislation provides for the conditions that must be in place for one to qualify for a free pardon and also that a free pardon expunges a conviction and sentence, Ugandan legislation is silent on these issues. As a result, the effect of a free pardon is approached differently in different pieces of legislation. Relying on case law from other common law countries, it is argued that since Ugandan legislation does not provide that a free pardon expunges a conviction, that effect should not be implied. In other words, a free pardon does not expunge a conviction. The Constitutional Court held that a prisoner has a right to petition the President to exercise the prerogative of mercy. It is argued that this view is neither supported by Article 121 nor by any legislation. It is also argued that section 102 of the Trial on Indictments Act which provides for the role of the Minister in the prerogative of mercy process is contrary to Article 121(5) of the Constitution and should be interpreted to bring it in conformity with the Constitution. Relying on the drafting history of Article 121, the author argues that the Constitutional Court rightly observed that the manner in which the President exercises the prerogative of mercy is not transparent. Had the Court considered the drafting history of Article 121, it would have appreciated the reason(s) why the drafters of the Constitution chose to shroud the process in secrecy. In *Uganda Law Society and Another v Attorney General*, the Constitutional Court held that Article 121 is applicable to cases where the offenders were convicted by a field court martial. It is argued that this reasoning is contrary to the drafting history of Article 121(6). In order to put the discussion in context, the author will start by illustrating the drafting history of Article 121 of the Constitution.

2. The drafting history of Article 121 of the Constitution

In 1988, the Ugandan government embarked on the process of enacting a new constitution to replace the 1967 constitution. Thus, it established the Constitutional Commission which went to different parts of

[2002] 1 FC 200, para 40, the Federal Court of Appeal held that, 'a free pardon can only be granted by the Governor in Council where a person has been wrongly convicted, and even then, there are established procedures that must be followed.'

[5] Section 407 of the Crimes Act (1961) provides that 'Where any person convicted of any offence is granted a free pardon by the Sovereign, or by the Governor-General in the exercise of any powers vested in him or her in that behalf, that person shall be deemed never to have committed that offence: provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted.'

[6] Section 85ZR of the Crimes Act, 1914 (pardons for persons wrongfully convicted).

the country and gathered peoples' views on the issues they wanted to be addressed in the new constitution. The Constitutional Commission summarised these views in its report. On the issue of presidential pardons, the Commission wrote that:

> A few submissions have commented on the prerogative of mercy, some noting that it is important for the Head of State to have the power to commute a sentence of death, to grant pardons, and reduce sentences. Such power should be mainly intended to enable the government to rectify injustices which only become apparent after the time for appeal against a conviction or sentence has passed. Some minority views oppose the prerogative of mercy, some arguing that sentences of convicted criminals should be carried out so as not to frustrate the independence of the judiciary and others noting dangers of exercise of the power for political reasons.[7]

The Commission's observations above show that most Ugandans who made submissions on this issue were of the view that the President's prerogative mercy should be limited to three powers: communing death sentences, granting pardons and reducing sentences. It is clear that in the cases of commuting death sentences and reducing sentences, the 'beneficiaries' should have been convicted of an offence. However, this is not a prerequisite in cases of pardons. Ugandans were also of the view that there had to be criteria for one to meet before they could benefit from the prerogative of mercy. Thus, they suggested that the prerogative of mercy should be exercised in cases of miscarriages of justices which were discovered in the post-appeal period. The Commission added that although it was necessary for the Constitution to provide for the circumstances in which offenders could be pardoned, those who made submissions to the Commission disagreed on whether that power should be exercised by the President or by the Chief Justice.[8] The Commission recommended that the power should be exercised by the President but added that 'it should

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[7] Report of the Constitutional Commission: Analysis and Recommendations (1993), para 17. 182.

[8] Ibidem, para 17. 183, it was reported that '[t]he necessity for a power to grant mercy is generally accepted, but there is disagreement on who should exercise such power and how to ensure it is not abused. Some have suggested that it should be exercised by the Chief Justice since he is the head of the judiciary which imposes sentences. Others have proposed the power should be exercised by the President, as Head of State, because it will be the State forgiving the convicted person. Since the Chief Justice is a part of the judicial system, it may cause difficulties to involve him or her in decisions on the grant of mercy to a person he or she may have convicted.'

not be a power exercised for political reasons, and…it should only be exercised on advice of an independent body.'[9]

The above recommendation was silent on the issue of pardon before the person had been convicted of an offence. It was limited to those who had been convicted of offences. Subsequent recommendations by the Commission show that it was of the view that as was the case with commuting death sentences and reducing sentences generally, the president should only grant pardon to a person who had been convicted of an offence. The Commission recommended that 'before the President exercises the power of mercy he or she should be advised by a committee and should act in accordance with the advice received.'[10] It also recommended the composition of the committee.[11] It recommended that the new constitution should include a provision to the effect that:

> (a) The President upon advice of the Advisory Committee on the Prerogative of Mercy should have powers to grant pardons to any person convicted of any offence and to give reprieve and respite and to remit, suspend or commute any sentence passed by any court or other authority.
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> (b) The Advisory Committee on the Prerogative of Mercy should consist of (i) The Attorney General who should be its chair-person; (ii) three prominent citizens of high moral standing, appointed by the President, subject to approval by the National council of State; (iii) one member appointed by the President after nomination by the Uganda Law Society, subject to approval by the National Council of State.
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> (c) The members of the committee should serve for a period of three (3) years subject to renewal.

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[9] Ibidem, para 17. 183.

[10] Ibidem, para 17. 184.

[11] Ibidem, para 17. 185. The Commission wrote that 'The current committee on the prerogative of mercy is chaired by the Attorney General and is composed of not less than six persons appointed by the President. We accept that the Attorney-General should continue to chair the committee, for it is important that full account is taken of all the issues that can be brought before it by virtue of the resources available to the Attorney-General.

But government concerns should not dominate, but rather, the concerns of society as a whole should be taken into account, we therefore suggest that the Committee should include three prominent citizens of high moral standing appointed by the President. But to ensure their independence, their appointments should be subject to approval by the National Council of State. There should also be a nominee of the Uganda Law Society, to ensure that independent views of the legal profession can be taken into account. This should help to ensure relevant and proper considerations are born in mind by the Committee. But again, the appointment should be subject to approval of the National Council of State, to ensure the appointee enjoys high public esteem.'

In the above recommendation, the pardon had to be granted by the President to a person who had been convicted of an offence. The President had to act on the advice of the Prerogative of Mercy Committee. The Commission included its recommendations in the Draft Constitution it prepared for discussion (debate) by the Constituent Assembly to adopt the new constitution. Clause 113 of the Draft Constitution dealt with the 'prerogative of mercy' and provided that:

> The President may, on the advice of the Committee on the prerogative of mercy – (a) grant an offender a pardon either free or subject to lawful conditions and whether or not he has been convicted of the offence; (b) grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him for an offence; (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or (d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

This provision was more or less similar to Article 73 of the 1967 Constitution.[12] Clause 113(2) dealt with the offender who had been sentenced to death.[13] Clause 113(3) dealt with the composition of the Advisory Committee.[14] Clause 113(4) provided that the prerogative of mercy was also applicable to courts martial.[15] The recommendation included in Clause 113(1)(a) of the Draft Constitution differed from the one in

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[12] Article 73 of the 1967 Constitution provided that 'The President may, (a) grant to any person concerned in or convicted of any offence a pardon, either free or subject to lawful conditions; (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence; (c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; or (d) remit the whole or part of any punishment imposed on any person for an offence or of any penalty or forfeiture otherwise due to the Government of Uganda on account of any offence.'

[13] It stated that 'Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the recSord of the case or elsewhere as may be necessary, shall he submitted to the Advisory Committee on the Prerogative of Mercy.'

[14] It stated that '(3) The Advisory Committee on the Prerogative of Mercy shall consist of – (a) the Attorney-General who shall be Chairman; (b) three prominent citizens of Uganda appointed by the President on the advice of the National Council of State; and (c) one member nominated by the Uganda Law Society and approved by the National Council of State.'

[15] It stated that 'A reference in this article to a conviction or imposition of a punishment, penalty, sentence or forfeiture includes conviction or imposition of a punishment, penalty, sentence or forfeiture by a court martial or other military tribunal.'

the Commission's report in two ways. One, unlike in its report where it recommended that a pardon could only be granted to a person who had been convicted of an offence, Clause 113(1)(a) applied to two categories of people – a person who had been convicted of an offence and one who had not been convicted of an offence. A literal meaning of Clause 113(1)(a) meant that it was applicable to different categories of people who had not yet been convicted of offences. This was broad enough to include a person who had been suspected of, alleged of, arrested or prosecuted (before sentence) for committing any offence. Two, Clause 113 provided for two different types of presidential pardons – free and conditional pardons. The Commission's report was silent on this distinction. Clause 113 also provided that the President was not bound by the recommendation of the Committee. This could be inferred from the use of the word 'may.' Since the Draft Constitution did not include an explanatory report, it remains unclear why the Commission's recommendations in the Draft Constitution slightly differed from those in its report. The Draft Constitution was debated by the Constituent Assembly. It is these debates that we turn to.

3. Debates in the Constituent Assembly

As mentioned above, Clause 113 provided that the President could pardon a person whether or not he had been convicted of an offence. However, when Clause 113 was introduced for debate in the Constituent Assembly, the Legal and Drafting Committee had excluded those words from the provision and, as illustrated below, made some amendments. When Clause 113(1) was introduced for debate, one delegate argued that although he supported the inclusion of the provision in the constitution empowering the president to exercise the prerogative of mercy in some cases, he wanted to know the grounds on which such power was to be exercised.[16] He specifically wanted a provision to be included in the constitution to provide that the president shall only invoke the provision on prerogative of mercy 'in the public interest.' Thus, he expected the constitution to require the president to disclose to all Ugandans the reason(s) why he had invoked such powers.[17] In response, the Chairperson of the Legal and Drafting Committee clarified that:

[16] *Proceedings of the Constituent Assembly* (1995), p. 3344.
[17] Ibidem, p. 3344 (Mr Karuhanga Elly).

> [T]he exercise of the prerogative of mercy comes after a person has been convicted by the courts and either sentenced to life imprisonment or to death as the case may be. In other words, the Legal requirements for his punishment will have been exhausted in the courts and what remains is for the President at his discretion to exercise the prerogative of mercy. The reasons for granting the prerogative of mercy which comes in mitigation for that person who has been convicted are of a secret nature.[18]

He also added that the identities of members of the Committee on the Prerogative of Mercy had to remain 'secret' to prevent members of the public from approaching them asking them to request the President to invoke his/her powers for the benefit of themselves, their friends or relatives.[19] He argued that the reasons for the President's decision to exercise prerogative of mercy were to be known only by the President, the Attorney-General and members of the Committee.[20] The Chairperson of the Constituent Assembly wanted to know whether 'all cases' where a person had been convicted of an offence had to go through the Committee before the President could invoke the prerogative of mercy. The Chairperson of Legal and Drafting Committee responded that in practice, 'all cases involving capital punishment go to that committee', but that, in some cases where the people were convicted of 'smaller offences', the Attorney-General did not have to call 'the whole meeting of the committee.'[21] He gave a recent example where a person had been convicted of a 'smaller offence' and after a discussion between the Attorney-General 'and presumably the Magistrate concerned', the former recommended to the President to invoke his powers.[22] It was also explained that prerogative powers are executive in nature and that is why the Attorney-General should chair the Committee and had to be exercised after the person had been convicted of an offence.[23] It is against that background that Clause 113(1), as introduced by the Legal and Drafting Committee, was adopted and would later become Article 121(1) of the Constitution. It was agreed that in exercising his prerogative powers, the President should be able, at the recommendation of the Committee, to commute death sentences to life imprisonment or specified number of years.[24] The Clauses on the qualifications of members of the Committee, the composition and tenure of office of the members of Committee, as suggested by the Legal and Drafting Committee,

[18] Ibidem, p. 3344 (Prof Kanyeihamba).
[19] Ibidem, p. 3344 (Prof Kanyeihamba). See also p. 3439.
[20] Ibidem, p. 3344 (Prof Kanyeihamba).
[21] Ibidem, p. 3344 (Prof Kanyeihamba).
[22] Ibidem, p. 3344 (Prof Kanyeihamba).
[23] Ibidem, p. 3345–3346.
[24] Ibidem, p. 5809 (Mulenga).

were approved without debate and would later become Articles 121(2), (3), (4) and (5) of the Constitution.[25] The above debates show, *inter alia*, that the delegates were of the view that President can only pardon a person once his/her sentence has become final.

As mentioned above, Clause 113(4) of the Draft Constitution provided that '[a] reference in this article to a conviction or imposition of a punishment, penalty, sentence or forfeiture includes conviction or imposition of a punishment, penalty, sentence or forfeiture by a court martial or other military tribunal.' This meant that the President's powers when exercising the prerogative of mercy extended to sentences imposed by courts martial. The Legal and Drafting Committee introduced an amendment to Clause 113(4) – it had been renamed Clause 113(6) after the insertion of new clauses when re-arranging the provision. It was to the effect that:

> A reference in this article to conviction or imposition of punishment, sentence or forfeiture includes conviction or imposition of a punishment, penalty, sentence or forfeiture by a court martial or other military tribunal except a field court martial during the war between Uganda and another country.[26]

One of the members of the Legal and Drafting Committee explained the rationale behind that amendment. Because of the way in which the Constitutional Court later approached this issue (whether Article 121 is also applicable to those sentenced by the Field Court Martial), it is important to reproduce the detailed rationale behind the introduction of that provision. The explanation went as follows:

> Initially, there was no exemption of any case or any court from the application of this clause because the clause is saying – anybody who is punished under law, should have benefit of that prerogative of mercy. Even in Military courts. So, an amendment was introduced that in the case of Field court martial, they cannot afford to wait for the prerogative of mercy Committee to consider. The sentence must be carried out instantly. The next step was a move to consider what kind of Field court martial should be exempted from this application and a proposal was made and carried that the exemption should be restricted to when there is war between Uganda and an enemy state. And the reason that was given…is that there is a distinction between the war between Uganda and another country – an enemy country and internal conflict. The emphasis made was that in internal conflict, it is brothers and sisters fighting over how to manage themselves and therefore, when someone is

[25] Ibidem, p. 3346–3347.
[26] Ibidem, p. 3347.

> convicted…by field court martial… There is no reason why this person should not also be considered for mercy. It is not that he is being exempted from punishment, it is that he should be considered for mercy and the committee was not satisfied that it would lead to loss of the internal conflict. So, that is why this was limited that in case of the external war, everybody in Uganda, every citizen, everyone fighting in that war must is [sic] under constitutional obligation, to be on the same side and if he is undermining that side, there is no reason why the executive should exercise mercy on him. So, the committee says…, that one can be sentenced summarily and he does not have to be exposed or given benefit of that mercy; but in any other case, including someone convicted by Field court martial in an internal conflict, should have benefit of that prerogative of mercy. This was decided after considering that special case of field court martial which always wants to carry out sentences of death or even imprisonment immediately.[27]

It was also argued that if field courts martial are allowed to sentence people to death and execute them immediately in 'every internal dispute' or military operation, there was a danger that that power could be abused to justify 'mass killings' in an attempt to 'quell' the insurgencies.[28] However, all military officers who made submissions on Clause 113(6) objected to it for different reasons. One argued that:

> [W]e have had problems in this country where officers in combat, for example, between the forces of the country – and say insurgency and an officer releases information about the moments and formations of his army and soldiers lose lives and the Field Court Martial has to sit- or civilians lose lives. A field court has to sit and pass sentence and that sentence must be executed expeditiously to enable the continuance of the war. What happens when this provision excludes a field court martial from executing that sentence where there is an internal conflict. It seems the justification given is insufficient because it says, this exclusion is simply because one side may be legitimately right today, and it is wrong tomorrow.[29]

Other delegates, military officers and civilians, also argued that the proposal to limit the provision to international armed conflicts was impractical as it would have made it impossible for the field court martial to execute its sentences immediately.[30] It was emphasised that 'a field court

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[27] Ibidem, p. 3348 (Mr Mulenga).

[28] Ibidem, p. 3351 (Mr. Okalebo Hensley).

[29] Ibidem, p. 3347 (Lt. Mayombo Noble).

[30] Ibidem, p. 3347–3350 (Maj. Amaza Ondoga; Chairperson of the Constituent Assembly; Mr Katenta Apuuli; and Maj. Tumukunde).

martial acts instantly' and that '[t]here is no time to appeal to the committee to have the case considered' for the prerogative of mercy because when 'the decision is made…the soldier is shot there and then.'[31] This is because field courts martial are temporary in nature, established to deal with service offences during military operations and failure to execute their sentences immediately puts the whole military operation and the officers involved 'in severe jeopardy.'[32] Since most of the delegates were opposed to the draft provision, one suggested that it should be amended to provide that '[a] reference in this article to conviction or imposition of punishment, sentence or forfeiture incudes conviction or imposition of a punishment, penalty, sentence or forfeiture by court martial or other military tribunal except a field court martial during a war.'[33] This proposal was meant to delete the words 'between Uganda and another country.'[34] One of the delegates wondered whether it was necessary for the provision to include the words 'during war.'[35] The mover of the motion responded that it was not necessary to add those words.[36] However, it was emphasised that field courts martial are circumstantial and meant to operate during war irrespective of its classification.[37] Delegates were reminded that field courts martial also imposed other sentences apart from the death penalty.[38] However, one of the members of the Legal and Drafting Committee clarified that

> [T]he real force behind this amendment and behind the idea that a field court martial must execute its sentences immediately is invariably about the sentence of death by hanging or shooting. Let us not mince words because otherwise there is no problem with any other punishment; it could be flogging, could be imprisonment like in civilian court. When somebody who is sentenced for life imprisonment, the sentence will start running until the mercy is exercised.[39]

In response to the above submission, it was argued that the field court martial had jurisdiction over military officers only (and not over civilians) and that its sentences, especially the death penalty, were meant to be executed immediately to deter other soldiers from committing serious

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[31] Ibidem, p. 3347 (Mr Kawere Puis).
[32] Ibidem, p. 3349 (Lt. Col. Besigye Kiiza).
[33] Ibidem, p. 3349 (Mr. Hashaka Jackson).
[34] Ibidem, p. 3349 (Mr. Hashaka Jackson).
[35] Ibidem, p. 3349 (Chairperson of the Constituent Assembly).
[36] Ibidem, p. 3349 (Mr. Hashaka Jackson).
[37] Ibidem, p. 3350 (Lt. Col. Guma; Mr Zziwa George; and Mr Kayiizi Asanasio).
[38] Ibidem, p. 3351 (one delegate).
[39] Ibidem, p. 3351 (Mr Mulenga).

service offences during military operations.[40] The member of the Legal and Drafting Committee said that he supported the proposed amendment (deleting the words 'between Uganda and another country') because he understood, from some of his fellow delegates, that 'the import of this amendment' was:

> that a person also who has been convicted and sentenced to death should be removed from the field and have [an] opportunity to be considered for mercy. The distinction has been made and I think explained that in this case of internal conflict there is no need to carry out that death sentence immediately. It will still be there. It will be carried out if he does not get mercy but he should not be banned from consideration for mercy.[41]

In the light of the above submissions, the delegates supported the proposed amendment and the words 'between Uganda and another country' were deleted. This would later become Article 121(6).

The following observations should be made about the drafting history of Article 121(6). First, although one of the delegates submitted that he supported the proposed amendment to delete the words which limited the application of Article 121(6) to international armed conflicts to mean that in a non-international armed conflict the field court martial will not execute those sentenced to death, this view was neither supported nor rejected by other delegates. The majority view was that a field court martial has the jurisdiction to impose a sentence, including a death sentence, and to carry it out immediately. There is no distinction between sentences and the nature of the armed conflict (whether international or non-international). Second and related to the above, the exception is only applicable where there is a war (armed conflict) between Uganda and another country or between government soldiers and rebels. The situation should be of such a nature that it is impossible to 'save an offender for a normal trial' before other courts martial.[42] The point is that failure to execute the sentence immediately jeopardises the operation. The offence must also be connected to the operation. In other words, it should endanger the operation. This is a high threshold and can only be met if there is an armed conflict. It does not apply to disarmament operations. Therefore, as the discussion below illustrates, the Constitutional Court's reasoning that Article 121 is applicable to sentences imposed by the field court irrespective of the circumstances in which its operating is contrary to the drafting

[40] Ibidem, p. 3351–3352 (Hon. Dick Nyai and Prof Kanyeihamba).
[41] Ibidem, p. 3352 (Mr Mulenga).
[42] Ibidem, p. 3349 (Lt. Col. Besigye Kiiza).

history of the Constitution. Thus, the president's prerogative powers do not extend to the Field Court Martial because it is temporary in nature and the sentences it imposes have to be executed immediately to enable the military operation to continue.[43]

Although there was no debate on Article 121(4), it is worth noting that the drafting history of Article 121 shows that the President can only grant a pardon to a person who has been convicted of an offence. This explains why the words 'whether or not he has been convicted of an offence' were deleted. The literal meaning of Article 121(4)(a) also supports that conclusion. The President does not have to explain the reasons behind the decisions taken in exercising the prerogative of mercy. The Human Rights Commission is barred from investigating the manner in which the President makes decisions under Article 121.[44] However, this does not oust the jurisdiction of the courts to review such powers if there is evidence that the President exercised the powers contrary to the Constitution. For example, if the President did not follow the procedure for granting pardon or pardoned a person who did not meet the requirements for pardon. The conditions of a pardon can also be successfully challenged if they impose limitations on rights unless such limitations are inherent in the execution of the sentence imposed by the court. For example, the President cannot pardon a person on condition that he/she refrains from voting in general elections or that denounces their citizenship.[45] Under Article 281 of the Constitution, the President's powers under Article 121 are applicable to offences committed before and after the commencement of the Constitution.

Another provision which deals with the issue of pardon is Article 28(10) of the Constitution. It states that '[n]o person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.' In its report, the Constitutional Commission did not mention anything on the issue of a person being pardoned before he/she has been tried of an offence.[46] However, the Commission included Clause

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[43] Ibidem, p. 3347–3352.

[44] Ibidem, p. 2205–2207, 2211–2213 (although many delegates were of the view that the Human Rights Commission should have had the powers to investigate the President's exercise of the prerogative of mercy). See also Article 53(4)(c) of the Constitution which provides that the Human Rights Commission shall not investigate 'a matter relating to the exercise of the prerogative of mercy.'

[45] For other impermissible parson conditions, see Note "The President's Conditional Pardon Power" 2833–2854.

[46] See Chapter Seven (human rights and fundamental freedoms) of the Report of the Uganda Constitutional Commission: Analysis and Recommendations (1993).

58(11) in the Draft Constitution.[47] This could be attributed to the fact that a similar provision appeared in Article 15 of the 1967 Constitution and the Commission just reproduced it from there. During the Constituent Assembly debates, Clause 58(11), which later became Article 28(10), was not debated. This could explain why it was not amended at all. However, one of the delegates argued that it should be retained in the Constitution because it was meant 'to give protection to a person…if he has been pardoned by the President, although he has committed a crime, you cannot take him to court.'[48] After making that submission, the delegate was applauded by his colleagues. In other words, none of them challenged his understanding of Clause 58(11).

The following observations should be made about Article 28(10). One, unlike the pardon under Article 121 which can only be granted by the President, Article 28(10) is silent on the person(s) with the power to grant a pardon before one is convicted of an offence. However, the drafting history of Article 28(10) shows that the delegates did not oppose the view that the pardon under Article 28(10) was to be granted by the President. That is why they applauded their colleague who made a submission to that effect. Two, unlike under Article 121 where the President can only grant a pardon based on the advice of the Committee on the Prerogative of Mercy, there is no such committee under Article 28(10). Three, unlike under Article 121 where the Uganda Human Rights Commission does not have the power to investigate the manner in which the President exercised his prerogative of mercy, nothing prevents the Uganda Human Rights Commission from investigating how the President exercised his powers in granting a pardon to a person before he/she has been convicted of an offence. This is so because such powers are not exercised in the context of prerogative of mercy. It also implies that courts can review the circumstances in which a pardon was granted to a person before he/she was convicted of an offence. It is now important to illustrate how the issue of pardons is dealt with in legislation and case law.

4. Articles 28(10) and 121(4) in practice

As mentioned above, there is a distinction between pardons under Articles 28(10) and 121 of the Constitution.[49] In this part of the article,

[47] It stated that '[n]o person shall be tried for a criminal offence if the person shows that he has been pardoned in respect of that offence.'

[48] Proceedings of the Constituent Assembly (1995), p. 2069 (Mr Malinga).

[49] In *Muzanyi & 3 Others v Attorney General* (Constitutional Petition 42 of 2015) [2024] UGCC 6 (21 February 2024), p. 14, the Constitutional Court held that 'Article

the author will illustrate how these provisions have been implemented in practice.

4.1. Article 28(10) of the Constitution: pardon before the person is prosecuted of an offence

Article 28(10) prohibits the trial of any person 'for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.' The prosecution is barred in respect of the offence mentioned in the instrument of pardon and any alternative offence(s) based on the same facts. Thus, once a pardon is granted, it prohibits the prosecution of person for the 'main' or 'principle' offence and for the 'alternative or backup' offence.[50] Article 28(10) is operationalised by different pieces of legislation. For example, section 61(1)(b) of the Trial on Indictments Act[51] provides that '[a]ny accused person against whom an indictment is filed may plead that he or she has obtained the President's pardon for his or her offence.' A similar provision is found in section 124(5)(b) of the Magistrates Courts Act.[52] The Supreme Court held that the fact that a person was pardoned is supposed to be raised 'as a plea in bar' as opposed to a defence.[53] Although Article 28(10) is silent on the person who is empowered to give the pardon under that provision, it has been illustrated above that the Constituent Assembly delegates were of the view that the pardon under Article 28(10) has to be granted by the President. In *Brigadier Smith Opon Acak, Ahmed Ogeny v Uganda*,[54] the Supreme Court, while interpreting Article 15(6) of the 1967, which was identical to Article 28(10) of the 1995 Constitution, held that a pardon has to be granted by the President in writing and should stipulate the conditions attached to it.[55] The Court also held that a person who claims that he/

28(10) applies in situations where a person was pardoned in respect of a criminal offence. Under Article 121(4) of the Constitution, the President has power to grant a pardon, respite, substitution or remission of any sentence or punishment imposed on any person. For Article 121 to apply, there must be a conviction or an imposition of punishment.'

[50] *Uganda v Ojwiya Santo & 4 Others* (Criminal Appeal 12 of 2017) [2020] UGHC 140 (14 August 2020) para 12 (the court used this phrase in the context of retrial).

[51] Trial on Indictments Act, Chapter 23.

[52] Magistrates Courts Act, Chapter 16.

[53] *Professor Isaac Newton Ojok v Uganda* (Criminal Appeal 33 of 91) [1993] UGSC 32 (18 June 1993), p. 3.

[54] *Brigadier Smith Opon Acak, Ahmed Ogeny v Uganda* [1993] UGSC 10 (4 November 1993).

[55] However, this should be understood in the light of the fact that under Article 73 of the 1967 Constitution, the President could "grant to any person concerned in or con-

she was pardoned should adduce evidence, on a balance of probabilities, to prove that claim. He could do so by adducing an instrument of pardon or calling witnesses to confirm that he was pardoned.[56] This is meant to, amongst other things, ensure that people do not escape prosecution by relying on false documents claiming that they were pardoned. This happened, for example, in the case of *Professor Isaac Newton Ojok v Uganda*[57] where the Court found that the appellant had adduced false documents as 'proof' that he had been pardoned by the President. The Supreme Court relied on English case law to hold that 'a proclamation promising a pardon does not have a legal effect of a pardon, but following such a proclamation the court could defer execution of sentence and so allow time for the prisoner to apply for a pardon.'[58] In *Thomas Kwoyelo alias Latoni v Uganda*[59] the Constitutional Court referred to Article 28(10) and held that:

> Pardon is therefore a constitutional protected right which the DPP has not complained about in respect of his independent powers to determine whom to prosecute or not prosecute. This pardon is general in nature and it applies to all criminal offences under the statute books. It operates as a bar in criminal prosecution. It is a constitutional command which has to be obeyed by everyone the DPP and the courts inclusive. The article does not state who can grant a pardon or under what circumstances the pardon may be granted. There is no dispute that under Article 79(1) of the Constitution Parliament is clothed with powers "to make laws of any matter for the peace, order, development and good governance of Uganda." When Parliament enacted the Amnesty Act which came into force on 21st January 2000, it was exercising the powers conferred by the article.[60]

In the Constitution Court's view, the pardon under Article 28(10) can also be granted by the legislature through legislation. On appeal, the

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victed of any offence a pardon, either free or subject to lawful conditions." The Court interpreted Articles 15(6) and 73 of the Constitution to mean that a pardon granted under Article 15(6) had to be 'either free or subject to lawful conditions.' This had to be clarified in the instrument of pardon.

[56] *Brigadier Smith Opon Acak, Ahmed Ogeny v Uganda* [1993] UGSC 10 (4 November 1993), p. 14.

[57] *Professor Isaac Newton Ojok v Uganda* (Criminal Appeal 33 of 91) [1993] UGSC 32 (18 June 1993).

[58] *Brigadier Smith Opon Acak, Ahmed Ogeny v Uganda* [1993] UGSC 10 (4 November 1993), p. 14.

[59] *Thomas Kwoyelo alias Latoni v Uganda* (Constitutional Petition No. 36 of 2011) [2011] UGCC 10 (22 September 2011).

[60] Ibidem, p. 14.

Supreme Court came to the same conclusion that Parliament can grant pardon. It also held that amnesty has the same meaning and effect as pardon under Article 28(10).[61] Since, as a general rule, an Act passed by Parliament has to be assented to by the President before it becomes law,[62] it can be argued that in this case Parliament granted the pardon with the consent of the President. In other words, the pardon was indirectly granted by the President. It is unconstitutional and a violation of the right to a fair trial to prosecute a person for offences over which he had been granted a pardon (amnesty).[63] Likewise, it is unlawful for the law enforcement officer to arrest a person for an offence over which he/she has been pardoned.[64] In *Muzanyi & 3 Others v Attorney General*,[65] the Constitutional Court held correctly that the prosecution's decision to withdraw charges against the accused does not amount to a pardon within the meaning of Article 28(10). The Supreme Court held that amnesty or pardon cannot be granted to a person who committed grave breaches of the Geneva Conventions. This is so because Uganda has an international obligation to prosecute such offences.[66] The same principle applies to all crimes under international law – that is all war crimes, crimes against human, genocide and aggression. Case law from the International Criminal Court supports this position.[67] Likewise, a pardon should not be granted to a person who has committed international crimes such as torture. It is against that background that section 23 of the Prevention and Prohibition of Torture Act[68] provides that '[n]otwithstanding the provisions of the Amnesty Act, a person accused of torture shall not be granted amnesty.' Thus, the President's power to pardon a person before he/she has been prosecuted for an offence is not absolute. It is limited by international law and can be reviewed and set aside by a court if it is illegal – contrary to international law or domestic law (which prohibits the grant of pardons in respect of specific offences).

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[61] *Uganda v Kwoyelo* [2015] UGSC 5 (8 April 2015).

[62] See Article 91 of the Constitution which provides for circumstances in which an Act passed by Parliament can become law without presidential assent.

[63] *Uganda v Wakwaya* (HCT-00-ICD-CR-SC 1 of 2022) [2023] UGHCICD 2 (13 April 2023).

[64] *Ogil v Attorney General* (Civil Suit No. 94 of 2004) [2009] UGHC 57 (30 April 2009).

[65] *Muzanyi & 3 Others v Attorney General* (Constitutional Petition 42 of 2015) [2024] UGCC 6 (21 February 2024).

[66] *Uganda v Kwoyelo* [2015] UGSC 5 (8 April 2015).

[67] See, for example, *Prosecutor v Saif Al-Islam Gaddafi* (ICC-01/11-01/11-695-AnxI; 21 April 2020) (Appeals Chamber).

[68] Prevention and Prohibition of Torture Act, Act 3 of 2012.

4.2. Article 121: prerogative of mercy

Article 121 of the Constitution deals with two categories of offenders: those sentenced to death and those who are not sentenced to death. Article 121(5) of the Constitution provides that:

> Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy.

As illustrated above, the drafting history of Article 121(5) shows that it was not debated. Article 121(5) was neither included in the Constitutional Commission report nor in the Draft Constitution. It was an amendment introduced by the Legal and Drafting Committee. The rationale behind its inclusion in the Constitution is not clear. However, section 102 of the Trial on Indictments Act suggests that the Committee assesses the report to decide whether or not to advise the President to take any of the actions under Article 121(1).[69] Under section 72 of the Prisons Act, any prisoner may also petition the President, through the Commissioner of Prisons, to take any action. The effectiveness of the prerogative of mercy with regards to offenders sentenced to death was raised in the Constitutional

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[69] Section 102 of the Trial on Indictment Act provides that '(1) As soon as conveniently may be after sentence of death has been pronounced by the court, if no appeal is preferred, or if an appeal is preferred and the sentence is upheld by the Court of Appeal, then as soon as conveniently may be after the determination of the appeal, the High Court shall forward to the Minister a copy of the judgment of the court and of the notes of evidence taken at the trial, with a report in writing signed by the judge who presided at the trial containing any recommendations or observations on the case which he or she may think fit to make.

(2) The Minister shall communicate to the High Court the terms of any decision that has been reached by the President with regard to the exercise of the prerogative of mercy in respect of the case to which the report mentioned in subsection (1) relates, and the court shall give directions for the tenor and substance of the terms of the decision of the President to be entered in the records of the court.

(3) The President shall issue a death warrant, or an order for the sentence of death to be commuted or a pardon, under his or her hand and the public seal to give effect to the decision. If the sentence is commuted to any other punishment, the order shall specify that punishment. If the person sentenced is pardoned, the pardon shall state whether it is free, or to what conditions, if any, it is subject.

(4) The warrant, or order or pardon of the President shall be sufficient authority in law to all persons to whom it is directed to execute the sentence of death or other punishment awarded and to carry out the directions given in it in accordance with its terms.'

Court case of *Susan Kigula & 416 Others v Attorney General*.[70] The petitioners argued, amongst other things, that the mandatory death penalty and the death row phenomena were unconstitutional because they amounted to cruel and inhuman treatment. In response, the state argued, *inter alia*, that:

> Article 121 sets out an Advisory Committee on Prerogative of Mercy to advise the President on when to grant a pardon etc or to remit part of the sentence imposed. This article also does not prescribe or set a time frame within which to exercise those powers. Had the framers of the Constitution wanted, they would have expressly set the time frame within which a sentence of death should be executed: Courts have no powers to legislate on time limit. The President must be given a chance to exercise his discretion unhinded.[71]

The Court referred to Article 121 of the Constitution and to sections 102 and 72 of the Trial on Indictments Act and Prisons Act respectively and held that:

> They provide procedure to be followed to seek prerogative of mercy. Neither the Constitution, nor those statutory provisions have set up a time frame within which the prerogative of mercy process should be completed. The prerogative of mercy is an executive process that comes after the judicial process is concluded. The evidence available shows that the average delays on death row among the petitioners who have exhausted their appeal process is between 5 and 6 years. The uncontraverted [sic] evidence … shows that from 1989 to 1999, there had been executions …after every three years. A good numbers of the petitioners [sic] had already been on the death row after their sentences had been confirmed by the highest appellate court, but the Advisory Committee did not consider their cases. It is important that; the procedure for seeking pardon or commutation of the sentence should guarantee transparency and safeguard against delay. The spirit of our Constitution is that whatever is to be done under it affecting the Fundamental Rights and Freedoms must be done without unreasonable delay.[72]

The Court also held that the President is not bound by the Committee's advice under Article 121.[73] The Court also held that the executive powers

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[70] *Susan Kigula & 416 Others v Attorney General* (Constitutional Petition No. 6 of 2003) [2005] UGCC 8 (10 June 2005).

[71] Ibidem, p. 48.

[72] Ibidem, p. 59–60.

[73] Ibidem, p. 88.

under Article 121 are subject to various (unknown) considerations.[74] The Court highlighted the fact that offenders who petitioned the President to exercise his powers under Article 121 had to wait for years before they could get a response.[75] This is because the President and the Attorney General have very busy schedules.[76] The Court added that:

> After the appeal process is completed the condemned prisoner has a right to apply to the Committee on the Prerogative of Mercy which advises the President on the exercise of his powers under Article 121 of the Constitution. Section 102 of the Trial on Indictments Act and Section [72] of the Prisons Act provide the procedure to be followed when a prisoner desires to seek pardon from the President. Both sections are worded in such a manner that it is difficult to tell when the process of seeking pardon ought to begin. Obviously it ought to commence soon after the judicial process is complete.[77]

In the above decision, the Constitutional Court held that a combined reading of Article 121 and sections 102 of the Trial on Indictments Act and 72 of the Prisons Act respectively provides for the prisoners' 'right' to apply to the Committee on the Prerogative of Mercy. This interpretation stretches the meaning of these provisions. The drafting history of Article 121 and its literal interpretation do not provide for this right. It is not a constitutional right. Likewise, section 102 of the Trial on Indictments Act does not contemplate the role of a prisoner in the process. This means the prisoner's 'right' in question is not provided for under section 102. Under section 72 of the Prisons Act, any '[a]ny prisoner may petition the President, but in exercising that right, shall address the President through the Commissioner General.' Section 72 provides the right to petition the President through the Commissioner and not through the Committee on the Prerogative of Mercy.[78] The petition in question does not necessarily have to deal with a request for the President to exercise any of his powers under Article 121. Thus, a combined reading of Article 121 with section 72 of the Prisons Act shows that a prisoner does not have a right to petition the Committee on the Prerogative of Mercy to advise the President to

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[74] Ibidem, p. 129.
[75] Ibidem, p. 166.
[76] Ibidem, p. 168.
[77] Ibidem, p. 211.
[78] In practice, annually, the prison authorities submit names of prisoners who 'qualify for presidential pardon' to the Attorney-General's office. See Pride Mudoola "President Museveni Pardons Sharma Kooky", The New Vision, 27 March 2012, accessed September 1, 2024, https://www.newvision.co.ug/new_vision/news/1300482/president-museveni-pardons-sharma-kooky

take any of the actions under Article 121. This could explain why some people have reportedly petitioned the President directly, as opposed to the Committee on the Prerogative of Mercy, to pardon some prisoners.[79]

Related to the above is the constitutionality of sections 102(1) and (2) of the Trial on Indictments Act. It is evident that sections 102(1) and (2) of the Trial on Indictments Act are contrary to Article 121(5) of the Constitution. Under 121(5) of the Constitution, a judge(s) who sentence(s) a person to death is obliged to send the report in question to the Advisory Committee on the Prerogative of Mercy. However, under sections 102(1) and (2) of the Trial on Indictments Act, the judge is supposed to send such a report to the Minister and it is the Minister to approach the President on the issue of prerogative of mercy. In the light of this contradiction, Article 274 of the Constitution may have to be invoked for section 102 of the Trial on Indictments Act to be interpreted to bring it in conformity with Article 121 of the Constitution.[80] Otherwise, it has to be declared unconstitutional. The Constitutional Court rightly observed that the manner in which the President exercises the prerogative of mercy is not transparent. Had the Court considered the drafting history of Article 121, it would have appreciated the reason why the drafters of the Constitution chose to shroud the process in secrecy.

On appeal to the Supreme Court by the Attorney General in *Attorney General v Susan Kigula & 417 Others*,[81] the Supreme Court dismissed the appeal and did not take issue with any of the above observations by the Constitutional Court. This means that the above principles are still sound and thus the criticisms against them are still valid. However, the Supreme

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[79] For example, it is reported that the lawyers of one of the prisoners wrote a letter to the President requesting him to pardon his client and he was subsequently pardoned. See "Confirmed: President Museveni pardons ex-NSSF MD Jamwa, 12 others" 18 January 2024, The Independent, accessed July 18, 2024 https://www.independent.co.ug/confirmed-president-museveni-pardons-ex-nssf-md-jamwa-12-others/

[80] Article 274 of the Constitution provides that '(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.

(2) For the purposes of this article, the expression „existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date.' For a detailed discussion of cases in which Article 274 has been invoked, see Jamil Ddamulira Mujuzi, 'Construing Pre-1995 Laws to Bring Them in Conformity with the Constitution of Uganda: Courts' Reliance on Article 274 of the Constitution to Protect Human Rights' *African Human Rights Law Journal*, vol. 22, no. 2 (2022): 520–547.

[81] *Attorney General v Susan Kigula & 417 Others* [2009] UGSC 6 (21 January 2009).

Court also made some important observations on the issue of prerogative of mercy that should be highlighted here. The Court referred to case law from the United States and explained the importance of the President's powers of prerogative of mercy.[82] It held that in the case of offenders sentenced to death, they need to know as soon as possible whether or not they have been granted pardon or their sentences have been commuted. Thus, it rejected the argument that Article 121 does not impose a duty on the President to make his decision on the prerogative of mercy within a specified period.[83] It held that:

> The right to fair hearing provided for in Article 28 envisages a fair, speedy and public trial. The right to liberty in Article 23 envisages that one's liberty may be compromised in execution of a court order. In our view, these provisions mean that a person who has had a speedy trial should only have his liberty compromised in execution of a sentence of court without delay. The person would thereby serve his due sentence and regain his liberty. In the case of a sentence of death it would mean that after the trial, the processes provided for under Article 121 should be put in motion as quickly as possible so that the person knows his fate, i.e., whether he is pardoned, given a respite or remission or whether the sentence is to be carried out. It could not have been envisaged by the Constitution makers that article 121 could be used to keep persons on death row for an indefinite period. This in effect makes them serve a long period of imprisonment which they were not sentenced to in the first place.[84]

Against that background, the Court held that the President has, without unreasonable delay, to decide on the prerogative of mercy in the case of offenders sentenced to death.[85] It agreed with the Constitutional Court that 'to hold a person beyond three years after the confirmation of sentence is unreasonable.'[86] The Court concluded that:

> At the end of a period of three years after the highest appellate court confirmed the sentence, and if the President shall not have exercised his prerogative one way or the other, the death sentence shall be deemed to be commuted to life imprisonment without remission.[87]

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[82] Ibidem, p. 51–52.
[83] Ibidem, p. 53.
[84] Ibidem, p. 53.
[85] Ibidem, p. 53–54.
[86] Ibidem, p. 55.
[87] Ibidem, p. 55.

The drafting history of Article 121(5) shows that it was not debated. The delegates also did not raise the issue of the period within which the President has to decide on whether to take any action with regards to offenders sentenced to death. The Court's decision means, *inter alia*, that in the case of offenders sentenced to death, the President has three years to decide whether or not to invoke any of his powers under Article 121. If he does not do so, the sentence of death is commuted to one of life imprisonment. This amounts to substituting a less severe form of punishment for a punishment imposed on the offender.[88] However, the three-year deadline does not apply to other categories of offenders. Thus, the President could take longer than three years to make a decision under Article 121 in case of the offenders not sentenced to death.

The issue of whether Article 121 is applicable to a person who has been sentenced to death by the field court martial arose in the case of *Uganda Law Society and Another v Attorney General*.[89] In this case, during a disarmament operation in one part of the country, two soldiers 'sneaked' out of their barracks, staged an illegal roadblock and murdered three civilians in the course of an armed robbery.[90] They were prosecuted for murder before a field court martial, which had been established by the President for the disarmament operation, and on the same day of the trial, they were convicted, sentenced to death and executed by a firing squad.[91] The issue before the Constitutional Court was whether their constitutional right to a fair trial had been violated. In answering this issue in the affirmative, the Court also dealt with the issue of prerogative of mercy. It first referred to the then section 92 of the Uganda Peoples Defence Act which allowed the President to exercise the prerogative of mercy pursuant to the advice of the High Command.[92] It held that the effect of section 92 was to replace the Advisory Committee on the Prerogative of Mercy with the High Command 'in cases decided by military courts.'[93] The Court reproduced Article 121 of the Constitution and held that:

> This procedure, however, does not apply where the punishment, penalty, sentence or forfeiture has been imposed by a Field Court Martial.

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[88] Sections 6 and 7 of the Law Revision (Penalties in Criminal Matters) (Miscellaneous Amendments) Act, Act 19 of 2021 give effect to the Court's judgement.

[89] *Uganda Law Society and Another v Attorney general* (Constitutional Petition 2 of 2002; Constitutional Petition 8 of 2002) [2009] UGCC 4 (5 February 2009).

[90] Ibidem, p. 33.

[91] Ibidem, p. 2.

[92] Ibidem, p. 42. Section 92 provided that "The President shall, while exercising his powers under article 121 of the constitution, be advised by members of the High Command in cases falling under this Act."

[93] Ibidem, p. 42.

> This does not mean that the President does not exercise the prerogative of mercy in those cases handled by the Field Courts Martial. He can definitely exercise it but without the intervention of the Advisory Committee on the Prerogative of Mercy.[94]

In the above decision, the Constitutional Court held that Article 121 is applicable to cases where the offenders were convicted by a field court martial. This reasoning is contrary to the drafting history of Article 121(6). However, as discussed above, the drafting history of Article 121(6) shows that the field martial court exception is only applicable where there is a war. On the facts before the Court, there was no armed conflict. It was a disarmament operation. Therefore, there was still time to 'save' the accused and prosecute them before other military courts or civil courts for the offence of murder. Secondly, the accused's conduct did not endanger the operation as contemplated by the drafters of the Constitution. They should not have been court martialled before the field court martial. It is worth noting that the UPDF Act which contained section 92 to which the Court referred has since been repealed. The applicable provision is now section 243 of the 2005 UPDF Act which states that '[n]othing in this Act shall be construed as restricting or regulating the exercise of the prerogative of mercy conferred on the President by article 121 of the Constitution.'[95] This implies that even in cases where people are convicted by military courts, their cases have to go through the Advisory Committee on the Prerogative of Mercy. However, this does not change the position that Article 121 does not apply to cases where soldiers have been convicted and by a field court martial during an armed conflict.

In all the above cases, Ugandan courts have dealt with Article 121 after the offenders had been convicted and sentenced by courts. The debates of the Constituent Assembly show, *inter alia*, that the delegates were of the view that the President can only pardon a person once his/her sentence has become final. This means that if courts are to interpret Article 121(4)(a) in the light of its drafting history, they are likely to conclude that the President can only pardon a person who has been sentenced by a court and the sentence is final. However, literally interpreted, Article 121(4)(a) creates room for the argument that the President can also pardon a person who has been convicted before he/she has been sentenced. This is because Article 121(4)(a) provides that the President may 'grant pardon to any person convicted of an offence.' It does not say that the President may 'grant pardon to any person convicted of and sentenced for an offence.' This literal interpretation would be in line with the approach taken

[94] Ibidem, p. 41–42. See also p. 61.

[95] Uganda Peoples' Defence Forces Act, Act 7 of 2005 (Cap 330).

by the Supreme Court of Ghana. Article 72(1)(a) of the Constitution of Ghana (1992), like Article 121(4)(a) of the Constitution of Uganda, provides that '[t]he President may, acting in consultation with the Council of State – grant to a person convicted of an offence a pardon either free or subject to lawful conditions.' In *Agbemava, Tuah-Yeboah, Bediatuo v Attorney General*,[96] the Supreme Court of Ghana referred to Article 72(1)(a) of the Constitution and held that '[t]he power of pardon may thus be exercised even before sentence is imposed by the court, once a conviction has been pronounced' and that '[i]t is only in matters of remission of sentence that will depend on the imposition of a sentence.'[97] Since Ugandan courts find decisions of Ghanaian courts persuasive,[98] they could rely on the above Supreme Court decision in interpreting Article 121(4)(a) of the Constitution. Another important issue relates to the effect of a free pardon. It is to this issue that we turn.

5. Effect of a free pardon on the conviction and sentence

Article 121(4)(a) provides for two types of pardons – a free pardon and a pardon with lawful conditions. Ugandan legislation and case law are silent on the differences between these two types of pardons and the criteria that should be in place for the president to grant one of them. Practice shows that the President has often granted pardons on humanitarian grounds.[99] However, the reports on these pardons do not explain whether the offenders are granted free or conditional pardons. In cases where the President has pardoned the offenders, they are released from prison immediately. The prison authorities refer to this as a 'total pardon.'[100]

[96] Agbemava, Tuah-Yeboah, Bediatuo v Attorney General [2018] GHASC 52 (21 November 2018).

[97] Ibidem, p. 12.

[98] Cases in which the Ugandan Court of Appeal, Constitutional Court and Supreme Court have relied on the decisions of the Supreme Court of Ghana include: *Kiiza Besigye v Attorney General* (Constitutional Petition No. 13 of 2009) [2016] UGCC 1 (29 January 2016); *Uganda Post Limited v Mukadisi* [2023] UGSC 58 (29 November 2023); *Bank of Uganda v Betty Tinkamanyire* [2008] UGSC 21 (16 December 2008); and *Mabirizi Kiwanuka v Attorney General* (Civil Application No. 549 of 2022) [2022] UGCA 226 (19 August 2022).

[99] See for example, Chris Kiwawulo, "Museveni Pardons 79 prisoners" *The New Vision*, 17 January 2022, accessed September 1, 2024 https://www.newvision.co.ug/category/news/museveni-pardons-79-prisoners-NV_124592 ; TRT Africa, "Ugandan President Museveni pardons 200 inmates" 28 August 2023, accessed September 1, 2024 https://trtafrika.com/africa/ugandan-president-museveni-pardons-200-inmates-14723561

[100] Kenneth Kazibwe, 'Over 1600 prisoners miss out on Museveni pardon' *Nile Post*, 28 August 2023, accessed September 1, 2024 https://nilepost.co.ug/news/169923/over-1600-prisoners-miss-out-on-museveni-pardon

Therefore, since no conditions are imposed on these pardons, they can be classified as free pardons. Free pardons have also been used as a means of decongesting prisons.[101] There are also instances in which the President has commuted the sentences of some offenders.[102] In cases of conditional pardons, there is no doubt that it does not expunge the conviction. Its effect is to reduce the length or severity of the sentence if the offender meets the conditions imposed. Ugandan legislation and case law are also silent on the legal effect of a free pardon. In particular, legislation does not specify whether a free pardon expunges a conviction.

Practice from some countries shows that a free pardon can only be granted in exceptional circumstances. For example, in South Africa, legislation provides that the president can grant a free pardon to a convicted person if 'evidence has since become available which materially affects his conviction.'[103] Likewise, in Canada[104] and Australia,[105] a free person can only be granted to a person who was wrongfully convicted. In the United Kingdom, a free pardon is 'reserved for cases where it can be established that the convicted person was morally and technically innocent.'[106] In other words, it 'may relate to miscarriages of justice.'[107] Legislation in some countries, such as South Africa,[108] Canada,[109] and New Zealand[110]

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[101] Kenneth Kazibwe, "Prisons list 680 inmates for Museveni pardon' *Nile Post*, 26 July 2021" accessed September 1, 2024 https://nilepost.co.ug/news/111179/prisons-list-680-inmates-for-museveni-pardon

[102] It is reported that the President commuted death sentences to life imprisonment. See William Tayeebwa, "Uganda: 16 Prisoners Escape Death Museveni Pardons 520" 15 July 2000, accessed September 1, 2024 https://allafrica.com/stories/200007170002.html

[103] Section 327 of the Criminal Procedure Act, 51 of 1977.

[104] Section 748(3) of the Criminal Code (R.S.C., 1985, c. C-46) provides that 'Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.' In *Canada (Minister of Citizenship and Immigration) v. Saini* (C.A.), 2001 FCA 311 (CanLII), [2002] 1 FC 200, para 40, the Federal Court of Appeal held that, 'a free pardon can only be granted by the Governor in Council where a person has been wrongly convicted, and even then, there are established procedures that must be followed.'

[105] Section 85ZR of the Crimes Act, 1914 (pardons for persons wrongfully convicted).

[106] *R v Secretary of State for the Home Department ex p. Bentley* [1993] EWHC Admin 2 (07 July 1993).

[107] *Shields, R (on the application of) v Secretary of State for Justice* [2008] EWHC 3102 (Admin) (17 December 2008) para 19.

[108] Section 327 of the Criminal Procedure Act, 51 of 1977.

[109] Section 748(3) of the Criminal Code (R.S.C., 1985, c. C-46) provides that 'Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.'

[110] Section 407 of the Crimes Act (1961) provides that 'Where any person convicted of any offence is granted a free pardon by the Sovereign, or by the Governor-General in

provides that a free pardon expunges a conviction and sentence. This is explained by the fact that a free pardon in those countries can only be granted to a person who was wrongfully convicted. In other words, to a person who should not have been convicted in the first place. Likewise, in Slovakia, legislation provides that an individual pardon expunges a conviction.[111]

In some countries where legislation is silent on whether a free pardon expunges a conviction, courts have held that it does not. This has been the case in countries such as the United Kingdom,[112] Barbados,[113] Fiji,[114] Australia,[115] Swaziland[116] and Pakistan.[117] Since a free pardon does not quash a conviction in these countries, courts have held that at common law, only a court can quash the conviction through an acquittal.[118] In Australia[119] legislation provides that a free pardon can only be granted in cases where a person was wrongfully convicted. Legislation also provides for the procedure which a person to whom a free pardon has been granted has to follow and ask the court to quash the conviction.[120] In *Eastman v Director of Public Prosecutions*,[121] the High Court of Australia referred to case law from England and Australia and explained the reason why a free pardon does not automatically quash a conviction:

> At common law the pardon "is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity." In England it has been held that at

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the exercise of any powers vested in him or her in that behalf, that person shall be deemed never to have committed that offence: provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted.'

[111] *Čačko v Slovakia* (Application no. 49905/08)(22 July 2014) para 32.

[112] *R v Secretary of State for the Home Department ex p. Bentley* [1993] EWHC Admin 2 (07 July 1993).

[113] *Boyce and Joseph v The Queen* [2002] BBSC 16 (27 March 2002).

[114] *Commissioner of Prisons v Raikali* [1998] FJHC 219; HBC0376.1998 (1 September 1998).

[115] *Armstrong v R* [2021] NSWCCA 311 (16 December 2021).

[116] *Mabila v The Director of Public Prosecutions and Others* (1531 of 2016) [2021] SZHC 108 (12 July 2021).

[117] *Mian Muhammad Nawaz Sharif v. Federation of Pakistan* (CP No. 200/2009) [2009] PKSC 7 (17 July 2009) para 13.

[118] *Boyce and Joseph v The Queen* [2002] BBSC 16 (27 March 2002) (Barbados).

[119] Section 85ZR of the Crimes Act, 1914 (pardons for persons wrongfully convicted).

[120] See generally, *Armstrong v R* [2021] NSWCCA 311 (16 December 2021).

[121] *Eastman v Director of Public Prosecutions* (ACT) [2003] HCA 28; 214 CLR 318; 198 ALR 1; 77 ALJR 1122 (28 May 2003).

> common law, "the effect of a free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, 'all pains penalties and punishments whatsoever that from the said conviction may ensue,' but not to eliminate the conviction itself"….The common law conception of a conviction is that, by it, the convicted person receives justice; the common law conception of a pardon is that, by it, the convicted person receives mercy, notwithstanding the demands of justice. Once it is apparent that the conviction is unjust, the convicted person should receive something different from a pardon, which grants mercy but assumes the validity of the conviction. Only a court can quash a conviction. "At the heart of the pardoning power there is a paradox. To pardon implies to forgive: if the convicted person is innocent there is nothing to forgive."[122]

In the light of the above jurisprudence, it is argued that in Uganda, since a free parson is not granted to a person who was wrongfully convicted, it does not expunge a conviction. Although Ugandan legislation is silent on whether a free pardon expunges a conviction, some pieces of legislation create room for the argument that once a free pardon has been granted, the person's rights or status prior to the conviction are restored. For example, section 52 of the Uganda Citizenship and Immigration Control Act[123] includes a list of persons who are prohibited immigrants and whose entry or presence in Uganda is unlawful. Section 52(h) provides that such persons include:

> any person who, not having received a free pardon, has been convicted in any country, for murder, or any offence for which a sentence of imprisonment has been passed for any term, and who by reason of the circumstances connected with the offence is declared by the Minister to be an undesirable immigrant; except that this paragraph shall not apply to offences of a political character not involving moral turpitude.

The above section shows that a person who was convicted of any of the above offences but granted a free pardon is not a prohibited immigrant in Uganda. This is the case whether or not that person's conviction was quashed in the foreign state (in countries where a separate procedure has to be followed to have the conviction quashed after a person has been granted a free pardon). What matters is that he or she was granted a free pardon. Likewise, section 4(1) of the Armed Forces Pensions Act[124] provides that:

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[122] Ibidem, para 98 (references removed).
[123] Uganda Citizenship and Immigration Control Act, (2015) Chapter 66.
[124] Armed Forces Pensions Act, Chapter 295.

> Where any person to or in respect of whom a pension, gratuity or allowance may be or has been awarded under this Act (hereafter referred to as "the pensioner") — (a) is serving a term of imprisonment or detention, or is detained in an approved school or a remand home under a sentence or order of any competent court, whether within or without Uganda, for any crime or offence; ….[T]he President may withhold the pension, gratuity or allowance or, if it has been awarded, direct that it shall be forfeited as from such date, including any past date, as he or she may think fit; but the pension, gratuity or allowance shall be restored with retrospective effect in the case of a person who after conviction at any time receives a free pardon.

The use of the word 'shall' means that once the person in question has been granted a free pardon, his/her benefits must be restored. However, a different approach is taken in the Advocates Act.[125] Section 12(1)(h) of this Act provides that the

> [R]egistrar shall refuse to issue or renew a practising certificate of any advocate who, on the date of his or her application for the certificate — has been convicted of a criminal offence involving moral turpitude and sentenced to imprisonment for a term of one year or more, without the option of a fine.

Section 12(2) of the same Act provides that '[n]otwithstanding anything contained in subsection (1), in the case of an advocate falling under paragraph (h), the chief registrar may, if the advocate has been granted free pardon, issue or renew his or her practising certificate.' The use of the word 'may' implies that the Chief Registrar has the discretion whether or not to issue or renew a practicing licence of an advocate who has received a free pardon. If the effect of a free pardon is to expunge a conviction and the person in question is, in the eyes of the law, taken to never have committed the offence, the word 'may' under section 12(2) should be interpreted as shall. However, since Ugandan law does not provide that a free pardon expunges a conviction, the Chief Registrar's discretion under section 12(2) remains valid. At common law, a pardon restores the rights of its beneficiary from the time it is granted. The Court of Appeal of Vanuatu referred to case law from the United Kingdom and the United States and held that 'a pardon does not undo events that have already happened, or remove rights that have become vested in a third party.'[126]

Another important issue that relates to pardons is the time at which they can be granted. In many cases, pardons, especially conditional par-

[125] Advocates Act, Chapter 267.

[126] *Sope Maautamate v Speaker of Parliament* [2003] VUCA 5 (9 May 2003), p. 4.

dons, are granted before a person has completed serving the sentence. This explains why, for example, the Canadian Supreme Court held, a conditional 'pardon only removes the disqualifications resulting from a conviction, and does not erase the conviction itself.'[127] Thus, jurisprudence from the Canadian Supreme Court shows that conditional pardons in that country include: '(1) the ordinary and partial pardon…which consists of the remission, in whole or in part, of a sentence without reviewing the issue of the person's guilt; [and] (2) the conditional pardon…which can amend the initial sentence imposed by the court and make it subject to certain conditions.'[128] Likewise, the Federal Court of Australia held that one of the examples of a conditional pardon is 'where a convicted person is relieved from the penalty imposed on condition that he or she undergo some lesser penalty.'[129] The Federal Court of Australia held that 'the fact that the sentence imposed after conviction has been carried into effect or served in full does not mean that either a free or conditional pardon cannot be granted.'[130] In countries such as New Zealand[131] and the United Kingdom, free pardons can even be granted posthumously.[132] The same approach has been followed in Uganda where the President pardoned a person who had been sentenced to imprisonment for corruption and also ordered to compensate the state for loss it incurred because of his corrupt activities.[133]

It has been demonstrated above that when a person is granted a free pardon, he/she is released from prison. However, the pardon does not expunge his/her conviction. This raises the question of whether a free pardon can also exonerate an offender from compensating his/her victim in case where the court ordered him/her to compensate them in addition to serving a prison sentence or another form of sentence.[134] It is argued

[127] *Canada (Minister of Citizenship and Immigration) v. Saini* (C.A.), 2001 FCA 311 (CanLII), [2002] 1 FC 200, (Federal Court of Appeal) para 40.

[128] *Therrien (Re)*, 2001 SCC 35 (CanLII), [2001] 2 SCR 3 para 114.

[129] *Ogawa v Minister for Immigration and Border Protection* [2018] FCA 62 (9 February 2018) para 85.

[130] Ibidem, para 85.

[131] See Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013.

[132] See for example, *R v Secretary of State for the Home Department ex p. Bentley* [1993] EWHC Admin 2 (07 July 1993).

[133] Charles Etukuri, 'Museveni Pardons Former PS Kashaka' 05 October 2024. Available at https://www.newvision.co.ug/category/news/museveni-pardons-former-ps-kashaka-NV_197176

[134] For example, section 197 of the Magistrates Courts Act (Chapter 16) provides that '(1) When any accused person is convicted by a magistrate's court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court,

that in case where the court ordered the offender to compensate his/her victims, the amount of compensation is the victim's property or interest in property which is protected under Article 26 of the Constitution.[135] Thus, the pardoned offender must compensate the victim. Alternatively, the state should compensate him/her. Otherwise, the victim would have been deprived of his/her property unlawfully. It is also important to remember that a compensation order is not a form of penalty. It is an ancillary order. Article 126(2)(c) of the Constitution obligates courts, in both civil and criminal matters, to ensure that 'adequate compensation' is 'awarded to victims of wrongs.' The pardon does not affect the victim's right to property. Related to the above is whether a pardon can exonerate a person from compensating the state if the court ordered him or her to do so. Article 164 of the Constitution provides that:

> (1) The Permanent Secretary or the accounting officer in charge of a Ministry or department shall be accountable to Parliament for the funds in that Ministry or department.
>
> (2) Any person holding a political or public office who directs or concurs in the use of public funds contrary to existing instructions shall be accountable for any loss arising from that use and shall be required to make good the loss even if he or she has ceased to hold that office.

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recoverable by that person by civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.

(2) When any person is convicted of any offence under Chapters XXV to XXX, both inclusive, of the Penal Code Act, the power conferred by subsection (1) shall be deemed to include a power to award compensation to any bona fide purchaser of any property in relation to which the offence was committed for the loss of that property if the property is restored to the possession of the person entitled to it.

(3) Any order for compensation under this section shall be subject to appeal, and no payment of compensation shall be made before the period allowed for presenting the appeal has elapsed or, if an appeal is presented, before the determination of the appeal.

(4) At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any sum paid or recovered as compensation under this section.'

[135] Article 26 of the Constitution provides that '(1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied – (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and (ii) a right of access to a court of law by any person who has an interest or right over the property.'

The drafting history of Article 164 shows that it was meant to ensure that political and public officials are held accountable for misusing public funds. In its report, the Constitutional Commission wrote that:

> [W]e have sought to ensure leaders do not escape liability for corrupt misuse of public funds or property. It has been recommended that both ministers and permanent secretaries to ministries or departments should be accountable for management of public funds. If either of them directs misuse of funds both may be required to account for or make good the resulting loss.[136]

Hence, Clause 191(2) of the Draft Constitution provided that:

> A Minister or any person holding a public office who directs an accounting officer or any other officer to apply or use public funds contrary to law or to existing instructions shall be accountable for any loss arising from such directions and may be required to render an account or to make good the loss even if he has ceased to be a Minister or to hold public office.

After a lengthy debate, which is not necessary to reproduce here, the Constituent Assembly delegates amended Clause 191 and, for example, replaced the word 'minister' with 'a person holding a political office' and deleted the words 'contrary to law.'[137] Although the delegates deleted the words 'contrary to law' from Clause 191, they understood 'contrary to existing instructions' to include instances where the misuse of the public funds amounted to the commission of an offence. That is why some of the them suggested if, after leaving office, any person holding a political (for example, a minister) or public (for example, a permanent secretary) office who had a role to play in the misuse of public funds should be 'charged after he is no longer in office'[138] because he/she 'is an accomplice in that offence.'[139] In other words, he/she should be held 'personally responsible' for the loss.[140] It was explained that in cases where any political or public official spent money 'contrary to law', he/she was to be personally responsible for that 'illegality.'[141] This meant that he/she was liable

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[136] *Report of the Uganda Constitutional Commission: Analysis and Recommendations* (1993), para 20.42.

[137] *Proceedings of the Constituent Assembly* (1995), 2718–2725.

[138] Ibidem, at 2716 (Mr Karuhanga).

[139] Ibidem, at 2716 (Mr Rwomushana).

[140] Ibidem, at 2717 (Dr Mugyenyi).

[141] Ibidem, at 2717 (Mr Mulenga).

to 'be in jail' for such conduct.[142] It was added that political and public officials involved in embezzling public funds should all be 'held accountable because in most cases, they are eating [the money] together.'[143] The provision was meant to ensure that Cabinet Ministers and other public officials who misappropriate public funds or play any role in the misuse of public funds are aware of the 'consequences after committing whatever crimes they have committed.'[144] Thus, it would deter political and public officials from misappropriating public funds and also from instructing others to commit such 'a wrong' leading to 'public loss.'[145] The drafting history of Article 164 shows, inter alia, that the delegates contemplated two ways in which political or public officials who misuse public funds are to make good the loss in question. First, by refunding that money to the state (without a conviction); and second, in the event of a conviction, by compensating the state. Thus, a political or public officer who has been convicted of an offence involving the misuse of public funds and ordered to compensate the state for the loss incurred because of his/her crime, has a constitutional obligation to 'make good the loss.' This means, inter alia, that the presidential pardon does not exonerate him or her from compensating the state. This is a constitutional obligation.

However, there appears to be a tension between Articles 164(2) and 121(4)(d). Under Article 121(4)(d), the President is empowered to 'remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.' Interpreted in isolation, Article 121(4)(d) creates room for the argument that the President can 'exempt' a person from making good the loss he/she caused to the government. However, one of the rules of constitutional interpretation is that of constitutional 'harmony.' As the Supreme Court held in *Attorney General v Nakibuule*,[146] 'the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.'[147] The Court added that 'both purpose and effect are relevant in interpreting the provisions.'[148] Article 164(2) is meant to,

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[142] Ibidem, at 2718 (Mr Karuhanga).

[143] Ibidem, at 2718 (Dr Byaruhanga). See also 2720 where the delegate, Mr. Kaijuka, dealt with misappropriation of government funds.

[144] Ibidem, at 2723 (Mr Bageya). See also 2724–2725.

[145] Ibidem, at 2725 (Prof. Kanyeihamba).

[146] *Attorney General v Nakibuule* (Constitutional Appeal 2 of 2016) [2018] UGSC 62 (11 July 2018).

[147] Ibidem, 20.

[148] Ibidem, 20.

inter alia, combat corruption. There are different constitutional provisions which require the government[149] and citizens[150] to put in place effect measures to combat corruption. Thus, exonerating a person from making good the loss he/she caused to the government is an indirect way of encouraging corruption hence undermining various constitutional provisions. Therefore, Article 121(4)(d) should not be interpreted as empowering the President to render Article 164(2) superfluous. As mentioned above, a compensation order is not a form of penalty. Therefore, Article 121(4)(d) does not apply.

6. Conclusion

In this article, the author has discussed the drafting history of Article 121 of the Constitution of Uganda and the circumstances in which the President can grant pardons to people who have been convicted of offences. The author has also dealt with the circumstances in which the President can pardon a person before he/she is convicted of an offence under Article 28(10) of the Constitution. The author has also discussed the limitations on the president's powers under both Articles 28(10) and 121 of the Constitution. Cases in which courts have interpreted or relied on Articles 28(10) and 121 of the Constitution and the legal effects of a free pardon have also been discussed. It has also been demonstrated that Article 121 does not apply to sentences imposed by the Field Court Martial and that Ugandan legislation does not provide the circumstances in which a prisoner can apply for a presidential pardon. It is recommended that Uganda may have to amend its legislation to provide for clear circumstances in which a person can apply for a presidential pardon[151] and

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[149] For example, National Directive and Objective Principle of State Policy XXVII(iii) provides that 'All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices.' Article 225(1)(b) provides that one of the functions of the Inspectorate of Government is 'to eliminate and foster the elimination of corruption, abuse of authority and of public office.' See also Article 232(2)(e) (Parliament to establish a special court for combating corruption); and Article 233(2)(b)(ii) which provides that the Leadership Code of Conduct shall prohibit conduct 'likely to lead to corruption in public affairs.'

[150] Article 17(1)(i) provides that it is the duty of every citizen 'to combat corruption and misuse or wastage of public property.'

[151] The right to seek pardon, for those sentenced to death, is provided for under Article 6(4) of the International Covenant on Civil and Political Rights (1966) which provides that 'Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.'

also for the circumstances in which the President can refuse or grant pardons. This enables the applicant to know whether or not he/she qualifies to apply and could prevent the President from abusing his/her prerogative powers. It also enables offenders to know whether the President was justified in rejecting their application(s) for a pardon. A similar approach has been followed in some countries such as Lithuania,[152] Hungary,[153] the Netherlands[154] and Georgia.[155] Legislation should also be enacted to expressly provide whether a free pardon expunges a conviction. In many cases where the President has granted pardons, it is not always clear whether it is a free pardon or a conditional pardon. This has to be clarified.

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[152] *Matiošaitis and Others v Lithuania* (Applications nos. 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13)(23 May 2017).

[153] *T.P. and A.T. v. Hungary* (Applications nos. 37871/14 and 73986/14)(4 October 2016).

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[155] *Assanidze v. Georgia* (Application no. 71503/01)(8 April 2004).

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