

The Presidential Power of Mercy in Kenya: Legal Framework, Public Understanding and Accountability Issues

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Abstract: The confusion surrounding the release of Joseph Irungu Maina has illustrated the need to seriously relook Kenya's presidential power of mercy. There was a great public confusion especially on social media accounts as many believed that the notorious "Jowie" had been granted clemency. This incident highlights a broader concern about the transparency and fairness of the clemency process in cases involving serious crimes like corruption and sexual offenses. Sexual Offenses against children do not allow for diversion but the law via its blanket application and provisions permit's them to be considered for presidential pardon. This paper examines the legal framework governing the presidential power of mercy with a focus on the role of the advisory committee. Despite the law's mandatory language, the use of the word "shall" in relation to public hearings and victim consultations, there is no clear evidence that these provisions are being followed in practice. It is clear that they are just honoured in breach. This paper seeks to explore how the failure to ensure transparency and victim involvement by the advisory committee affects public trust in the clemency process. The aim is to assess the gaps in Kenya's legal framework for granting clemency, particularly in serious crime cases and propose reforms to ensure the process is transparent, accountable and just. This will restore public confidence in the justice system and ensure that the power of mercy is used ethically and consistently in relation to clemency.

Keywords: Transparency, fairness, clemency, corruption, sexual offenses.

1. Introduction

Clemency is a significant constitutional prerogative in Kenya that allows the President to pardon individuals convicted of crimes or commute their sentences.¹ The intention of clemency has always been to offer a second chance or rectify injustices but its application has been marred by public confusion, opacity and questions surrounding its ethical use.² These issues affect

the public's understanding of clemency in serious criminal cases and leaves more questions that answers on the legitimacy of the process. Recently in Kenya there was the release of one Joseph Irungu Maina whom the public mistakenly believed that the notorious "Jowie Irungu."³ This happening exposed a gap in how the power of mercy is perceived and understood by the general public⁴ and how the committee charged with the mandate of advising the president on the same has slept on its role. The lack of clarity surrounding this release coupled with the failure of the advisory committee to adequately educate the public caused significant public confusion on how the process is conducted from the start to the end.

The core problem this paper addresses is the public's misunderstanding of the presidential power of mercy and how it is applied to serious crimes like sexual offenses⁵ and corruption. This gap if left unregulated risks the abuse of clemency powers for political gain, much like the situation in South Africa, where clemency decisions have been questioned for their political motivations despite them having progressive laws on the same and their Judiciary standing firm to defend the law. Recent instances such as the release of individuals convicted of corruption without the required public hearings and if it happened no evidence of the same is available in public domain raises concerns about the integrity of the process. This is also seen in the confusion caused by the recent release of one Joseph Irungu Maina. These issues if left unchecked could allow politically connected individuals to circumvent justice⁶ thus undermining both public trust and the justice system. This paper seeks to address these concerns by analysing Kenya's legal framework on presidential power of mercy, highlighting the gaps in its application and proposing reforms to ensure that clemency is granted transparently and ethically. I will start by

¹ Constitution of Kenya 2010, art 133.

² Irungu Houghton, 'The Presidential Power of Mercy Needs Another Look' (Amnesty International Kenya, 6 August 2023) <https://www.amnestykenya.org/the-presidential-power-of-mercy-needs-another-look/> accessed 9 June 2025.

³ Duncan Bwire, 'Convicted murderer Joseph Kuria Irungu not among 57 prisoners pardoned by Kenyan president' (Africa Check, 2 June 2025) <https://africacheck.org/fact-checks/meta-programme-fact-checks/convicted-murderer-joseph-kuria-irungu-not-among-57> accessed 9 June 2025.

⁴ Ghafla! Kenya, 'Fact Check: Claim That Jowie Irungu Was Pardoned by President Ruto Is False' (29 May 2025)

<https://www.ghafla.co.ke/ke/fact-check-claim-that-jowie-irungu-was-pardoned-by-president-ruto-is-false/> accessed 9 June 2025.

⁵ See Reuben Kipkoech Tanui v Republic [2021] KEHC 1102 (KLR).

⁶ See the warning Justice Gikonyo gives in *Elkana Rono Kirui v Republic* [2021] KEHC 2525 (KLR) para 20.

examining the historical and legal context of the power of mercy in Kenya. I will then critique the advisory committee's role and its failures in breathing life into law. I will also draw a comparative analysis with South Africa's clemency process and conclude with recommendations for reform that would help in public confidence and uphold the rule of law specifically in relation to clemency.

2. Historical Analysis of the Power of Presidential Pardon

The concept of the presidential power of mercy or prerogative of mercy, has ancient origins.⁷ In ancient Athens, the *Adeia* allowed individuals to seek pardon⁸ through a process requiring the approval of 6,000 citizens via secret ballot.⁹ This system was often used for influential figures such as athletes and orators.¹⁰ Clemency in ancient Rome was employed as a tool for political control with pardons granted to maintain order among citizens and soldiers.¹¹ Monarchs in England initially used pardons as a means of raising money or bolstering military forces in exchange for financial contributions or commitments to military service.¹² As monarchs consolidated their power over time, they were granted more discretion in pardoning individuals. By the mid-sixteenth century, the King had the authority to pardon any offence, a power that remained largely unrestricted until the Act of Settlement of 1701 that limited the use of pardons in cases of impeachment.¹³

The power of mercy in Kenya was incorporated into the Constitution at independence. President Jomo Kenyatta amended the Constitution in 1975 to grant a pardon to his associate, Paul Ngei who had been convicted of an election offence.¹⁴ Similarly, Charles Mugane Njonjo who was Kenya's former Attorney General exercised the power of mercy by releasing prisoners and commuting sentences including those of Members of Parliament Jesse Gachago and Godfrey Muchiri who had been convicted for theft of coffee.¹⁵ Njonjo himself in 1984 benefitted from a presidential pardon following accusations of involvement in a plot to overthrow President Daniel arap Moi.¹⁶ These instances highlight how the power of mercy has often been used for political and personal advantage in cases involving high-profile individuals with close ties to the government. This is what led to the enactment of the power in

Article 133 of the Constitution and the same was given life by the establishment of the Power of Mercy Act (POMA) that Power of Mercy Committee whose main aim is to ensure justice is served in the whole process and that no one takes advantage of it. Concerns persist regarding the application of the power of mercy despite reforms in cases involving high-profile individuals or those with political connections.

3. Legal Framework Governing the Power of Mercy (400 Words)

Article 133 of the Kenyan Constitution grants the President the power of mercy which is a prerogative to pardon individuals convicted of offenses or to commute sentences.¹⁷ The Constitution requires that this power be exercised based on the advice of an advisory committee¹⁸ established under the Power of Mercy Act.¹⁹ This committee has wide-ranging responsibilities such as the assessment of petitions for clemency, conducting investigations and making recommendations to the President.²⁰ It is also mandated to consult victims and hold public hearings an aspect whose practical application raises serious concerns.²¹

The Power of Mercy Act mandates that the Committee shall notify victims and conduct public hearings.²² The section uses the word "shall," suggesting a mandatory obligation to adhere to these requirements. Though in practice there is no public record or accessible information to demonstrate that these obligations have been fulfilled with the public remaining unaware of how hearings are conducted, when they occur and whether victims are indeed consulted as the law prescribes. The requirement for the Cabinet Secretary to publish hearing schedules in the Gazette has gone largely unmet²³ with this lack of transparency undermining public confidence in the process especially when individuals convicted of serious crimes like corruption or violent offenses are granted mercy without any apparent public involvement or accountability.²⁴

The law offers the same level of scrutiny for people convicted of serious offenses like corruption and defilement of which even diversion is not allowed when it comes to the application and criteria for clemency.²⁵ This inconsistency is particularly evident in cases where individuals who have

⁷ Keith Ian Wanyangu, 'An Appraisal of the Law on the Power of Mercy in Kenya' (2024) SSRN 2

<https://ssrn.com/abstract=4922599> accessed 9 June 2025. See also William F Duker, 'The President's Power to Pardon: A Constitutional History' (1977) 18 William & Mary Law Review 475 <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2444&context=wmlr> accessed 9 June 2025.

⁸ Michaela Colby and Paul F Eckstein, 'Presidential Pardon Power: Are There Limits, and If Not, Should There Be?' (2019) 51 Arizona State Law Journal 71, 74.

⁹ Daniel T Kobil, 'The Quality of Mercy Strained: Wrestling the Pardoning Power from the King' (1991) 69 Texas Law Review 569, 584.

¹⁰ Ibid, 583.

¹¹ Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (Oxford University Press 1989) 15–17.

¹² Jashim Ali Chowdhury, 'President's 'Lockean' Prerogative of Mercy: A Lawful Lawlessness?' (2012) 15 The Chittagong University Journal of Law 23, 28.

¹³ Ibid.

¹⁴ Wanyangu, 'An Appraisal of the Law on the Power of Mercy in Kenya' (n 1) 3.

¹⁵ Mwalimu Mati, 'Sticky Presidential Pardons, and a Call for the Pardoning of Dedan Kimathi and Others' (Debunk Media, 11 October 2023)

<https://debunk.media/sticky-presidential-pardons-and-a-call-for-the-pardoning-of-dedan-kimathi-and-others/> accessed 9 June 2025.

¹⁶ Ibid.

¹⁷ Constitution of Kenya 2010, art 133.

¹⁸ Ibid, art 133(2).

¹⁹ Power of Mercy Act (Cap 94) ss 5–18.

²⁰ Ibid, s 14–15.

²¹ Ibid, s 21(4 and 5).

²² Ibid, s 21(3 and 5).

²³ Ibid, s 21(4).

²⁴ See Sheila Masinde, 'Power of Mercy Needs to be Exercised with Restraint, Objectivity and Sound Mind' (Transparency International Kenya, 8 August 2023)

<https://tikenya.org/2023/08/08/power-of-mercy-needs-to-be-exercised-with-restraint-objectivity-and-sound-mind/> accessed 9 June 2025.

²⁵ Power of Mercy Act, s 21(2a & b).

committed serious crimes like sexual offenses and corruption²⁶ are granted pardons without a stringent measure. This divergence between the letter of the law and its application calls into question the integrity of the power of mercy process. This mirrors Kenya's historical use of clemency which has often been politically motivated thus allowing individuals with political connections to benefit from pardons that seem disconnected from the principles of justice.²⁷ The absence of clear procedural safeguards such as the timely publication of hearing schedules and the consultation of victims creates an environment ripe for abuse. The failure to implement the law as intended is like the story of a cripple who despite of the availability of a walking stick chooses to remain immobile. The application fails to move the system forward in a meaningful and just way despite its clear requirements. The next section will analyse how the Committee has also failed in its role of breathing life to the law that is already on a life supporting machine.

4. The Advisory Committee's Role and its Failures

The Power of Mercy Act in Kenya outlines a legal framework where the President with the advice of an advisory committee can grant pardons to convicted individuals.²⁸ The Constitution allows the President to exercise this power to grant a free or conditional pardon²⁹ but the process is not entirely discretionary. The committee is integral to this process and has the duty to assess petitions, gather evidence and recommend to the President whether clemency should be granted.³⁰ The Act states that the committee *shall* determine the admissibility of petitions and *shall* undertake certain tasks including calling for evidence, conducting investigations and receiving reports from government agencies.³¹ The use of the word "shall" here is indicative of a mandatory requirement implying that these actions must take place for the process to be considered legitimate. However, the practical application of these requirements is questionable. Public knowledge about how the hearings were conducted remains scant despite the explicit legal mandate. The Cabinet Secretary is also required to publish notices in the Gazette detailing the time and venue for the hearings and interviews.³² This is crucial for transparency and for ensuring that victims are notified and have an opportunity to participate in the process. It is astonishing that no clear information has been provided by the committee regarding the actual public hearings. There is no evidence that victims are

consulted as required by the Act raising questions about the credibility of the process.

This gap between the law and practice becomes especially problematic when looking at the pardons granted by Presidents Uhuru Kenyatta³³ and William Ruto.³⁴ Despite of the argument that the releases are aimed at ensuring restorative justice,³⁵ they have been shrouded in mystery with no clear details on how the decisions were made or how the hearings were conducted. The public, victims of various offenses and their families are always left in the dark about the process. The law mandates the committee to engage with the victims³⁶ but this has not been happening in practice.

The lack of transparency has raised serious concerns, and had there been public hearings as the law prescribes, much of the confusion surrounding certain high-profile cases could have been avoided. The lack of clarity in the case of Joseph Irungu Maina only contributed to confusion the main problem being that no public hearings was conducted and the public has no clue of the happenings that led to the release despite the end goal being justified. It turns out that the individual pardoned in the gazette was not the notorious "Jowie" Irungu but rather a different person with a similar name and different prisoner number, "NAV/219/2015/LS."³⁷ The public was left wondering whether this was the same individual till clarity was brought by some Kenyans who chose not to go by what was circulating in the media and exercise due diligence. This confusion might have been avoided if a public hearing had been conducted and the public could have been more confident in the fairness and transparency of the clemency process. The advisory committee's failure to fully implement the statutory provisions and ensure victim participation and public transparency has led to a loss of trust in the process. The lack of adherence to these requirements despite having clear legal frameworks has created significant concerns, with cases like that of Joseph Irungu Maina highlighting the shortcomings in the actual workings of the system. The next section of this paper looks at the blanket requirements for clemency that gives room for exploitation due to the disregard of the intensity of offenses when one is making applications only for it to be considered by the committee, something that the public will definitely not know about.

5. Impact on Serious Crimes and the Question of Diversion

The application of the presidential mercy power to serious crimes like corruption³⁸ and sexual offenses raises difficult

²⁶ Ibid.

²⁷ Wanyangu, 'An Appraisal of the Law on the Power of Mercy in Kenya' (n 1) 3.

²⁸ Power of Mercy Act, s 21-25.

²⁹ Constitution of Kenya 2010, art 133(1).

³⁰ Power of Mercy Act, s 14(a-c).

³¹ Ibid, s 21(1a).

³² Ibid, s 21(4).

³³ Joseph Muia, 'President Uhuru pardons over 3,000 prisoners' (Citizen Digital, 1 June 2022)

<https://www.citizen.digital/news/president-uhuru-pardons-over-3000-inmates-during-his-final-madaraka-day-celebrations-n299274> accessed 9 June 2025.

³⁴ Africa-Press – Kenya, 'Presidential pardon! Ruto frees 57 prisoners' (Africa-Press – Kenya, 29 April 2025)

<https://www.africa-press.net/kenya/all-news/presidential-pardon-ruto-frees-57-prisoners> accessed 9 June 2025.

³⁵ Maureen Kinyanjui, 'Ruto Pardons 57 Inmates Serving Long Jail Term Sentences, Urges Rehabilitation and Restorative Justice' (Eastleigh Voice, 10 June 2025)

<https://eastleighvoice.co.ke/kenya%20prisons-power%20of%20mercy%20advisory%20committee-prisoners/143493/ruto-pardons-57-inmates-serving-long-jail-term-sentences-urges-rehabilitation-and-restorative-justice> accessed 10 June 2025.

³⁶ Power of Mercy Act, s 21(5).

³⁷ Viral Tea, 'Fact Check: Was Jowie Irungu Released from Prison?' (Viral Tea, 10 June 2025)

<https://viraltea.co.ke/fact-check-was-jowie-irungu-released-from-prison> accessed 10 June 2025.

³⁸ Masinde, 'Power of Mercy Needs to be Exercised with Restraint,' (n24).

legal and ethical questions. Kenya's criminal law and policy treat these offenses as particularly grave with sexual offenses (such as rape or defilement) carrying strict mandatory sentences³⁹ and generally no provision for diversion from prosecution unless in very rare circumstances⁴⁰ reflecting a societal stance that such crimes must face full accountability. Anti-corruption laws likewise aim to impose deterrent punishment on offenders to combat graft and releasing offenders of the same can easily act as a catalyst to encourage them to take part in graft knowing they can easily escape even if courts find them guilty.⁴¹ Ordinarily, offenders convicted of these serious crimes are ineligible for lenient alternatives and they cannot avoid prison through diversion programs or negotiated settlements.⁴² The power of mercy as enshrined in Article 133 contains *no explicit exception for any offense*. This has led to a contradiction with individuals guilty of offenses that could never be diverted or bargained away in court have managed to obtain freedom through presidential clemency.⁴³

In July 2023, when the President pardoned 37 convicts on the advice of POMAC, a group that included persons convicted of corruption, sexual offenses and even murder.⁴⁴ Among those released was Davy Koech, a former director of the Kenya Medical Research Institute who had been convicted in 2021 of corruptly obtaining about Ksh 19.3 million and sentenced to a term of imprisonment.⁴⁵ His pardon after he had served only a portion of his sentence exemplifies the early release of individuals convicted of serious economic crimes.⁴⁶ The same clemency batch reportedly included others convicted of *heinous crimes* some involving sexual violence and homicide.⁴⁷ Granting mercy in such cases has sparked public disquiet because it appears to override legal standards that treat these crimes as too serious for compromise. It sends a message, rightly or wrongly, that a well-connected offender or a high-profile convict might *evade the full force of justice* through executive discretion.⁴⁸

The early release of those sentenced to long terms or even life imprisonment after only a few years raises profound ethical concerns. Such releases can be devastating to the victims and the community at large. Victims of violent or sexual crimes often struggle to heal⁴⁹ and knowing that the perpetrator is back in society much earlier than expected possibly without any input from them in the process can feel like a betrayal of justice.

It undermines the sense of closure and public trust in the justice system. The law imposes life sentences or long custodial terms for the most serious offenses to affirm society's condemnation of the crime and to protect the public. When a life term is cut short by clemency without a transparent and compelling justification, it blunts the deterrent effect of punishment. Pardoning corrupt convicts can undermine the national fight against corruption by sending a signal that white-collar criminals might escape with minimal consequences.⁵⁰ This perception erodes confidence in legal institutions and can encourage cynicism which is the idea that who one knows in power matters more than what one did.⁵¹

Legally, the President's power of mercy is sovereign within its constitutional sphere by virtue that once the judiciary has rendered judgment and the convict has served some of their term, the President may extend leniency.⁵² However, misuse of this power to benefit those convicted of egregious crimes would subvert the intentions of the law. The spirit behind Kenya's stringent sentencing for offenses like defilement or grand corruption is to declare them off-limits for *special treatment*. Bypassing that through clemency in questionable cases risks turning the mercy power into a loophole for the influential. It is here that the distinction between lawful authority and wise exercise of discretion becomes critical. The power of mercy must be wielded with extreme restraint and objectivity to avoid abuse. If pardons are seen as political favors or exercises in impunity, they "claw back on gains of justice" and politicise what should be a principled process. Certain offenses like sexual abuse, murder or theft of public funds are so repugnant to the community that their perpetrators should ordinarily serve out their full sentences.⁵³ Mercy should be reserved for petty or marginal cases or in serious offenses, those who have demonstrated genuine rehabilitation after long years in custody. The power of mercy in serious crime cases sits at a tense intersection between law and mercy. On one hand it is a constitutional safety valve to correct miscarriages of justice or to recognise extraordinary rehabilitation. On the other hand, when used to benefit those who flouted the most serious laws, it can undermine legal principles and public confidence. The recent pardons of high-profile corrupt and violent offenders highlight the need for scrutiny and perhaps reform of clemency

³⁹ Republic v Joshua Gichuki Mwangi [2024] KESC 34 (KLR) (Supreme Court of Kenya, 12 July 2024) paras 63–67.

⁴⁰ Office of the Director of Public Prosecutions, *Diversion Guidelines and Explanatory Notes* (ODPP, August 2024) 6, Guideline on Diversion Policy Clause 2.9 – When is eligibility for Diversion considered?

<https://odpp.go.ke/wp-content/uploads/2024/08/DIVERSION-GUIDELINES.pdf> accessed 10 June 2025.

⁴¹ Masinde, 'Power of Mercy Needs to be Exercised with Restraint,' (n24).

⁴² Ibid.

⁴³ David Ochieng' Ayuo, *An Appraisal of the Power of Mercy Act* (Moi University, 2024) 6

https://www.academia.edu/6826884/AN_APPRAISAL_OF_POWER_OF_MERCY_ACT accessed 10 June 2025.

⁴⁴ Masinde, 'Power of Mercy Needs to be Exercised with Restraint,' (n24).

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ See the happenings during the Moi regime in Mwalimu Mati, 'Sticky Presidential Pardons, and A Call for the Pardoning of Dedan Kimathi and Others' (Debunk, 10 June 2025)

<https://debunk.media/sticky-presidential-pardons-and-a-call-for-the-pardoning-of-dedan-kimathi-and-others/> accessed 10 June 2025.

⁴⁹ UNODC, 'Handbook on Justice for Victims' (United Nations, 1999)

https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf accessed 10 June 2025.

⁵⁰ Masinde, 'Power of Mercy Needs to be Exercised with Restraint,' (n24).

⁵¹ David S Kirk and Mauri Matsuda, 'Legal Cynicism, Collective Efficacy, and the Ecology of Arrest' (2011) 49 *Criminology* 443. See also Thiago R Oliveira and Jonathan Jackson, 'Legitimacy, Trust and Legal Cynicism: A Review of Concepts' (2021)

https://eprints.lse.ac.uk/112546/3/191381_Texto_do_artigo_530751_1_10_20211209.pdf accessed 10 June 2025.

⁵² William Blackstone, *Commentaries on the Laws of England* (Thomson 2004) 398.

⁵³ *Diversion Guidelines and Explanatory Notes* (n 40) 6.

standards.⁵⁴ To preserve the integrity of the justice system, the President and POMAC must ensure that any exercise of mercy in such cases is backed by clear, compelling reasons and follows the due process laid out in law. If we relent and let things be as they are, clemency for serious crimes will continue to be viewed with suspicion as a circumvention of justice rather than an act of grace in the public interest.

6. Comparative Analysis: South Africa's Use of Clemency

South Africa's approach to clemency is governed by the South African Constitution which grants the President the authority to pardon or relieve offenders and remit fines or penalties.⁵⁵ Unlike Kenya where the power of mercy is influenced by an advisory committee,⁵⁶ South Africa's pardoning process involves some level of transparency and consultation⁵⁷ as seen historically from the *Hugo Case* where Mandela pardoned mothers with children under the age of 12 who had committed minor offences.⁵⁸ The Constitution outlines clear guidelines for public participation and accountability when exercising clemency including the need for public communication and clemency will only apply if it does not breach the bill of rights.⁵⁹ Public hearings, judicial reviews and political processes are all conducted in a transparent manner to ensure that the public is informed of decisions.⁶⁰ A key difference between Kenya and South Africa lies in the openness of the clemency process. The presidential pardons are subject to scrutiny thus ensuring that any pardoning decision is made with justification and transparency⁶¹ though the same has not been consistent as seen in the recent release of President Jacob Zuma which many saw as a politically motivated move.⁶² This was buttressed by the fact that many of the offenders who were released became repeat offenders forcing the police agencies to re-arrest them.⁶³ Despite this, for South Africa public consultation is a significant part of the process. The South African President is required to consider the Constitution's values and principles when exercising clemency with judicial oversight to ensure that the power is used in good faith and not for political expedience.⁶⁴ This ensures that the public is aware of why and how decisions are made, providing legitimacy to the clemency process.

In contrast, Kenya's clemency process often lacks transparency with minimal public participation. Despite the legal framework mandating that public hearings and victim

notifications be part of the process, these steps are rarely followed. The lack of clarity on how hearings are conducted or whether victims are consulted undermines the fairness of the clemency process. For example, during President Ruto's pardons in 2023, the public received little information on the process. The law mandates that the Cabinet Secretary should publish the time and place of hearings in the Gazette, yet such publications are either scarce or non-existent, raising questions about the accountability and legitimacy of the decisions made. This issue is magnified in high-profile cases such as the Zuma case in South Africa, where allegations of political motivations surrounded the use of clemency.⁶⁵ Jacob Zuma's release on medical parole raised concerns about the politicisation of the clemency power. The perception that political figures can evade justice due to their status undermines public confidence in the justice system. Kenya has seen allegations that clemency decisions are politically driven,⁶⁶ creating a risk that the process might be perceived as a tool for political favours rather than a legitimate form of mercy. Kenya can learn important lessons from South Africa's approach. Clear public communication, transparency in the decision-making process and stronger checks and balances would enhance public trust in the power of mercy. South Africa's model of judicial review ensures that politically motivated clemency decisions are not easily manipulated. For Kenya to improve its clemency process, there must be greater transparency, public participation, and strict adherence to legal procedures, including ensuring that victims are involved in the process. The use of advisory bodies in South Africa is another aspect that could be adopted in Kenya to ensure a broader consultation before clemency decisions are made.

7. Recommendations for Reform

The current legal framework governing the presidential power of mercy in Kenya faces significant challenges around transparency, victim involvement and the application of clemency to serious crimes. Several reforms are necessary in order to address these issues and prevent misuse. First, the law must explicitly mandate the consultation of victims in the clemency process. Victims' voices are often overlooked yet their involvement is essential for ensuring that justice is not only done but seen to be done.⁶⁷ Clear laws should be put in place to guide the manner, method and timeline for victim

⁵⁴ Masinde, 'Power of Mercy Needs to be Exercised with Restraint,' (n24).

⁵⁵ Constitution of South Africa 1996, Section 84(2)(j).

⁵⁶ Power of Mercy Act, s 21-25.

⁵⁷ Karthy Govender, 'Judicial Review of the Pardon Power in Section 84(2)(j) of the Constitution of the Republic of South Africa, 1996' (2012) 23 Stellenbosch Law Review 490

⁵⁸ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 para 29.

⁵⁹ Helen Suzman Foundation, 'Crime and Punishment (and Presidential Pardons)' (Helen Suzman Foundation, 10 June 2025) <https://hsf.org.za/publications/hsf-briefs/crime-and-punishment-and-presidential-pardons> accessed 10 June 2025.

⁶⁰ See Sections 59 and 72 of the Constitution, 1996.

⁶¹ Molefhi S Phorego, 'Promoting Administrative Justice for Presidential Pardons in South Africa' (2024) 45 *Obiter* 138–160.

⁶² International Center for Transitional Justice, 'Zuma's Presidential Pardons Process "Unconstitutional"' (15 June 2012)

<https://www.ictj.org/news/zuma%E2%80%99s-presidential-pardons-process-%E2%80%99Cunconstitutional%E2%80%9D> accessed 10 June 2025.

⁶³ Lee Rondanger, '97 Convicts Who Were Released Under Prisoner Release Programme That Saw Jacob Zuma Set Free, Back in Jail' (15 January 2024) Independent Online <https://www.iol.co.za/news/2024-01-15-97-convicts-who-were-released-under-prisoner-release-programme-that-saw-jacob-zuma-set-free-back-in-jail/> accessed 10 June 2025.

⁶⁴ See *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (SARFU) para 159.

⁶⁵ Barry Bearak, 'Jacob Zuma's Return to Prison Stirs South Africa's Political Turmoil' (21 November 2022) The New York Times <https://www.nytimes.com/2022/11/21/world/africa/south-africa-jacob-zuma.html> accessed 10 June 2025.

⁶⁶ Mati, 'Sticky Presidential Pardons, and a Call for the Pardoning of Dedan Kimathi and Others' (n 15).

⁶⁷ See Daniel Pascoe and Marie Manikis, 'Making Sense of the Victim's Role in Clemency Decision Making' (2018) SSRN

consultations.⁶⁸ These laws should specify the minimum requirements for informing victims, their right to submit statements and their ability to participate in public hearings.

Second, the failure of the Cabinet Secretary to Gazette public hearings and the lack of transparency in how hearings are conducted must be addressed. The law's use of mandatory terms like "shall" in Section 21 of the Power of Mercy Act indicates an obligation that has not been consistently fulfilled. To ensure accountability, the Cabinet Secretary and the advisory committee should be held legally accountable when these provisions are not followed. If public hearings are not advertised in the Gazette⁶⁹ or if hearings are conducted behind closed doors, penalties should apply with clear enforcement mechanisms in place. The substantive aspects of the public hearing process need to be redefined. The law should not only require hearings but also set out detailed regulations about their conduct. This should include clear guidelines on how the public is notified, the scope of public participation and how decisions are documented and made available to the public. A structured process will ensure consistency, fairness and reduce the room for arbitrary decisions or political interference. Finally, the application of clemency must be reassessed when it comes to serious crimes like sexual offenses and corruption.⁷⁰ The law should draw clear distinctions between the types of crimes and impose stricter criteria for granting clemency in serious cases. Offenders convicted of such crimes should only be considered for clemency under exceptional circumstances and detailed rules must guide these decisions. The committee's recommendations should be based on transparent and compelling justifications to ensure that the exercise of mercy does not undermine public trust in the justice system. These reforms will restore public confidence and ensure that the presidential power of mercy is used fairly, transparently and in a manner consistent with the principles of justice. By providing clear regulations, holding public officials accountable and involving victims in the process, Kenya can create a more

transparent and fair system of clemency.

8. Conclusion

So long as systems of justice are imperfect, there is great need for clemency⁷¹ but care must be taken to avoid loss of the main intent and target of the process. The process of granting clemency is like a bridge that connects justice and mercy.⁷² When this bridge is constructed poorly there will be high risks of it collapsing under the weight of confusion, distrust and potential misuse. Kenya's system of presidential pardons despite being grounded in law is flawed by a lack of transparency, accountability and public involvement.⁷³ The clear legal framework is rarely implemented as intended and if implemented it is often honoured in breach.⁷⁴ This disconnection between the law and its application, seen in the inconsistent gazetting of public hearings and the failure to consult victims, creates a situation where the public is left in the dark, questioning the integrity of the process. The lack of transparency surrounding clemency decisions regarding serious crimes like corruption and sexual offenses exacerbates these concerns. Without clear and accessible procedures, the system risks becoming a tool for political advantage rather than a mechanism of justice. Reforms must be enacted to ensure that the law is followed strictly for Kenya to restore faith in this process. The involvement of victims in the clemency process should be legally mandated, public hearings must be held transparently and the criteria for granting clemency be revisited with a focus on ensuring justice rather than not political gain. Only through these reforms can the presidential power of mercy regain its legitimacy and restore public trust in Kenya's justice system. Without these changes, the power of mercy risks becoming just another tool for the powerful that will have the effect of undermining both the rule of law and public confidence.

<https://ssrn.com/abstract=3281755> accessed 12 June 2025.

⁶⁸ Andrew Novak, 'Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States' (2016) 49 University of Michigan Journal of Law Reform 817.

⁶⁹ Power of Mercy Act, s 21(4).

⁷⁰ Tijani, N., Kanu, U., and Ugwu, L., 'The Grant of Pardon and the Fight against Corruption in Nigeria: Comparative Analysis' (2024) 15 Beijing Law Review 165–187.

⁷¹ Cesare Beccaria, *An Essay on Crimes and Punishments* (W.C. Little & Co. 1872) 158–159.

⁷² Kathleen Dean Moore, 'Pardon: Justice, Mercy, and the Public Interest' (1988–1989) 35 Wayne Law Review 15–54.

⁷³ Christopher E. Smith and Scott P. Johnson, 'Presidential Pardons and Accountability in the Executive Branch' (1989) 35 Wayne Law Review 1113–31.

⁷⁴ See this historical African problem in; H W O Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press 1993)