

EXERCISE OF PREROGATIVE OF MERCY BY THE PRESIDENT OF BANGLADESH: AN INTERPRETATION WITH COMPARATIVE STUDY

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1. Introduction

The power of ‘pardon’ has been dealt by the judiciary in different countries. The framers of the constitution of Bangladesh were well acquainted with the notion of prerogative power, having witnessed their use by British monarchs during the colonial period. The president of Bangladesh is the constitutional head of the state and of the executive Government. Article 49 of Bangladesh Constitution has entrusted the President with a prerogative of mercy following the paramount trend of monarch’s privileges. The power always goes with the tension of abusing. Justice Oliver Wendell Holmes in *Biddle v. Perovich*² said, “A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of our constitutional scheme. When granted it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment fixed.”³ However, this “prerogative power “suffers some serious weakness i.e. lack of the direction of the exercising this discretion of the President himself. Because of the honor, dignity and supremacy of the post of the President, he is immune from any criminal proceeding during his office. Actually the constitution gives this facility to the president to act as per his discretion on the basis of his best choice what may be done for the welfare of the society, community and country smoothly so that no one can question him for his action which he has done for the sake of country at all. That is exactly not given for exercising for his own interest or party’s interest. Prerogative mercy is one of the prerogative powers of the President of the Bangladesh as he can pardon reprieves and respite and remit, suspend or commute any sentence passed by any court, tribunal or other authority .So law may be otherwise though president exercises this power .That is exactly a prerogative power. It is very significant in a sense that a convicted person may be pardoned after the declaration of the verdict of the court or before the verdict of the court whereas the president is not needed to wait for the verdict. Actually such power has been given because of keeping the nature of fallibility of human judgment which may be committed by the persons who is even well trained⁴ and for this reason the high authority has been given power to scrutinize for the best protection of the life and liberty.⁵ The British sovereign as also the American and Indian Presidents have such a power .This kind of power has also been given because of protecting the dignity of the post of the president and for which such mercy cannot be modified, abridged or diminished by Parliament.⁶ As like as other activities the president accomplish such power with the advice of the prime minister. The president can little exercise the discretion in granting pardoning as it has been furnished with advice of the Prime Minister .However the President is not needed to wait the verdict of the court.⁷ He is not needed to abridge, modify or change the verdict.⁸ The conclusion

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²274 U.S 480 (1927). Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US &vol=274&invol=480> (visited on July 14, 2014)

³*Ibid.* at 486.

⁴Islam Mahmudul, *Constitutional Law of Bangladesh*, MullickBothers, Second Edition reprint 2006, P. 321.

⁵*Ibid.*

⁶*Ibid.* p.322

⁷Islam Mahmudul, *Constitutional Law of Bangladesh*, MullickBothers, Second Edition reprint 2006, P. 323

of the court will be wholly undisturbed and intact.⁹ He can only scrutinize the record of the criminal proceedings and the conclusion drawn by him may be different and diversified and the criminal cannot claim the oral hearing to the president.¹⁰ It is fully the discretion of the president how he can best acquaint with concerned matter to draw his final decision.¹¹ While it is a prerogative and conventionally not questioned in any country court, it has made people anxious. The theoretical appearance of this prerogative is too grave to consider it lightly especially in Bangladesh where the President comes through a political nomination and a mere election by the members of the Parliament.¹² In this article I have tried to explore the background and objective of prerogative of mercy, its practice, the threatened constitutional provisions and the practicable control of this prerogative in the light of Bangladesh Constitution. But the question as to whether the case is appropriate for the exercise of the power conferred by Article 49 depends upon the facts and circumstances of each particular case. The courts usually held it salutary principle that ‘to shut up a man in prison longer than really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss to the community.’¹³

2. Historical Background of Prerogative of mercy

The Power of Pardon was historically vested in the British monarch. At common law, a pardon was an act of mercy whereby the king forgave any crime, offence, punishment, execution, right, title, debt, or duty. This power was absolute, unfettered and not subject to any judicial scrutiny. Hillarie Barnett approached “The King’s claim to dispense justice in his own right and without the judges was dispelled in 1607”.¹⁴ This opinion was firmly provided by Chief Justice Coke in *Prohibitions Del Roy*, 1607. Prior to the Glorious Revolution, 1688 in UK, all powers were found exercised by the Monarch with his discretions. It was the seventeenth century when throughout several cases, the courts of England contemplated about the risks of the measures dealt with the prerogatives of the Crown.¹⁵ The judges then began to crave that the power had been vested upon the Crown for doing goods of the subjects only and remarked that it should not go unquestioned. Even it was declared rigidly “The King hath no prerogative, but that which the law of the land allows him.”¹⁶ Those very facts led the changes of the traditional thoughts around the King’s powers. The concept of the rights of the men and the freedom of the organs of the Government over the King’s authority extended and the comments of Henry Bracton was admitted as “the King Should not be over man, but under God and the Law.”¹⁷ From this source, it came to find a place in the Constitutions of India. From 1935 onwards, the law of pardon was

⁸Ibid.

⁹Ibid.

¹⁰Ibid.

¹¹Ibid.

¹² Article 48(1) of Bangladesh Constitution

¹³*Ibid.* As quoted in Burghess, J.C. in (1897), U.B.R. 330 (334).

¹⁴Barnett, H. (2003), *Constitutional and Administrative Law*, 4th edition, Cavendish Publishing Ltd, London. P.139

¹⁵Parpworth, N. (2006), *Constitutional and Administrative Law*, 4th edition, Oxford University Press, New York, p.50

¹⁶ The Proclamations Cast (1610) 12 Co Rep 74,76

¹⁷*De Legibus et Consuetudinibus Angliae* ("On the Laws and Customs of England")

contained in Section 295¹⁸ of the Government of India Act, 1935 which did not limit the power of the Sovereign. There was no provision in the Government of India Act, 1935 corresponding to Article 161 of the Constitution.¹⁹ In the Constitution of India, the power of Presidential Pardon is found in Article 72.²⁰ Article 72 says that the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.²¹ The countries having colonial background mostly became follower of common law legal system and adopted the prerogative powers in their governance. So, the article 49 of Bangladesh is nothing but the constitutional hereditary from the British predecessor which can be corroborated with the view of Margaret Davis as “decolonization does not result in a return to a pre-colonial state, but rather movement into a ‘postcolonial’ state, where the effects of colonialism have become an inextricable part of the culture and of its legal, educational, and political institutions, and where the colonial state still serves as a reference point in local discourse.”²²

3. Prerogative of mercy in United States of America

The American President is constitutionally empowered by Article II of the US Constitution grants the President the “Power to Grant Reprieves and Pardons for offenses against the United States, except in cases of Impeachment.”²³ This very power of the American executive is not any unique one rather it was traced back into the colonial history of America under British dominions

¹⁸ Section 295, the Government of India Act 1935 reads as: (1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission of commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province. Provided that nothing in this sub-section affects any powers of any officer of His Majesty’s forces to suspend, remit or commute a sentence passed by a court-martial. (2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.

¹⁹ The above constitutional provisions were debated in the Constituent Assembly on 29th December 1948 and 17th September 1949. (See Constituent Assembly Debates, Vol.7, pages 1118-1120 and Vol. 10, page 389.) The grounds and principles on which these powers should be exercised were neither discussed nor debated. (See *Framing of India’s Constitution: A Study*, 2nd Edition, Dr. Subhash C Kashyap, page 367-371, page 397-399.)

²⁰ Article 72. Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases – (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence – (a) In all cases where the punishment or sentence is by a Court Martial; (b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c) In all cases where the sentence is a sentence of death. (2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial. (3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

²¹ These terms mean: Pardon: Complete pardon; Reprieve: Temporary suspension of sentence; Respite: awarding less sentence; Remission: Reducing amount of sentence; Commutation: Changing one punishment to another.

²² Margaret Davies, (2002) *Asking the Law Question: the Dissolution of Legal Theory*, 2nd edition, Lawbook Co, Sydney, p. 278

²³ Article II, Section 2, Clause 1

in seventeenth and eighteenth century.²⁴ Courts, in the USA, have been cautious in interpretation of the pardoning power where conditions have been imposed in grant of pardons which conflicted with the constitutional rights of the persons who were pardoned. American Supreme Court also endorsed this power in *United States v Wilson*²⁵ by referring identical power of the British monarchs. The merits of this clemency by the President were characterized in *Biddle v Perovich*²⁶ in a way that “A pardon is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.” In *Hoffa v. Saxbe*²⁷, a condition imposed on a pardon was challenged as unconstitutional. The District Court held that the “framework of the constitutional system” establishes limits beyond which the President may not go in imposing and subsequently enforcing conditions on pardons. In *Burdick v. United States*²⁸, the Court upheld an offender’s right to refuse a presidential pardon granted in order to compel him to testify in a case which conflicted with his right against self-incrimination. However, apart from judicial scrutiny in this area, the power of pardon has been allowed to be exercised freely. The practice of President’s pardon does not occur by himself. Irrespective of its status or name, this power alone with responsibility is delegated to the Department of Justice i.e. United States Federal Executive Department empowered to enforce law and administer justice at a large extent. Actually, that department regulates each case and mentions the President about the sanction.²⁹ American Supreme Court by the statement of Chief Justice Taft in *Ex parte Grossman* as “[O]ur Constitution confers this discretion on the highest officer in nation in confidence that he will not abuse it.”³⁰ The pardoning by the American Presidents to the offenders could not maintain always the holy stream. Those were used to favor the politically obedient people³¹ considerably besides the actual deserving cases. In spite of the utility of the Presidential clemency, Americans witnessed of its disadvantageous effects.

4. Prerogative of mercy in United Kingdom

The exercise of Prerogative of mercy by the Crown in United Kingdom became established in the middle ages, with the infringement of King’s peace emerging as a basis for criminal liability. Lord Denning MR pronounced in *Laker Airways v Department of Trade* (1977) that “the prerogative is a discretionary power to be exercised for the public good; it follows that its existence can be examined by the courts just as any other discretionary power which is vested in the executive.” As early as 1673, in *Thomas v. Sorrel*³² the maxim *non potest ex gratiam facere*

²⁴Moore D.K. (1993) ‘Pardon for Good and Sufficient Reasons’, *University of Richmond Law Review*, Vol.27, pp 281-282

²⁵ 32 U.S. (7 Pet.) 150 (1833)

²⁶ 274 U.S. 480 (1927)

²⁷378 F. Supp. 1221 (D.D.C. 1974). Available in *Judicially Reviewing the President’s Prerogative of Mercy: A Comparative Study*, at <http://www.bdresearch.org/home/attachments/article/nArt/292.pdf> (visited on 14-04-2014)

²⁸236 U.S. 79 (1915). Available at <http://phbar.org/forum/viewtopic.php?f=65>

&t=1623&start=0&view=print (visited on 28-05-2014)

²⁹Kapoor, A.C. and Mishra, K.K. (2002) *Select Constitution*, 15th edition, S Chand and Company Ltd., New Delhi, p. 255

³⁰ 267 U.S. 121 (1925)

³¹ President George HW Bush pardoned to the six officials of the previous Reagan’s administration in 1992, clemency by Clinton to sixteen Hispanic offenders of Puerto Rican group FLAN in 1999, George W Bush in 2007 controversially commuted the sentence of I Lewis Libby who was connected with Valerie Wilson scandal.

³²(1673) Vaugh 330 at 343. Available at http://en.wikipedia.org/wiki/Thomas_v_Sorrell (visited on 29-05-2014)

cum injuria et damno aliorum, that is to say ‘the king cannot confer a favour on one man to the injury and damage of others’, was applied. More so, where any right or benefit is vested in a subject by statute or otherwise, the Crown, by a pardon, cannot affect it or take it away.³³ At present, the monarch exercises the power on the advice of the Home Secretary.³⁴ The Home Secretary’s decision can in some situations be challenged by judicial review. British jurisprudence agrees with judicial review against the prerogative on the ground of its nature not on its source. The English courts felt the urgency of exercising judicial review in order to confirm public good. In *De Freitas v Benny* (1976), Lord Diplock said that “At common law, this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion.” So, the Crown in UK does not exercise this power with any personal involvement rather acts in accordance to the Home Secretary of the state who is accountable before the Parliament.

However, the judiciary, in UK, has constantly monitored the uninhibited, irrational grants of pardons and has provided a few checks and measures. In *R v. Secretary of State for the Home Department ex parte Bentley*³⁵, the Court held that the formulation of policy for the grant of a free pardon was not justifiable but a failure to recognize that the prerogative of mercy was capable of being exercised in many different circumstances and therefore failure to consider the form of pardon which might be appropriate to meet the present case was reviewable. Thus, in UK, judicial review of the power of pardon is extremely restricted in scope.³⁶ Whereas the judicial review has been activated once against clemency with the immense endeavor of the English judges, subsequently, the courts are to follow the precedents of judicial review which is believed as the heart of the British constitutional and administrative laws. If it is found that the

³³Biggins case (1599) 5 Co Rep 50 a,b. Available at <http://www.legalserviceindia.com/article/1370-Presidential-Pardon.html> (visited on 24- 05-2014)

³⁴ According to the Report of the U.K. Royal Commission pardon can be granted where the Home Secretary feels that despite the verdict of the jury there is a ‘scintilla of doubt’ about the prisoner’s guilt. Judicial decisions, legal text books, reports of Law Commission, academic writings and statements of administrators and people in public life reveal that the following considerations have been regarded as relevant and legitimate for the exercise of the power of pardon. Some of the illustrative considerations are: (a) interest of society and the convict; (b) the period of imprisonment undergone and the remaining period; (c) seriousness and relative recentness of the offence; (d) the age of the prisoner and the reasonable expectation of his longevity; (e) the health of the prisoner especially any serious illness from which he may be suffering; (f) good prison record; (g) post conviction conduct, character and reputation; (h) remorse and atonement; (i) deference to public opinion. It has occasionally been felt right to commute the sentence in deference to a widely spread or strong local expression of public opinion, on the ground that it would do more harm than good to carry out the sentence if the result was to arouse sympathy for the offender and hostility to the law (*See* Law Commission Report, page 328, para 1071). Written Submissions of Senior Counsel Soli Sorabjee in the Supreme Court of India as Amicus Curiae in *EpuruSudhakar vs. Government of Andhra Pradesh* (WP (Crl.) No. 284-285/2006). Available at http://www.ebc-india.com/downloads/written_submissions_of_mr_soli_sorabjee_in_power_to_pardon_case.pdf (visited on 16.07.2014)

³⁵1993 (4) All ER 442. Available at https://bookshop.blackwell.co.uk/extracts/9780199217762_leyland.pdf (visited on 09-05-2014)

³⁶*Lewis* in his book, *Judicial Remedies in Public Law*(1992) p 21, states: “In principle a failure to consider exercising the power to grant a pardon should be reviewable, at least if an individual can demonstrate that there is some reason why the Home Secretary should consider the case. It is also difficult to see why a decision to refuse a pardon should not also be reviewable in appropriate circumstances, for example, where the allegation is that there has been a failure to act in accordance with any relevant material or a failure to act in accordance with any relevant guidelines, or if there is an error of law as to the element of the offence for which the pardon was sought”. Available at <http://www.legalserviceindia.com/article/1370-Presidential-Pardon.html> (visited on 30-04-2014)

prerogative of mercy has been introduced for political purpose or some other needs other than the rational conventional objective, then that matter will be good to challenge on the charge of using power for improper purpose.³⁷ In UK, the operation of judicial review is restricted whereas it is practiced in case of the failure of granting pardon (*Bentley case*) at the instance of injustice on account of misapplication of law but still the formulation of policy about the grant of clemency by the Monarch is not subject to judicial review.

5. Prerogative of Mercy in South African

South Africa incorporated the prerogative of mercy with the President in their post-apartheid constitution.³⁸ The provision of the pardoning power of the President of South African can be a following instance as the Presidential Pardon's Bill 2010 enumerated there some solid and reasonable grounds to avoid the accusation of incomprehension of pardoning power and to ascertain the accountability of the executive actions. Section 3 of Presidential Pardon's Bill 2010 has figured out some points which have to be considered at sanctioning mercy. Mainly, the provision highlighted on the age of the offender, whether the reasonable period has lapsed after the conviction, surrounding circumstances, type or nature of crime, the personal condition of the offender during the commission of offence and the state's interest. These grounds honestly have substantiated the good intention of the legislators for the incorporation of the president's power of mercy. The legislatures fingered there that constitutional limit is perceived to guide the President and the consulting body in deciding allocation of mercy whereas no criteria were incorporated in the constitution of South Africa. It was a grave tension that the no detail of the mercy power to the South African President might be an abusing scope. Specifically, the Bill of 2010 provided the provision about written statement from the victim side should be considered in preparing a report by the Minister to the President.³⁹ This initiative would lodge more balance in the eye of the victim.

6. Prerogative of mercy in India:

In India, Article 72 of the Constitution of India empowers the President of India to grant pardon, reprieve, respite or remission of punishment, or to suspend, remit or commute the sentence of any person convicted of any offence and for the Governors by article 161. Section 295 of the Government of India 1935, first experienced the unrestrained prerogative of mercy in India. Alike other common law countries, the Presidential prerogatives in India are not an isolated means. DD Basu inscribed, "But it seems a reasonable view to take that this power, like other powers of the President, is expected to be exercised on the advice of the Cabinet."⁴⁰ However, the President cannot act as per his own whims and fancies and in this process he is to be guided by the Home Minister and the council of ministers. The power to pardon rests on the advice tendered by the executive to the President, who subject to the provisions of Article 74(1) must act in accordance with such advice. Indian Constitution has become advanced and obvious by keeping provisions to form Council of Ministers to aid and advise President.⁴¹ The exercise of

³⁷ *Attorney General v Fulham Corporation*[1921] 90 LJ Ch 281

³⁸ Section 84(2)(i) of the Constitution of 1996

³⁹ Section 3(1)(a) of the Constitution of 1996

⁴⁰ Bakshi, P.M. (2007), *The Constitution of India, Eighth edition*, Universal Law Publishing Company, New Delhi, p.100

⁴¹ Article 74 of Indian Constitution

judicial review is constitutionally permitted there.⁴² The preeminence of this power was ascertained as subject to judicial scrutiny in *Maru Ramu v Union of India*⁴³ and *Kehar Singh v Union of India*⁴⁴. In *Maru Ram v. Union of India*⁴⁵, the court observed, ‘Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favoritism cannot but be interlopers in this area. The order which is the product of extraneous or malafide factors will vitiate the exercise....For example, if the Chief Minister of a State releases everyone in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the Constitution to let such madness survive.’⁴⁶ In *Kehar Singh v. Union of India*, CJ Pathak observed “The power of pardon is part of a constitutional scheme and we have no doubt that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the head of the state and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context.” The court also justifies the existence of a “Pardon”, by acknowledging the fallibility of human judgment being undeniable even in a supremely legally trained mind and therefore any such errors can be remedied by entrusting power to a higher authority, which shall “scrutinize the validity of the threatened denial of life or the continued denial of personal liberty.”

7. Prerogative of mercy in Pakistan

Article 45⁴⁷ of the Constitution of Pakistan states that The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. The power cannot be questioned.⁴⁸ The question of granting of Pardon was in attention in *Sarabhjit’s Case*.⁴⁹

8. Prerogative of mercy in Bangladesh

Article 49 of the Constitution of Bangladesh confers mercy power on the President. According to the said Article “The President shall have power to grant pardon, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.”⁵⁰ Apart from constitutional provisions, the government may suspend, remit or commute the sentence of a person under the Code of Criminal Procedure of 1898.⁵¹ According to the Constitution,⁵² the President is to exercise the prerogative power of mercy in consultation with or in accordance

⁴² Article 72(b) of Indian Constitution

⁴³[1981 (1) SCC 107

⁴⁴ AIR 1989 SC 653

⁴⁵1981(1) SCC 107.

⁴⁶ Available at <http://indiankanoon.org/doc/1222748/> (visited on 05-07-2014)

⁴⁷Article 45. President’s power to grant pardon, etc.- The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. Available at <http://www.pakistani.org/pakistan/constitution/part3.ch1.html> (visited on 26-05-2014)

⁴⁸ Available at <http://orissa.gov.in/e-magazine/Orissareview/2012/oct/engpdf/58-63.pdf> (visited on 24-04-2014)

⁴⁹ Available at <http://www.legalserviceindia.com/article/1149-Presidential-Pardon.html> (visited on 16-06-2014)

⁵⁰Article 49 of the Constitution of the Peoples’ Republic of Bangladesh.

⁵¹Section 401 & 402 of the Code of Criminal Procedure, 1898.Available at http://bdlaws.minlaw.gov.bd/pdf_part.php?id=75 (14-07-2014)

⁵² Article 48 (3) In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister: Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court.

with the advice of the Prime Minister through the Ministry of Law and Parliamentary Affairs.⁵³The President cannot act independently in exercising the prerogative power of mercy. Rule 14 of the Rules of Business of 1996 states that the Ministry of Law, Justice and Parliamentary Affairs shall be consulted before tendering advice on a mercy petition against an order of death sentence and pardon, reprieve, respite, remission, suspension or commutation of any sentence. Now it is clear that the President is to act according to the wish of the government and he cannot apply his individual discretion. The President cannot act independently in exercising the prerogative power of mercy. The President is to act simply according to the Prime Minister's direction except in the case of appointment of Chief Justice. Article 48 (3) there is no scope in our Constitution for the exercise of discretion by the President while granting pardon. It shows that there is scope of abuse or arbitrary exercise of prerogative power of mercy. The Code of Criminal Procedure, 1898 also contains the provision of pardoning whereas "the prerogative power of mercy" of the president is undoubtedly independent but the provisions contained in chapter XXIX (Sections 401-402A) of the Code Criminal Procedure, 1898 is restricted⁵⁴ for granting pardoning by the Government. It is imperative that this pardoning power should be exercised to prevent miscarriage of justice. The object of conferring this judicial power on the president is to correct possible judicial errors as no human system of judicial administration can be free from imperfections.

9. Misuse of Mercy Power in Bangladesh: Some Recent Issues

The exercise of the prerogative power of mercy by the President have been called to question by the media and people at large. The facts of those decisions are discussed below in brief:

In the Advocate Nurul Islam an opposition (Bangladesh Nationalist Party alias BNP) leader's murder (on September 18, 2000)murder case, President ZillurRahman pardoned AHM Biplob, a son of Abu Taher, a present ruling party (Awami League) leader in which he was given death sentence.⁵⁵In February 2012, the president has granted mercy to the convicted killer AHM Biplob for the second time. This time, Biplob's life sentence in each of two murder cases [Kamal (a BNP activist) murder (2001) case and Mohsin (a student wing activist of JamaitIslami Bangladesh) murder (2000) case] has been reduced to 10-year imprisonment.⁵⁶

In another case, the President of Bangladesh has pardoned 20 death row convicts in Gama (youth wing activist of BNP) killing case on September 6, 2010.⁵⁷The fact of the case, in brief, is that the Speedy Trial Tribunal, Dhaka convicted and sentenced 21 persons to death for killing the Jubo Dal leader SabbirHossain Gama, also nephew of former BNP Deputy Minister RuhulQuddusTalukdarDulu, at RamsharkazipurAmtali Bazar under NaldangaUpazila of Natore district on February 7, 2004. As reported in newspapers, prior to the presidential pardon, the 20 convicts filed appeal with the High Court Division against their death sentence. The 20 convicts withdrew their appeal petition from the High Court Division when they were assured from

⁵³ 31 Rule 14 of the Rules of Business of 1996 provides that the Ministry of Law, Justice and Parliamentary Affairs shall be consulted before tendering advice on a mercy petition against an order of death sentence and pardon, reprieve, respite, remission, suspension or commutation of any sentence.

⁵⁴ Section 401-402 A of the Code of Criminal Procedure, 1898.

⁵⁵ShakhawatLiton 'Controversies can be costly'. The Daily Star, February 28, 2012

⁵⁶ The Daily Star, February 27, 2012

⁵⁷M. Abdul LatifMondal 'Presidential prerogative to grant clemency'. The Daily Star, September 24, 2010

responsible quarters of the ruling Awami League to grant them presidential pardon, and prayed for presidential clemency. On September 6, President Zillur Rahman granted them pardon.⁵⁸

In 2009, President Zillur Rahman granted mercy to Shahadab Akbar, son of the deputy leader in parliament Syeda Sajeda Chowdhury, who was sentenced to 18 years' imprisonment and fined Tk 1.6 crore in absentia in four cases filed by the Anti-Corruption Commission and the National Board of Revenue during the tenure of the last caretaker government.⁵⁹ Without surrendering to the court, he got his sentences and fines pardoned.

In terms of precedent, during the regime of BNP as 2001-2006, the then President created an uproar by granting clemency to a pro BNP leader named Mohiuddin Zintu who fled abroad to evade justice. That criminal was not only pardoned rather he was brought back into Bangladesh for his political rehabilitation. On January 13, 2005, President Dr. Iajuddin Ahmed granted pardon to a double murder convict Mohiuddin Zintu, founder President of BNP Sweden chapter. He was accused of murder with others of two businessmen in Demra area. A Martial Law Court tried the case in 1982 and convicted Zintu (*in absentia*) and other two. They were awarded capital punishment. Two convicted prisoners were executed, but Mohiuddin Zintu escaped the sentence because he at that time absconded in abroad. According to the press reports, Zintu maintained close liaison with the incumbents of Home Ministry and Law Ministry and managed to have them channeled the process for presidential clemency. After having the process ready, he came to Bangladesh on January 3 and surrendered before the Court of the Chief Metropolitan Magistrate of Dhaka and got presidential amnesty on January 13.⁶⁰

The culture of pardoning initially started in different way as by promulgating the Indemnity Ordinance 1976 by President Khondaker Mostaq Ahmed which was also ratified by the next Parliament in 1979 and that draconian law prohibited any investigation and prosecution of the murder of Sheikh Mujib, the national leader and 14 members of his family.

The crux of the subject is primarily rooted in our political culture. The politicians have to decide whether they need rogue and criminal elements in furthering their so-called political objectives even at the expense of their public image and social acceptability. Legally speaking, therefore, the matter is quite clear and explicit. What, however, may not be adequately and satisfactorily clear is whether, without the suspected lack of application of judicious scrutiny, such legal actions are socially and politically desirable in a healthy democratic polity. Upon a point of elucidation and clarification a citizen could wish to know whether public interest has necessitated the exercise of such extraordinary constitutional power.

In Bangladesh, it is not settled, whether the exercise of prerogative power by the President is subject to judicial review or not. Recently a Division Bench of High Court Division held that in exercising the power of mercy the President misused it.⁶¹ Citing examples of various cases, the Bench said the court had the jurisdiction to examine whether the President had misused his constitutional power.

⁵⁸ Ibid.

⁵⁹ The Daily Star, April 26, 2012.

⁶⁰ <http://www.thedailystar.net/law/2005/08/01/>, Last accessed on 12 June 2012.

⁶¹ *Sarwar Kamal vs. State*, 64 DLR (2012) 331

10. Effect of prerogative of mercy without rational consideration

(a) **The constitutional supremacy and democratic perception:** In Bangladesh Constitution from the preamble to the end the constitutionalists kept the theme of democracy in every segment of their work. the President of a state must not be politically biased if democracy signifies the government for the people. While an elected government moves prejudicially to save the obliged people by rendering mercy, it will be terminated into political autocracy. Rationally, it is “Being for and about people’s welfare, democratic sovereignty generally downplays revolution and violence as a primary means to quash despotic policies, structures and behaviors.”⁶² The second and third paragraph of the preamble of Bangladesh Constitution emphasizes on ‘democracy’ as the fundamental principle of the state policy and ‘democratic process’ as a means to realize the aims of the state respectively. Article 7 states that the people of the republic keep all the powers.⁶³ As a part of the constitution, this provision should prevail upon any authority. So, all authorities have been originated from the citizens who have conferred the authorities on the different organs of the state commonly known as the government.⁶⁴

(b) **Rule of Law:** Unfair prerogative of mercy by the President hampering the standards of rule of law. Bangladesh constitution accommodates rule of law by inserting government to run in accordance with law⁶⁵, equality for all citizens⁶⁶, treatment according to law⁶⁷, ensuring independence of judiciary⁶⁸, and access to justice⁶⁹, protection against arbitrary exercise of discretionary power⁷⁰ and so on. Bangladesh vows the execution of ‘due process of law’ as a state of typical democracy and social equality. Uncontrolled and unaccountable prerogative mercy let to infer ‘the rule of man’ instead of ‘the rule of law’. When a convicted is being specially favored throughout mercy from the head of the state on account of his political affiliation with the ruling party but a non-political convicted is not treated such, usually it shall throw a question whether the government is sincere to enforce the fundamental right of all citizens irrespective of their political ideology.

(c) **Natural justice:** A judgment is made by the highest court of the state punishing the criminal rightly and if nothing found wrongful or erroneous but the President pardons the convicted unreasonably, then the prerogative of mercy does not work as the

⁶² W.S. Matthew (2007) *Democratic Sovereignty: Authority, legitimacy, and state in a globalizing age*, 1st edition, UCL Press, Oxon, UK, p. 19

⁶³ “All powers in the republic belong to the people, and their exercise on behalf of the people shall be affected only under, and by the authority of, this constitution.”

⁶⁴ *Shoib v Government of Bangladesh* (37 DLR 318)

⁶⁵ Article 7

⁶⁶ Article 27 “All are equal before law and all are entitled to the equal protection of law.”

⁶⁷ Article 31

⁶⁸ Articles 94, 96 and 147

⁶⁹ Articles 44 and 102

⁷⁰ Arbitrary or capricious exercise of discretion (*Presiding Officer v Sadaruddin*, 19 DLR (SC) 516) and non-application of mind (*Lutfu Mia v Bangladesh* (1981) BLD (AD) 105)

constitutional safeguard to prevent justice rather supplants justice. Furthermore, this unnecessary sympathy to the criminal will aggravate the victims or his family as in Bangladesh the admission of mercy by the President still is absolute and unchallenging. The theme of natural justice requires the duty of the President to act fairly more than previous decisions.⁷¹

- (d) **Independence of judiciary:** The criminals will be provoked by the precedence of the arbitrary exercise of pardoning and will think that not the judiciary rather the President is the last shelter of them. In such way, the administration of justice of the state will be collapsed down losing its institutional independence. The President should act as a man of prudence and always keep in mind that his power for recovering justice, not to create any issue of injustice.
- (e) **Transparency:** While President is pardoning someone, what are being considered is absolutely unknown to the people. In a criminal litigation, all documents are considered as public document whereby people may come to know the facts. So, during considering mercy to a convicted person, abnormal secrecy by hiding all facts and materials may deteriorate the genuineness of clemency.

11. Judicial Review of Prerogative Mercy by President

Whether at all or how far the exercise of power under Article 49 is justifiable in the matter of immunity granted for protecting the president from criminal proceeding under the constitution creates the query.⁷² In some cases the court can examine the nature extent and scope of the power and enquire the power that falls within the ambit of Article 49. Since it is the mercy and decision of the highest authority of the state so the duress fraud or coercion must be proved actually. Political consideration may be an instance of the arbitrariness in pardoning. In *Maru Ram Vs India*,⁷³ Justice Krishna Iyer said that if the Chief Minister releasing everyone in the prison in his state on his birth day and it will be an outrage on the Constitution to let such madness survive. On the other hand if the brutal murderer has been convicted having strong observations of the court about the convict's bestiality, it will be arrogant and irrelevant abuse of the power to grant in remitting his entire life sentence merely because he has joined the party in power on the very next day after the conviction or in close relation of a high up. The court in the same case recommended for framing of rules as guideline in the exercise of this power and observed:

*“Consideration for exercise of power under article 72/161 may be myriad and their occasions protean and are left to the appropriate Government, but also consideration nor occasion can be wholly irrelevant, irrational, and discriminatory or malafide .Only in these rare cases will the court examines the exercise”.*⁷⁴

In 1989 the Supreme Court of India also held in the *Keharsingh Vs India* that there is sufficient indication in the terms of art.72, in the history of the power enshrined in that provision as well as existing case law, there is no necessity to framing the specific guide line and the exercise of

⁷¹ Para 30, *Knight v Indian Head School Division No. 19* [1990] 1 S.C.R. 653 SC (Canada)

⁷² Islam Mahmudul, *Constitutional Law of Bangladesh*, MullickBothers, Second Edition reprint 2006, P. 324

⁷³ *Maru Ram Vs Union of India* 1981(1)SCC 107

⁷⁴ *Ibid.*

power under art.72 cannot be subject to judicial review except the strict limitations defined in *Maru Ram case*. In *Satpal v State of Haryana*⁷⁵, the Supreme Court quashed an order of the Governor pardoning a person convicted of murder on the ground that the Governor had not been advised properly with all the relevant materials. The Court spelt out specifically the considerations that need to be taken account of while exercising the power of pardon, namely, the period of sentence in fact undergone by the said convict as well as his conduct and behavior while he underwent the sentence. The Court held “*not being aware of such material facts would tend to make an order of granting pardon arbitrary and irrational*”.

In the recent judgment of *EpuruSudhakar and Anr.v Government of Andhra Pradesh and Ors.* The Court held that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

- (1) That the order has been passed without application of mind;
- (2) That the order is mala fide;
- (3) That the order has been passed on extraneous or wholly irrelevant considerations;
- (4) That relevant materials have been kept out of consideration;
- (5) That the order suffers from arbitrariness

Thus, in these judgments concerning the Governor’s exercise of pardon, the Court seems to have widened the grounds for judicial review by enumerating specific grounds on which the grant of pardon can be considered arbitrary. Among these are non-consideration of relevant factors such as the length of sentence already undergone, the prisoner’s behavior and involvement in other crimes and consideration of extraneous or irrelevant grounds such as political affiliation.⁷⁶

12. Conclusion

The president of the Bangladesh has prerogative power of mercy which is not the new invention rather it has been practicing by many supreme bodies of the Sate because of having many rationales as already described. I stand with the existence of prerogative of mercy in Bangladesh. It could delight people, if it would have been exercised for a rational and sustainable issue. Most of the States constitution, like Bangladesh constitution, does not contain specific framework or guideline to exercise this power. Though, such guideline is not available, it can never be said that power exercised by the president cannot be judicially reviewed as the activities of the president is immune from the criminal proceedings. Nevertheless, if such discretionary power of the President is discriminatory, arbitrary or gross violation of the equality, justice and good conscience it can be challenged as limitations in exercising the prerogative power of President are prescribed in *Maru Ram*⁷⁷ case and mere political or personal interest cannot undermine such prerogative power. In Bangladesh, keeping the examples of Indian Courts in mind, prerogative power of the President should be subject to some measures of control. Such control can be imposed either through specification of circumstances of exercising pardoning power or subjecting to judicial review to prevent any arbitrary exercise of such power. Being a responsible and accountable administration, no government can ignore the cautious and proportionate practice of the power of pardoning while it is a recognized means to substantiate good governance.

⁷⁵Ibid.

⁷⁶ Islam Md. Minhazul , Judicially Reviewing the President’s Prerogative of Mercy : A Comparative Study, Bangladesh Research Publications Journal, Volume 7(2012)

⁷⁷ Ibid.