

## President's Prerogative of Clemency in Bangladesh: An Analysis

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*Abstract: The President of Bangladesh is the constitutional head of the state. But the 'Prerogative of Clemency of the President' can be exercised with the advice of the ministerial direction. The President is to act according to the wish or advice of the Prime Minister and he cannot apply his individual discretion. The prerogative of clemency to persons convicted of criminal offences is an ancient concept and this power traditionally was vested in heads of states. Every civilized country in its Constitution or in its laws provides a power to grant pardon or remission of sentences, though the means or conditions of grant of pardon vary from country to country. It is imperative that this pardoning power should be exercised only 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. Exercise of the presidential power to grant clemency over the last few years has led to a perception of the misuse and abuse of such extraordinary constitutional authority. Abuse of this power not only operates against constitutionalism and rule of law, but also besmears the country's criminal administration of justice and renders it ineffective. This article attempts to closely analyze and evaluate the historical aspects of President's Prerogative of Clemency and recommend appropriate measures in the light of the findings of the present study.*

*Keywords: Prerogative, Mercy, Presidential clemency, Judicial review, Fugitive.*

### Introduction

From ancient times, the power of the executive to suspend the operation of the justice system by extending clemency to an accused or convicted criminal has been a fundamental part of the criminal justice systems.

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Now every civilized country in its constitution or in its laws provides for a power to grant pardon or remission of sentence. The philosophy underlying the pardon power is that "every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy." [1] The classic exposition of the law relating to pardon is to be found in *Ex parte Philip Grossman Case* [2] Chief Justice Taft stated: "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."

### **The Nature and Origin of Clemency**

The clemency power or prerogative power of mercy traditionally was used to entrench regimes by "endearing the sovereign to his subjects," [3] rewarding political supporters, and even lining the executive's coffers. [4] The power of pardon was historically vested in the British monarch. In 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. [5] From this source, it came to find a place in the Constitutions of Bangladesh, India and the USA as well as the constitutional structure of England. However, it could hardly survive in its unrestrained nature in the democratic systems of these states. Over a period of time, it became diluted in the U.K. and U.S.A. to a limited extent through the exercise of judicial scrutiny. But its greatest dilution has occurred in India.

### **History of the Power of Pardon in Different Jurisdictions**

In his Commentaries, Blackstone said that the Crown's use of the pardon power to ensure that justice was administered with mercy was one of the great advantages of monarchy over any other kind of government, because it softened the rigors of the general law. Although Blackstone is undoubtedly correct in asserting that clemency in England often served the salutary purpose of mitigating a system of criminal justice, which was harsh and inflexible, the lack of meaningful checks on the

prerogative resulted in frequent abuses. For instance, felons were typically granted a pardon conditioned on their agreeing to travel to the colonies and work on the plantations.[6] The clemency power was also used to exact testimony from accomplices that would incriminate co- defendants, a practice that became a "mainstay" of the English criminal justice system in the eighteenth and nineteenth centuries.

#### **Present Position in England**

At present, the monarch exercises the power on the advice of the Home Secretary. The Home Secretary's decision can in some situations be challenged by judicial review. In *R vs. Secretary of State for the Home Department ex parte Bentley*,[7] 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.

#### **Current Position in the USA**

Article II of the US Constitution grants the President of the United States, the "Power to Grant Reprieves and Pardons for offenses against the United States, except in cases of Impeachment." [8] The Court has been cautious in its 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. In *Hoffa vs. Saxbe*, [9] 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 vs. United States* [10], 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. The lack of any standards or checks on the exercise of the clemency power has not helped the American system of justice in this case. Commentators have noted that unbridled discretion in pardoning threatens to permit the President to shield himself and his subordinates from criminal prosecution and to undermine the essential functions of coordinate branches of government. [11] Indeed, President Richard Nixon's advisors had such confidence in the scope of the presidential pardoning power that they seriously explored the possibility of the President pardoning himself. [12] Governors (and, many would contend, Presidents) have regularly exercised the clemency power in ways that are clearly at odds with society's interests, including granting or denying

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pardons to convicted murderers solely because of campaign promises made to supporters.[13] One governor was even impeached and removed for particularly blatant abuses of the pardoning power.[14]

### **Canada**

In Canada, clemency is granted by the Governor-General of Canada or the Governor in Council (the federal cabinet) under the royal prerogative of mercy. Applications are also made to the National Parole Board, as in pardons, but clemency may involve the commutation of a sentence, or the remission of all or part of the sentence, a respite from the sentence (for a medical condition) or a relief from a prohibition (e.g., to allow someone to drive that has been prohibited from driving).

### **Greece**

The Constitution of Greece grants the power of pardon to the President of the Republic (Art. 47). He / She can pardon, commute or remit punishment imposed by any court, on the proposal of the Minister of Justice and after receiving the opinion (not the consent necessarily) of the Pardon Committee.

### **Hong Kong**

Prior to the return of Hong Kong to China in 1997, the power of pardon was a royal prerogative of mercy of the monarch of the United Kingdom. This was used and cited the most often in cases of inmates who had been given the death penalty: from 1965 to 1993 (when the death penalty was formally abolished) those who were sentenced to death were automatically commuted to life imprisonment under the Royal Prerogative. Since the return, the Chief Executive of Hong Kong now exercises the power to grant pardons and commute penalties under section 12 of article 48 Basic Law of Hong Kong.

### **Switzerland**

In Switzerland, pardons may be granted by the Swiss Federal Assembly for crimes prosecuted by the federal authorities. For crimes under cantonal jurisdiction, cantonal law designates the authority competent to grant pardons (if any). In most cantons, the cantonal parliament may pardon felonies, and the cantonal government may pardon misdemeanors and minor infractions.

### **Russia**

The President of the Russian Federation is granted the right of pardon by Article 89 of the Constitution of the Russian Federation. The Pardon Committee manages lists of people eligible for pardon and directs them to

the President for signing. While President Boris Yeltsin frequently used his power of pardon, his successor Vladimir Putin was much more hesitant; in the final years of his presidency he did not grant pardons at all. *De jure* pardon can be requested after half of the sentence has been served (one year minimum), *de facto* even after sentence made in force. But in practice, the president reduced the sentence only to those eligible for parole. There were only two pardons where full sentences were discarded: one for espionage (a 20-year sentence), another for robbery (fled under arrest).

### **Presidential Clemency in Muslim Countries**

The prerogatives of clemency of Presidents are used for purposes of calming and unifying the country. Among the Muslim countries at first Nigeria has adopted this system. A former Head of state of this nation, General Yakubu Gowon pardoned Chief Obafemi Awolowo who repeatedly applied for the pardon. In his application he stated his achievements, his contributions to the unity and progress of the nation. He also alluded to the testimonies of his good deeds even by his inveterate enemies. The letter from him to the then Head of state were written from Calabar prison. He saw himself as a truly public spirited person. President Shehu Shagari as NPN member brought back Ikemba Nnewi, Chukwuemeka Odumegwu Ojukwu from exile and granted him pardon. He also released Mrs. Helen Gomwalk and Captain Peter Temlong from jail. General Badamosi Babangida pardoned Nduka Irabor and Tunde Thompson after they were released from a Decree four inspired jail. Again General Abubakar set General Obasanjo free. Also Major General Oladipo Diya, Shettima Bulama, General Musa Yar' Adua (late) and Major-General Abalukareem Adisa (late) were granted pardon. President Olusegun Obasanjo granted pardon to Alhaji Salisu Ibrahim Buhari who was alleged to have doctored his resume with forged educational results and certificates including an N.Y.S.C. discharge certificate and a University degree appearing to issue from the University of Torsion, Canada. He was alleged to have made false declaration of age wherein his youthful age of 29 was bloated to 36 years all in a bid to meet the statutory age for the office he vied for. In the Islamic Republic of Iran, the Supreme Leader has the power to pardon and offer clemency under Article 110 of the Constitution.

### **Prerogative Power of Mercy in India**

Articles 72[15] and 161[16] of the Indian Constitution confer the prerogative power of mercy on the President and the Governor, respectively. The Indian Constitution of 1949 specifically points out where power of the President can be exercised. The President shall have

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the power to grant pardon in certain cases as enumerated in the said articles. It is settled law that this power is to be exercised in accordance with the ministerial advice and not by exercise of the President's or the Governor's individual discretion. Though, the President or Governor is required to grant pardon in accordance with the ministerial advice, but there are some grounds upon which this power can be exercised by the President or Governor. In India, judicial decisions, law books, reports of the 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; f) good prison record; g) post conviction conduct, character and reputation; h) remorse and atonement; i) deference to public opinion. In *Epruru Sudhakar & Another vs. Government of Andhra Pradesh & Ors Case* [17] the Amicus Curiae Soli Sorabajee, former Attorney General of India submitted before the Supreme Court of India that having regard to various instances of arbitrary exercise of power of pardon it is desirable that this Honorable Court should lay down broad principles or criteria for exercise or non-exercise of pardon power. Though the circumstances and the criteria for exercise or non-exercise of pardon power may be of infinite variety, one principle is well settled and admits of no doubt or debate, namely, that the power of pardon should be exercised on public considerations alone. An undue exercise of the pardon power is greatly to be deplored. It is a blow at law and order and is an additional hardship upon society in its irrepressible conflict with crime and criminals.

### **Mercy Power in the Constitution of Bangladesh**

Article 49 of our Constitution confers mercy power on the President.[18] The President can exercise the power in the following ways:-

- 1. Pardon:** to completely set free the convict of his conviction. A pardon completely absolves the offender from all sentences and punishments and disqualification and places him in the same positions if he had never committed the offence.
- 2. Reprieves:** a temporary suspension of punishment fixed by law.
- 3. Respites:** postponement to the future the execution of a sentence. Postponement to the future execution of a sentence or awarding a lesser punishment on some special grounds e.g. the pregnancy of a woman offender.

4. **Commutation:** changing the sentence to one of a different sort than that originally proposed. It means exchange of one thing for another. Here it means substitution of one form of punishment for another of a lighter character e.g. simple imprisonment for rigorous imprisonment.
5. **Remission:** reducing the amount of the punishment without changing the character of the punishment. It means reduction of amount of sentence without changing its character e.g. a sentence of one year may be remitted to six months.
6. **Suspension:** to stop the execution temporarily.

Apart from constitutional provisions, the government may suspend, remit or commute the sentence of a person under the Code of Criminal Procedure of 1898.[19] According to our Constitution, [20] the President is to exercise the prerogative power of mercy in consultation with or in accordance with the advice of the Prime Minister through the Ministry of Law and Parliamentary Affairs.[21] 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.[22] 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. It is clear that in the above mentioned cases, the President acted as the government directed him. Though, it is claimed that the government followed the Rules of Business of 1996, in fact according to 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. Article 49 is to be amended by stating the grounds or conditions; that is, when the tender of pardon can be exercised in order to prevent miscarriage of justice in the name of mercy by the President. If the President is empowered to exercise this power independently without any advice from the Prime Minister, does it ensure that the President will exercise this power rationally? The answer is 'no'. In Bangladesh, the President is elected by the Members of Parliament. The person nominated by the ruling party always becomes the President. So, the President is a partisan person. If we remember Bangladeshi politics, we can't expect that a partisan person will exercise this before tendering advice on a mercy petition against an order of death sentence and pardon, reprieve, respite, remission, suspension or commutation of any sentence power

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rationality without discrimination, without favoring any person of his party of which he was a member.

### **Clemency Power in the Code of Criminal Procedure, 1998**

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 of Criminal Procedure, 1898 is restricted for granting pardoning by the Government.

### **Section 401 of Cr PC; Power to Suspend or Remit Sentence**

- (1) When any person has been sentenced to punishment for an offence, the Government may at any time without conditions or upon any conditions which the person sentenced excepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
- (2) Whenever an application is made to the Government for the suspension or remission of a sentence, the Government, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.
- (3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Government not fulfilled, the Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.
- (4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.
- (4A) The provision of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or impose any liability upon him or his property.
- (5) Nothing herein contained shall be deemed to interfere with the right of the President to grant pardons, reprieves, respites or remissions of punishment.



- (5A) Where a conditional pardon is granted by the President, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.
- (6) The Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

#### **Analysis of Section 401 of Cr PC**

There is a difference between suspension of a sentence and its remission. Suspension clearly means that the sentence has not been remitted and it is only in abeyance. The power exercised under this section is largely an executive power vested in the appropriate Government and by reducing the sentence, the authority concerned does not thereby modify the judicial sentence. A remission of sentence does not mean acquittal and an aggrieved party has every right to vindicate himself or herself. This section empowers the Government to remit and suspend a sentence passed by a Court but for such remission and suspension of sentence the order of conviction is not reversed. It remains in force, but the convict due to an order of remission and suspension passed under s.401 is not to serve out the period of sentence so suspended and is not to pay the fine so remitted. Question of remission of sentence arises only when the trial is over and judgment is delivered and court becomes *funct us officio*. When a person undergoes imprisonment in default of payment of fine, it is obvious that imprisonment can come to an end in one of these three ways: efflux of time, payment of fine or remission of fine. There is no scope under section 401, for merely remitting a sentence in default of payment of fine. Section 401 empowers the Government to remit in whole or in part a substantive sentence, passed on a person but not imprisonment in default of payment of fine, imprisonment in default of payment of fine is suffered by a person not because he committed an offence but because he failed to pay the fine.

#### **Section 402A of Cr PC; Sentences of Death**

The powers conferred by sections 401 and 402 upon the Government may, in the case of sentences of death, also be exercised by the President.

#### **Reasons of the President's Prerogative of Clemency**

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

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human judgment which may be committed by the persons who is even well trained and for this reason the high authority has been given power to scrutinize for the best protection of the life and liberty.

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 the Parliament. As like as other activities the president accomplish such power with the advice of the prime minister. 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 restricted for granting pardoning by the Government.

### **Procedure of Exercise of the Prerogative of Clemency**

The President of the Bangladesh exercised the powers and functions of him upon the advice of the Prime Minister except the appointment of the Prime Minister and the appointment of the Chief Justice of the Supreme Court. So the exercise of the prerogative mercy by the president will be accomplished upon the ministerial request or advice. So, here the personal discretion of the President is disregarded because of article 48(3). Here, the rule 14 of the Rules of Business, 1996 [23] may be applied as the advice of the Prime Minister goes to the President through the ministry of Law, Justice and Parliamentary Affairs. Rule 14 says that Consultation with the Law and Justice Division –The Law and Justice Division shall be consulted –i. On all legal questions out of any case; ii. On the interpretation of any law arising out of any proceedings; iii. Before tendering advice on a mercy petition against an order of death sentence and pardoned reprieve, respite, remission, suspension or commutation of any sentence; iv. Before involving Government in a criminal or civil proceeding instituted in a court of law. So the discretion of the President is totally out of the consideration. Nevertheless the president is not precluded to exercise his discretion. From the practical experience to what extent we can expect such so welfare discretion or mere discretion without recommendation from the ministerial advice because of the election and impeachment procedure of the president Bangladesh.

### **Guideline to Exercise Prerogative Power of Clemency**

It is unfortunate that there is no guideline of direction regarding exercise of the prerogative power of mercy of the President. In course of time such special power is given to anybody because of special protection or special vigilance of the public interest or major welfare and that can never be

denied. Article 49 of the Constitution that empowers the President to grant “mercy” does not explain the situations under which the President may exercise his prerogative power.

It is imperative that this power should be exercised judiciously and should be offered to one with the highest degree of remorse in addition to service to the nation or mankind. The commutation of death penalty of Col. Taher, a wounded and decorated hero of our war of national liberation, could have been an ideal case to follow the letter and spirit of the constitutional prerogative power of mercy, particularly because the sentence was awarded by a Martial Law Court for encouraging and honoring the sacrificing tendency of the hero for the country.

On the government's powers under Section 401 of the Code of Criminal Procedure to suspend and remit sentences of any convict, the High Court Division in *Sarwar Kamal vs. State*, [24] case held that; “No rules or standing guidelines are there for the government to exercise this power. Thus, we are of the view that for fair, proper and *bonafide* exercise of the above power the government may frame rule and guideline or even amend the Code, as has been done in one of our neighboring countries.” Though the Constitution of the People’s Republic of Bangladesh does not contain any guidelines for the exercise of the prerogative power of mercy, the president may be encouraged by scrutinizing the guideline exercised by the various Presidents of the various countries whereas the prerogative power of mercy is *intra vires* of the President of the country concerned.

The rationale of the pardon power has been felicitously enunciated by Justice Holmes of the United States Supreme Court in the case of *Biddle vs. Perovich*, [25] in these words: “A pardon in our days 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.” So, the test of tendering pardon is public welfare. At the time of granting pardon, the president is to examine many factors. Because, this power is given to use in extraordinary cases and where there is no other option open to the convicted person or to his family. For example if anybody has been convicted for murder, after the pronouncement of judgment the person murdered has been found alive whereas the pardon will be better judgment than the execution of the judgment fixed by the court. When pardon is granted to a convicted person, it may create a sense of injustice in the mind of the victims or family members of the victims. That is why, at the time of granting pardon, the President is to examine many factors

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specially, because this power is given to use in extra ordinary cases where there is no other option open to the convicted person or to his family.

### **Misuses of Clemency Power in Bangladesh**

As many as 30 convicts have been given the president's clemency in Bangladesh since 1972.[26] In recent times, we have witnessed a good number of decisions, where 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:

#### **During the Period of Bangladesh Awami League**

Twenty-six condemned convicts received presidential clemency during the rule of the Awami League-led government from 2009 to 2013, according to a statement State Minister for Home made in parliament. The figure was only four during the period between 1972 and 2008.

#### **Fact 1**

In 2009, the incumbent 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. [27] Without surrendering to the court, he got his sentences and fines pardoned.

#### **Fact 2**

Former Deputy Minister Ruhul Kuddus Talukder Dulu's nephew Sabbir Ahmed Gama was chopped and shot dead on Feb 7, 2004 at Ramsharkazipur Amtali Bazar under Naldanga Upazila of Natore district. The assassins left the place chanting slogans for outlawed Sarbhara group confirming his death. Gama's father Rafiqul Islam filed a case in this connection with Naldanga Police Station against 16 people, including Feroz Shah. The President pardoned 20 death row convicts in 2010. [28]

The Speedy Trial Tribunal, Dhaka convicted and sentenced 21 persons to death for killing the Jubo Dal leader Sabbir Hossain Gama. 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 responsible quarters of the ruling Awami League to grant them presidential pardon, and prayed for presidential clemency. On 06 September Former president Zillur Rahman pardoned them as the government considered the murder case a "false one" plotted to destroy the whole Awami League leadership in Natore. The convicts

are ruling Awami League's Naldanga Upazila unit general secretary SM Feroz Shah, Nator Sadar Upazila vice-chairman Asaduzzaman's father Anisur Rahman, Faisal Hossain, Sentu Shah, Shajahan Shah, Jahedul Islam, Badal Shah, Fazlul Haq Shah, Faruk Hossain, Abdul Jalil, Jahurul Shah, Sajjad Hossain, Sohag, Babul, Abul, Aatur, Ashraf, Farmazul, Fakruddin and Ohidur Rahman.

**Fact 3**

Former President Zillur Rahman pardoned Biplob, son of municipality mayor and Awami League leader Abu Taher, an Awami League leader in the Advocate Nurul Islam murder case, in which he was given death sentence.[29] In 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 has been reduced to 10-year imprisonment. Abdul Hamid's predecessor Zillur Rahman pardoned the sentence of life imprisonment of AHM Biplob, son of Lakshmipur municipality mayor and Awami League leader Abu Taher. Biplob was also given life sentence in another murder case, but the late president reduced that sentence to 10 years.

**Fact 4**

In 2012, President Zillur Rahman pardoned Biplob, son of Abu Taher, an Awami League leader in the Advocate Nurul Islam murder case, in which he was given death sentence. In 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 has been reduced to 10-year imprisonment.[30]

**During the Period of Bangladesh Nationalist Party (BNP)**

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 convicts' prisoners were executed, but Jhintu escaped the sentence because he at that time absconded in abroad. According to the press reports, Jhintu 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.[31]

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### **During the Period of HM. Ershad**

In Former military ruler HM Ershad was the first president to exercise this constitutional authority in 1987 when he granted amnesty to his party cadre Azam Khan, who had been sentenced to death for killing Moyez Uddin Ahmed, father of State Minister for Women and Children Affairs Meher Afroze Chumki.

### **During the Period of Caretaker Government**

The first time exercise of presidential clemency in caretaker government in 2008. The military-backed caretaker government pardoned one person in 2008.

### **Noncompliance of Rule of Law**

In the above mentioned cases, considering political affiliation to the ruling party, President granted mercy to the applicants, which is against the spirit of the constitution and a clear violation of the rule of law. The Indian Supreme Court in *Kehar Singh's* case [32] unequivocally rejected the contention of the Attorney General that the power of pardon can be exercised for political consideration. 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.[33] Citing examples of various cases, the Bench said the court had the jurisdiction to examine whether the President had misused his constitutional power. In the case of *Ehthesamuddin Ahmed Alias Iqbal vs. Bangladesh*, it was held that "power to suspend or remit sentence is within the absolute discretion of the Government or the President and the Court cannot give any direction in this regard." [34]

### **Mercy to a Convicted Fugitive and a Bold Step of the Higher Judiciary of Bangladesh**

A Division Bench of the High Court Division expressed that the powers of the president and the government to pardon, suspend or remit sentences of any convict should be exercised fairly and on unbiased relevant principles. If a fugitive from law is given pardon knowing his status then the exercise of power under Article 49 of the Constitution or section 401 (1) of the Code certainly be arbitrary, *malafide*, unreasonable, irrational and improper and such exercise of power is against the principle of the rule of law and an abuse of power. The judgment came in response to the petition by Sarwar Kamal, who challenged a trial court's warrant for his arrest in Cox's Bazar in 1997, four years after he was given presidential clemency while on the run. Kamal, now 58, was jailed by a trial court in 1989 and the High Court Division in 1992 in a case for beating a man to death. The case was filed with Teknaf Police Station in Cox's Bazar in

July 1981. Following an appeal against the trial court's verdict, the High Court Division granted him bail till the disposal of the appeal in August 1991. Subsequently, he was freed from jail. However, in September 1992, the High Court Division in its judgment on the appeal petition sentenced Kamal to eight years' imprisonment and ordered him to surrender before the trial court. Meanwhile, Kamal's wife in 1991 submitted a mercy petition to the then president Abdur Rahman Biswas, who pardoned Kamal in April 1993. Seven months before the clemency, a Bench of the High Court Division had ordered Kamal to surrender before the trial court, but he did not comply with the order. In their judgment, the Judges mentioned that the court cannot direct the President and the government on exercising their powers according to Article 49 of the Constitution and Section 401 of the Code of Criminal Procedure (CrPC). But the action of the President or the Government, as the case may be, must be based on some rational, reasonable, fair and relevant principle which is non-discriminatory and it must not be guided by any extraneous or irrelevant considerations. The Court further held that public power, including constitutional power, shall never be exercisable arbitrarily or *malafide* and ordinarily and Guidelines for fair and equal execution are guarantors of the valid play of power and when the mode of power of exercising a valid power is improper or unreasonable, there is an abuse of power. The Court observed that when the court issues an arrest warrant for a person or starts the process in this regard, the accused must surrender before the court if he wants to defend himself against the move. Any fugitive on the run would not have the right to get any remedy unless he surrenders before the court.

### **Judicial Review of the Prerogative Power of Mercy: Lessons to Learn From India**

In India, it is well settled that the exercise or non-exercise of pardon power by the President or Governor is not immune from judicial review. The power of pardon under Article 72 was reviewed in the two landmark cases of *Maru Ram vs. Union of India* [35] and *Kehar Singh vs. Union of India*. In *Maru Ram* case, the Court while deciding upon the validity of 433A of the Code of Criminal Procedure examined the power of pardon under Article 72. It 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 mala fide 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." In *Kehar Singh* case, the Court considered the

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nature of the President's power under Article 72 while dealing with a petition challenging the President's rejection of a mercy petition by Indira Gandhi's assassin, Kehar Singh. The Court explicitly held, "Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review." However, the Court qualified this finding by holding that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations delineated in *Maru Ram's* case. In *Kehar Singh's* case, placing reliance on the doctrine of the division (separation) of powers it was pleaded, that it was not open to the judiciary to scrutinize the exercise of the "mercy" power. In dealing with this submission this Court held "the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review". In *Kehar Singh* case, the Court declined to lay down guidelines for the exercise of the power under Article 72, stating that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law. The decisions in *Maru Ram and Kehar Singh* still hold the field and thus the present position is that Presidential Pardon under Article 72 is subject to judicial review on the grounds mentioned in *Maru Ram vs. Union of India*. The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter to be determined by the court. The Governor's power of pardon under Article 161 runs parallel to that of the President under Article 72 and thus several cases based on the same have a bearing on the Presidential Power under Article 72. Moreover, judgments dealing with Article 72 have simultaneously deal with Article 161 and vice-versa. In the early case of *K.M. Nanavati vs State of Bombay*, a reprieve granted by the Governor under Article 161 was held constitutionally invalid since it conflicted with the rules made by the Supreme Court under Article 145. In *Swaran Singh vs. State of U.P.*,<sup>[36]</sup> the Governor of Uttar Pradesh remitted the whole of the life sentence of an MLA of the State Assembly who had been convicted of the offence of murder within a period of less than two years of his conviction. The Supreme Court found that Governor was not posted with material facts such as the involvement of the accused in 5 other criminal cases, his unsatisfactory conduct in prison and the Governor's previous rejection of his clemency petition in regard to the same case. The Court quashed the order reasoning that the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner, hence the 'order fringed on arbitrariness. In *Satpal vs. State of Haryana*,<sup>[37]</sup> 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 *Epuru Sudhakar and Anr vs. 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: (a) that the order has been passed without application of mind; (b) that the order is mala fide; (c) that the order has been passed on extraneous or wholly irrelevant considerations; (d) that relevant materials have been kept out of consideration; (e) 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.

### **Conclusion**

Though the power of pardon has been provided for peace and good government and for doing justice, the successive governments in Bangladesh abused the power in granting pardon in party interest. The pardoning power of Executive is very significant as it corrects the errors of judiciary. It eliminates the effect of conviction without addressing the defendant’s guilt or innocence. The process of granting pardon is simpler but because of the lethargy of the government and political considerations, disposal of mercy petitions is delayed. Therefore, there is an urgent need to make amendment in law of pardoning to make sure that clemency petitions are disposed quickly. There should be a fixed time limit for deciding on clemency pleas. Regarding the judicial review debate, pardoning power should not be absolute as well as Judiciary should not interfere too much in exercise of this power. As judicial review is a basic structure of our Constitution, pardoning power should be subjected to limited judicial review. If this power is exercised properly and not misused by executive, it will certainly prove useful to remove the flaws of the judiciary. All citizens have the right to justice, but people’s rights are infringed when a convict is pardoned by the president and that too on

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government decisions, the petition stated. The time has come to think on the issues addressed in this article. It is a duty of the Parliament to take appropriate steps regarding the application of Article 49 to avoid the arbitrary exercise of clemency power. Article 49 of our Constitution should specifically sellout the circumstance in which prerogative power may be exercised and judicial review power of the Supreme Court should be exercised to control the misuse or arbitrary exercise of such power.

### **Recommendations**

The philosophy underlying the clemency power is that every civilized country recognizes it as an act of grace and humanity in proper cases. Without such a power of clemency to be exercised a country would be most imperfect and deficient in its political morality and in that attribute of deity whose judgments are always tampered. The clemency power of Executive is very significant as it corrects the errors of judiciary. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The most important points of recommendation for the president's prerogative of clemency in Bangladesh rationally are given in the following:

- Pardon may substantially help in saving an innocent person from being punished due to miscarriage of justice or in cases of doubtful conviction. Pardoning power is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections.
- The pardoning power may be considered of public good and is to be exercised on the ground of public welfare.
- The president may be pardon offender let off subject to certain conditions. The breach of these conditions will lead to revival of his sentence and he shall be subjected to the unexhausted portion of his punishment. He should not pardon absolutely or permanently.
- Article 49 of the Constitution of the People's Republic of Bangladesh empowers the President to grant "mercy" does not explain the situations under which the President may exercise his prerogative power. There should have proper guidelines and criteria for granting pardon in any convict.
- The President is to act according to the wish or advice of the Prime Minister as well as the government and he cannot apply his individual discretion. The President must have free from Prime Minister or ministerial directions regarding the discretion of clemency.
- The process of granting pardon is simpler but because of the lethargy of the government and political considerations, disposal of mercy

petitions is delayed. Therefore, there is an urgent need to make amendment in law of pardoning to make sure that clemency petitions are disposed quickly. There should be a fixed time limit for deciding on clemency pleas.

- The President may be appointed beyond the Members of Parliament or beyond the members of political party in government.

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  - (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

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of the Union extends; (c) in all cases where the sentence is a sentence of death.”

- [16]. Article 161 reads: The Governor of a State 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 against any law relating to a matter to which the executive power of the State extends.
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