



If the power of pardon is exercised for political and corrupt reasons, it will be a gross injustice
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Presidential Power to Grant Pardon: Solving the Dichotomy of Judicial Review & Unfettered Power

Arafat Ibnul Bashar

In ancient times, the king or the ruler was considered the fountainhead of justice. The King's Court was an original court for crucial cases and overall, the highest court of appeal. Although in reaching a decision, the king was usually assisted by his ministers, elders, judges, religious scholars, and representatives of different communities, it was the king who was the supreme authority to administer justice in the kingdom. But with the gradual expansion of the state and the burden of work, the king could no longer preside over disputes; rather administration of justice was carried out in his name by judges, arbitrators, and other appointed officials. In a modern state, the responsibility to administer justice is usually upon the shoulders of an independent judiciary. Although the constitution of Bangladesh doesn't explicitly confer judicial power on the Supreme Court and the subordinate courts, there is no doubt that the Supreme Court and the subordinate courts are the bodies that are to exercise the judicial powers.¹

According to our Constitution, the President is the head of the state.² Although all the executive actions of the government are taken in the name of the President³, the functions of the President itself are very limited. Again, in the exercise of his powers, the president acts in accordance with the advice of the president, with the only exception of the appointment of Chief Justice and the Prime Minister.⁴ Irrespective of that the President performs functions that may be of the nature of executive, legislative, diplomatic etc. Out of the functions and duties imposed by the constitution upon the President, the power to grant pardons under article 49 can be categorized as judicial power. The provision states that a president "shall have the power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other Authority." Although the power to pardon may be judicial in nature, its categorization as a judicial power is indeed faulty as while pardoning a convict, a president doesn't give a verdict of guilt or innocence, nor does he restore the innocence of the convicted. While granting pardon, a president doesn't even amend, modify or supersede the judicial record⁵, as the exercise of this power doesn't imply correction of any judicial error.⁶ This power to grant mercy belongs to the people⁷ and the President exercises this power being the guardian of the state.⁸ The aim for bestowing such power is to maintain peace and serving justice and humanity in exceptional situations.⁹ In *Kehar Singh v India*, it was stated that the purpose of such clemency is "to afford relief from undue

harshness...”¹⁰ The grant of pardon thus doesn't necessarily imply that the decision of the court has been wrong but that application of the criminal laws in that particular case is harsh and inconsiderate considering the circumstances of the particular case.

The power of granting pardon by the head of the state or the head of the executive is quite a common phenomenon in almost all legal systems. Even article 6(4) of the International Covenant on Civil and Political Rights provides for the right to seek pardon or commutation to anyone sentenced to death. But such power has been subject to controversy, due to its application for all the wrong reasons. Although such power was supposed to be exercised for the greater interests of justice, peace, humanity and public policy, it has been seen that it has been mostly exercised for political reasons. On top of that, the constitution is silent regarding whether the president's decision to pardon someone or rejection of such a plea is justiciable or not. But in *Bangladesh v Kazi Shaziruddin*, the Appellate Division stated that the power exercised by the president under Article 49 of the constitution is not justiciable.¹¹ The court further held that such power is not subject to any constitutional or judicial restraints except that such power cannot be used to enhance the sentence. But the Supreme Court of India in *Epuru Sudhakar v A.P.*¹², was of the opinion that exercise or non-exercise of the pardon power by the president is not immune from judicial review. The court was of contention that whether a pardon has been obtained by fraud or granted by

mistake or for improper reasons will be grounds for judicial review.¹³ The Supreme Court further in *Maru Ram v India*¹⁴, observed that the court can exercise its power of judicial review only in rare cases that such power has been exercised or non-exercised for irrational, irrelevant, irrational, discriminatory or mala fide considerations. In *Swaran Singh v U.P.*¹⁵, the court observed that the court can review the exercise of such power by the president if it is done arbitrarily, mala fide or in absolute disregard of the finer canons of constitutionalism. Even passing order of pardon mechanically and without applying mind to the material on record can be quashed by the courts.¹⁶ The House of Lords, in *Council of Civil Service Unions v Minister of Justice*, found that the royal prerogative powers cannot be immune from judicial review based on principles of administrative law.¹⁷ The British courts have also stated that some aspects of the prerogative of mercy may be subject to judicial review.¹⁸ This decision also has been followed in jurisdictions like Australia, Canada and New Zealand.¹⁹

There is an inherent problem with the courts examining the exercise of the power of pardon by the President. A grant of pardon is usually exercised after a court gives its verdict (though the pardon can also be granted even before the verdict is given).²⁰ A president's grant of pardon goes against the decision of a court of law. Thus it is quite irrational to let a court decide on the rationality of such a decision. When a decision has been given by the highest court of the land and the

president grants pardon on such a decision, it's not right for that court or any other subordinate court to decide on that decision of grant of pardon. Although the issue on such review will be the consideration, scope, and nature of such grant of pardon, there will always be a possibility that the court will be biased against the decision of the president, since the convict was pronounced guilty by the bench of the same court or a superior or lower court. Again, the consideration of justice, peace, humanity, or public policy upon which such grants are based, is mostly outside the scope of letters of the law. Thus it may be impractical to justify a grant of pardon on a legal basis.

On the other hand, not exercising judicial authority over presidential power to grant pardon opens the door for misuse. In almost all the jurisdictions, where such power exists, there have been allegations of misuse of this authority for political and personal reasons. Again, though the president is granted the authority to pardon due to his position, the act of pardon is not based on his will, but rather an exercise of constitutional authority for the furtherance of constitutional objectives and public welfare. And the exercise of every constitutional authority must be subject to judicial review. In a legal system, where the constitution is the supreme authority and power of every person, institution, organ of the state and government is defined and limited, absolute power to grant pardon is an anomaly.

In such contradictory standings, recourse must be sought in alternative ways. For example,

introducing some procedural safeguards to the process might bring more transparency into the process. For example under the constitutional scheme of Zambia, the president may consult with an advisory mercy committee, formed with different persons appointed by him, in all matters related to clemency.²¹ The constitution of Singapore requires the advice of the cabinet and in regards to a death sentence confirmed by an appellate court, the report made to the president²², by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court along with the opinion of the Attorney-General, to be considered before a grant of pardon by the president. Such provision of mercy committee can also be found in the constitutions of Sierra Leone²³ and Trinidad & Tobago.²⁴ Impartial review by a separate independent committee might bring fairness to the process. Again, questions of political appointment to the committee or its findings might also create further controversies. In this case, engagement of the judges who tried that particular case and other judicial personnel, similar to that of Singapore, may be more practical and desirable. Cabinet members could also have a say in that process and more conveniently, the President could draw up a guideline, which could enumerate the requirements of such pardon. This would ensure that every time there is a grant of pardon, it is based upon sound reasons and requirements and not just the private will of the decision-maker. There will be concerns that introducing such mechanisms may lengthen the process with far fewer grants of pardon. But the grant of pardon

was supposed to be an exceptional measure and an increase in such grant could only point towards its misuse.

The power to grant pardon is granted to the president to reduce the severity of the criminal code in exceptional cases and to serve justice through the promotion of humanity and public welfare. But if such power is exercised for political and corrupt reasons, it will be a gross injustice. The explicit letters of the constitution and the exercise of judicial review in such matter, however also raises the question of constitutionality and rule of law. Introducing the concept of 'Mercy Committee' might be a feasible solution. Such a concept, however, is not meant for evading the process of judicial review but to enforce it. Because the addition of a mercy committee in the process would ensure that the courts can look into the matter of pardon by inquiring whether the president has consulted with the committee; whether committee members are unqualified; the considerations are taken into account by the committee etc. In any case, there must be a procedural safeguard and judicial intervention, so that the clemency proceedings are not merely subject to a coin flip.²⁵

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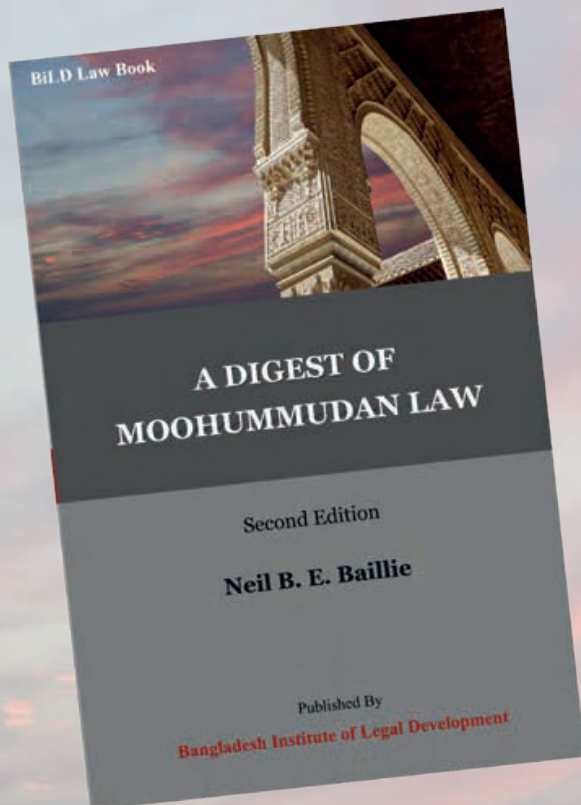
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Arafat Ibnul Bashar



LL.B (Hon's), LL.M (pursuing)
Department of Law
University of Chittagong
Email: a.ibnul.b@gmail.com

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