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President's 'Lockean' Prerogative of Mercy: A Lawful Lawlessness?

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> The right to pardon a criminal, either by mitigating or by entirely remitting the punishment, is certainly the most slippery of all the rights of the sovereign. By exercising it he can demonstrate the splendor of his majesty and yet thereby wreak injustice to a high degree. With respect to a crime of one subject against another, he absolutely cannot exercise this right, for in such cases exemption from punishment constitutes the greatest injustice toward his subjects.
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> Immanuel Kant
> *The Metaphysical Elements of Justice*, John Ladd (trans.),
> Hackett, 2nd ed. 1999, p. 144

1. A legally sanctioned Alegality

The traditional understanding of Athenian, Roman and British jurists, among others, stands that a polity must make some provisions for the power to pardon, whether for the purpose of remedying injustice, tempering justice with mercy or furthering the interests of the state.[1] Ideally the power of pardon does not exist under a perfect administration of the laws. The admission of the power is a tacitly conceded imperfection of human action in the punishment of offenders. Yet some vilifies the concept for making

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[1] John Dinan, *The Pardon Power and the American State Constitutional Tradition*, The Polity, Vol. 35, No. 3 (Apr., 2003), pp. 389-418, Palgrave Macmillan Journals, http://www.jstor.org/stable/3235525, (Accessed on: 25/07/2011), p. 408

a mockery of murder victims, undermining democracy, using raw power to cut down the law itself and making law meaningless. Some others reject such a feeling saying that clemency issues from a court of equity exercising a 'prerogative' inherent in the sovereign. The essence of a 'prerogative' being discretionary, its efficacy is bound up to its very disregard of declared law. Thus Jhon Locke famously defines 'prerogative' as:

> [The] power to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative. For since in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution: and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the public; or to make such Laws, as will do no harm, if they are Executed with an inflexible rigor, on all occasions, and upon all Persons, that may come in their way, therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.[2]

However it is the insinuation of this 'Lockean prerogative'[3], understood as a residuum of plenary executive power, independent

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[2] Jhon Locke, *Two Treatises of Government* (Section 160 of the Second Treatise) quoted in Thomas S. Langston and Michael E. Lind, *John Locke & the Limits of Presidential Prerogative*, The Polity, Vol. 24, No. 1 (Autumn, 1991), Palgrave Macmillan Journals, pp. 49-68 at p. 55; Stable URL: http://www.jstor.org/stable/3234984 (Accessed on: 09/09/2011)

[3] Relying principally on a broad reading of the vesting clause of Article II, Section 1, of the U.S. Constitution, scholars, executive branch legal counsel, certain Supreme Court Justices and several Presidents of USA have claimed an essentially monarchical prerogative power for the American executive. These "presidentialists" frequently assert that the Framers and ratifiers of the U.S.

of the specific grants of presidential power in the Constitution that has made most pardon exercises controversial and open to questions. Interestingly Article 49 of the Constitution of Bangladesh itself leaves no residuum regarding prerogative of mercy. Rather it provides a sweeping, unlimited and absolute authority in the President regarding the pardon power:

> The President shall have power to grant pardons,[4] reprieves[5] and respites[6] and to remit[7], suspend or commute[8] any sentence passed by any court, tribunal or other authority.

Moreover Sections 401[9], 402[10] and 402A[11] of the Code of Criminal Procedure 1898 add to the abundancy of the executive authority by

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Constitution intended to endow the President with a supposed "Lockean prerogative," understood as a residuum of plenary executive power, independent of the specific grants of presidential power in Article II. According to many presidentialists, Congress cannot restrict or eliminate this residual "executive prerogative" by law.

[4] Complete relinquishment of all sorts of punishments, sentences and legal disqualifications so as to restitute the convicted in the position he held before the conviction.

[5] Temporary suspension of operation of a conviction

[6] Postponement of execution of a sentence

[7] Reduction of amount of sentences without changing its nature, *e.g.,* a longer version imprisonment may be converted into a shorter version imprisonment.

[8] Sanctioning a punishment lighter than the earlier one, e.g., simple imprisonment may be substituted in place of a rigorous imprisonment.

[9] 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 accepts, suspend the execution of his sentence or remit whole or any part of the sentence.

[10] The government may, even without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it, death, transportation, rigorous imprisonment for a term not exceeding that to

empowering the head of the Executive, *i.e.*, the Prime Minister as well in this regard. Predictably this absolute power carries with it an inherent danger of being abused and actually the case is so. In Bangladesh we had to bear the pain of seeing pardon of even death sentence only on political considerations.[12]

The abuse of discretion, however, is not a peculiar one for Bangladesh. More or less the controversial incidents of pardon are frequent in almost all parts of the world. Even in the USA[13], the most sophisticated democracy of the world, a series of high-profile pardons like Andrew Johnson's sweeping pardons of thousands of former Confederate officials and military personnel after the American civil war, Gerald Ford's post-Watergate pardon of Richard Nixon,[14] Jimmy Carter's grant of amnesty to Vietnam-era draft evaders, George H.W. Bush's pardons of 75 people, including six Reagan administration officials accused in connection with the Iran-contra affair and Bill Clinton's eleventh-hour pardons of Marc Rich as well as other individuals[15] raised

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which he might have been sentenced, simple imprisonment for a like term, and fine.

[11] In case of death sentence, the powers granted in Sections 401, 402 maybe excercised by the President as well.

[12] Professor Dr. Iaj Uddi Ahmed pardoned the death penalty of *Mr. Mohidduin Zinto*, a worker of Sweden BNP, who was convicted to death in a murder case while others convicted for the same offence were executed. President Zillur Rahman also has pardoned at least twice on considerations which apparently seem to be purely partisan.

[13] The President's power to pardon is stated simply in the US Constitution: The President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment" (Art. II, Sec 2 Cl. I of the Constitution of United States of America)

[14] Pardon was granted by President Gerald Ford to former President Richard Nixon on September 8, 1974, for official misconduct which gave rise to the Watergate Scandal. Majority of Americans showed disapproval and he was narrowly defeated in Presidential campaign, two years later.

[15] Those receiving pardons included President Clinton's brother, the son of his education secretary, his former housing secretary, Susan McDougal of

significant concerns about ways in which pardons might be used to advance personal, partisan or pecuniary interests.

Therefore several scholars have put forth a variety of proposals, such as requiring that pardons be approved by a board; that president gives adequate notice to relevant parties before granting a pardon; that he gives reasons for the pardons; that pardons be issued only after conviction, or that legislature be empowered to disapprove of presidential pardons, etc.

This exercise shall try to explore the ins and outs of each potential alternatives, examine their comparative adaptability in different jurisdictions which may ultimately lead us to one, two or even more concrete 'what to do' findings suitable to the genius of the body politic we have got in Bangladesh. Even before that I would like to present a brief historic account of the pardon power as it was and is exercised by the British Crown. Keeping our common law heritage in mind it will help us to understand the breadth of the 'prerogative' that actually prevails in the homeland of common law jurisprudence. Inspiration is also heavily drawn from the American jurisprudence on presidential pardon.

2. Root of the Pardon power

The British tradition legal academics have traced the roots of the pardon power to prior English practice. English monarchs had the power to pardon well before the Norman invasion. In the early

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Whitewater fame, an old political friend from Georgia, and Marc Rich, whom the government had indicted for the largest tax scam in the nation's history. Marc Rich fled the US to escape a massive tax invasion to Switzerland in 1983. Many present and former high ranking officials in Israel, as well as leaders of the Jewish community in America and Europe, urged the pardon of Rich because of his charitable contribution and services to Israeli causes, the peace process in the Middle East through education and health programs in Gaza and the West Bank. It was suggested that Rich's wife, Denis made political contribution which comprise more than $1 million to the Democratic Party; $450000 to the Clinton library etc.

centuries, pardons had little to do with mercy. Two popular rationales for extending royal clemency were raising money and armies. Early pardonees often gave either a cash payment or a promise to serve in the military. Over the years, various Kings expanded and consolidated the power, ignoring a series of attempts by Parliament to limit it. By the middle of the sixteenth century, the royal pardon power was absolute, giving the King the authority to pardon or remit any treason, murders, manslaughters or any kind of felonies committed by or against any person or persons in any part of the realm. In the late seventeenth century, Parliament was finally able to limit the royal pardon power legally instead of extra legally. Its actions were in response to an episode involving the impeachment of the Earl of Danby.[16] In the 1701 Act of Settlement, Parliament forbade pardons from being used to preempt impeachments.

[16] The Earl, Thomas Osborne, was a Lord High Treasurer of England under King Charles II. In December of 1678, Parliament began impeachment proceedings against him for conspiring with France. It was the King, however, who was making deals with the French; Danby was merely acting ministerially. Parliament realized this, but the King was "beyond reach" of legal remedies; impeaching the hapless Treasurer was the best that Parliament could do. Unfortunately for Parliament, the King revealed in March 1679 that he had issued a pardon for Danby. If Charles had only been trying to protect Danby he could have pardoned the Earl in December, but the King was now acting to solve a different problem. An examination of Danby's actions would have revealed that Charles had been receiving bribes from France; a pardon would end the investigation and spare the King this embarrassment. The King's action sparked a "constitutional confrontation" with Parliament, which had come to rely on the impeachment power to ensure proper governance. If the King could foil impeachments, Parliament would have no means of controlling his ministers. A debate raged as to the legality of Charles's action. Those who believed the Danby pardon to be invalid looked poised to win the argument, but the King defused the crisis by dismissing Parliament. Charles won the battle but the monarchy lost the war. In the 1701 Act of Settlement, Parliament forbade pardons from being used to preempt impeachments.

In the USA, during the British period, the royally appointed colonial governors enjoyed broad pardon powers. Although there was some variation from colony to colony, the governors could remit fines or exonerate convicted criminals as they saw fit. With Independence, however, the newly established legislatures began to circumscribe the pardon power. Most States' governments vested the power to pardon jointly in the governors and legislatures. Massachusetts, for instance, only allowed pardons after a criminal had been convicted. Several states completely removed the power to pardon impeachments from their governors' purview. Georgia and New Hampshire took the power out of the hands of the Governor completely, giving it instead to the Legislature.

This history reveals at least two facts that are important for our purposes. First, the English pardon power was one of broad royal fiat, which fit uncomfortably with our notions of a limited executive. Second, Parliament eventually restricted the pardon power in a way that is important to understand the implication of 'limited prerogative' I wish to establish here.

3. On the Pardoning Authority

Coming to the 'appropriate authoirty' in granting pardon, issues circle round three fundamental questions - Who would Pardon? Should the authority be sole and exclusive or should there be any shared responsibility in this regard? Who should share the 'shared responsibility' in case there be one? The Philadelphia Convention leading to the framing of US Constitution presents a vivid narrative of the arguments and counter arguments for and against both the sides of the view.

3.1. Hamiltonian advocacy for Presidential monopoly

When it came time to write the US Federal Constitution, the executive pardon power was somewhat moribund in America. This

was mainly because that the Americans had just fought a war against a monarchy. Hence the first two suggested structures for the new government, the Virginia and New Jersey Plans, omitted the pardon power altogether. It was through the initiative of John Rutledge that the Committee of Detail added a pardon power based on the language of the British Act of Settlement of 1701.[17] Then the debate concerned with the question as to which official or officials ought to be entrusted with the pardon power. Most of the assembled delegates assumed that the power would be lodged in the executive, but several delegates were willing to consider other arrangements. The leading alternative, which was proposed by Roger Sherman, would have provided for shared responsibility of pardoning, so that the president would have had the power "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate." In the end, this motion received no votes other than that of Sherman's State of Connecticut, and after that point in the proceedings it was agreed that the president would wield the power and would not need to obtain the approval of any other officials. Ultimately it was left to Alexander Hamilton in *Federalist No. 74* to provide a sustained account of the logic underlying the decision to lodge the pardon power solely with the President. Hamilton contended that the virtues of vesting the power in a single official were readily apparent. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law.[18] Moreover, when Hamilton turned to consider

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[17] Brian C. Kalt, *Pardon Me?: The Constitutional Case against Presidential Self-Pardons*, The Yale Law Journal, Vol. 106, No. 3 (Dec., 1996), pp. 779-809, at p. 785; Stable URL: http://www.jstor.org/stable/797310 (Accessed on: 09/09/2011)

[18] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter ed., (New York: Mentor 1, 961), 447-4

the consequences of alternative arrangements, he noted that, "as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency."[19] Thus the arguments supporting the sole presidential authority of pardon may be summed up as follows:

First, other members of the executive branch, such as the Minsters, Bureaucrates and Law and Order force officials, are unfit to serve in this capacity, because there is no guarantee that the individuals selected for these particular offices would possess the requisite judgment or inclination to deal with pardon applications. Also it would be rather a delicate matter for the Attorney-General, after having prosecuted a man for a crime, to sit in judgment upon the subsequent development of facts as to whether that person should be pardoned.

Second, the legislators are equally ill suited for playing such a role, because they would be even more susceptible to the political pressure that is so often complained of in connection with the executive exercise of the power.

Third, nor is it wise for judges to participate in pardon decisions. It is always difficult for judges at any level of the court system to adopt the dual postures that would be required in the two quite different tasks of judging and pardoning, given that 'an appeal to a Judge is to a sense of justice and his knowledge of the laws; the other is an application for one reason or another to the other side of man's nature, that of mercy or of relief against the carrying out of the law.'[20]

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[19] *Supra Note* 1, p. 395

[20] William Spruance arguing in the Delaware Convention of 1897

3.2. Arguments for a shared responsibility

Against the pure Presidentialist approach however, there is always a strong current in favour of a shared responsibility in pardoning. In many instances, the executives are thought to have granted pardons not because they sought personal or political gain, but rather because they did not have the means to verify the accuracy of proffered testimonials. On this view, then, the problem stems not from the corrupt character of particular individuals, rather from an institutional arrangement that places extra-ordinary pressures on all individuals who occupy the office.[21] Therefore, it is certainly possible that shared responsibility for pardoning would lead to a lesser degree of accountability, but this becomes outweighed by the chance that a great many ill-advised pardons would be prevented by such an arrangement. Not only would such an arrangement prevent corrupt excutives from using the pardon power for personal or political gain, given that a pardon board members could be counted upon to deny applications in these cases, but it would also provide a buffer that might permit conscientious executives to resist appeals from friends and family members of pardon applicant.[22]

The necessity of such an institutional arrangement has been recognized in many states of the United States. By the turn of the twenty-first century, only six states provide that the governor shall have sole responsibility for pardoning, while nine states require the governor to obtain the non-binding advice of a board before granting a pardon. Another eleven states provide that the governor may grant a pardon only upon the favorable recommendations or with the concurrence of a board, council, cabinet, or legislative

[21] *Supra Note* 1, p. 397
[22] *Ibid*, p. 398

body. Still another nine states vested the pardoning power entirely in a board, of which the governor may or may not be a member.[23]

Many other constitutions around the world also have opted for such an institutional approach. Under some constitutions the power is vested in a collective body rather than in an individual. In China,[24] Japan,[25] Nigeria,[26] South Africa[27] and Sri Lanka,[28] the President is required to act on the advice of a specially constituted Board or Panel in exercise of mercy, rather than acting entirely at his own discretion. In some other countries like France,[29] Spain,[30]

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[23] Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, Virginia Law Review, Vol. 89, No. 2 (Apr., 2003), pp. 239-310, Stable Url: http://www.jstor.org/stable/3202434 (Accessed on: 09/09/2011)

[24] Article 80 of the Constitution of 1982 of The People's Republic of China provides that the President shall have power to issue orders of special pardons. But the power can only be exercised in pursuance of the National People's Congress and its standing committee's decision.

[25] In Japan the Emperor Exercises the power in pursuance of the recommendation of the Cabinet. There the national Offenders Rehabilitation Commission established under the Offenders Rehabilitation Act 1949 recommends the Minister of Justice to file deserving cases with the Cabinet.

[26] Article 101 and 102 of the Federal Constitution of Nigeria provide that the President or Regional Governor may pardon freely or conditionally. However the power is exercised in pursuance of the consultation with Chairman of the Advisory Council on Prerogative of Mercy which on its turn depends on the report of the Ministry of Justice, that is prepared taking into consideration the recommendations of Judges and report of probation officers.

[27] The Articles 84(2)(j) and 85 of the 1996 South African Constitution. The President exercises the power without seeking advice of the Executive Council and every pardon must be countersigned by a Minister (Article 101).

[28] Power is exercised by the President in accordance with the advice of the advisory Minister. However in case of Capital Punishment the President shall ask trial judge to make report to be sent with Attorney General's advice to the advisory Minister.

[29] Article 17 of the French Constitution of 1958 authorizes the President in this regard. However the counter signature of the PM or any other appropriate Minister is necessary (Article 19). In post-revolutionary France, the acceptance of the need for a pardoning power did not entirely dispel reservations about the

Belgium,[31] Italy[32] etc the President is required to take counter signature of the Prime Minister or a designated Minister.

Some constitutions provide for the establishment of an Advisory Committee on the Prerogative of Mercy (Kenya, Nigeria, Uganda, Zambia), a Pardons Board (Malaysia), a High Council of Pardons (Ivory Coast) or other consultative council (Greece), the State Council in Bulgaria, the German Democratic Republic, Poland, Romania and South Korea; the Praesidium of the Legislative Assembly in Albania, Mongolia and the Ukraine; the Presidential Council in Dahomey and Hungary. Most of these bodies, as their names sometimes indicate, perform tasks akin to those of a president. Such a pardon board comprises of individuals within the executive branch.[33]

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wisdom of concentrating the decision making power solely in the hands of the head of state in his capacity as chief executive. The 1802 constitution provided for the establishment of an advisory council in which all three branches of government were represented. Similarly, the 1848 constitution provided for mandatory consultation with the Conseil d'Etat, and in serious cases (i.e., convictions in the High Court) the right to pardon was reserved to the National Assembly. Finally, under the Constitution of the Fourth Republic, the power was vested in the President sitting in the High Council of the Judiciary, an indication that the power was not to be regarded as purely executive in nature.

[30] The King of Spain exercise the power with counter signature of the President (Article 62 and 64 of the Spanish Constitution)

[31] Article 110 along with Article 106 of the Constitution of Belgium 1970 makes the King to act with Counter Signature of a Minister.

[32] Article 89 of the Italian Constitution requires a countersignature of the Minister concerned.

[33] Leslie Sebba, *The Pardoning Power: A World Survey*, The Journal of Criminal Law and Criminology (1973), Vol. 68, No. 1 (Mar., 1977), pp.83-121; p 111-112, Stable URL: http://www.jstor.org/stable/1142480 (Accessed: 09/09/2011)

3.2.1. Should the Legislature be involved?

Another group of experts mounts an even more fundamental challenge to the Hamiltonian model, in so far as they cast doubt on whether the power should even be lodged in the executive branch at all.[34] Occasionally, they contend that clemency is, in part, a legislative power, and therefore that pardons should be granted only with the consent of the legislature. Hence in a few countries the power to pardon offenders is reserved exclusively to the legislature. This is the situation under the constitutions of Switzerland, Uruguay and, for some purposes, Turkey. In Nicaragua the power is vested primarily in the legislature, but supplementary powers are also granted to the President and the judiciary. The Constitution of Switzerland stands in a marked contrast to accommodate a place for the legislature as well in pardon proceedings. In Switzerland the Federal legislature known as the Federal Assembly comprises of the National Council and Council of States. Article 148 of the Swiss Constitution provides that subject to the rights of the people and the Cantons, the supreme power of the Confederation shall be exercised by the Federal Assembly. As per Article 173, the Federal Assembly grants pardon in the joint session. Decisions are taken by a majority of the members of the two Councils.[35] The American State of Arizona also follows the same line. There the Governor grants reprieves, commutations and pardons, 'upon such conditions and with such restrictions and limitations as may be provided by law', which means that the legislature is at a position to dictate the terms of pardons.[36]

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[34] *Supra Note* 1, p. 399

[35] Mst. Naznin Begum and Siffat Sharmin, *President's Prerogative Power of Mercy: A Comparative Study of Practices in Different Countries,* The Chittagong University Journal of Law, Vol X (2005), pp. 1-17 at p. 10

[36] *Ibid,* p. 12

3.2.2. Should the Judiciary be involved?

The advocates of judicial involvement argue that the pardoning power is not an inalienable right of the Executive; it is rather a sort of high judicial power conferred on the executive to serve the ends of justice and mercy.[37] To them the blending of the Judicial and Executive power in regard to pardoning would provide the best and safest power we can create.[38] Along these lines, they seek to require that pardons be granted only with the concurrence of the Judges of the Court before whom the individual may have been convicted. Article 65 of the French Constitution 1958, for example, provides for consultation with the Higher Council of the Judiciary on questions of Pardon. Accordingly in general cases the Higher Council of Judiciary *may* be consulted but in capital punishment cases the consultation is a *must*. Constitutions of Algeria and Zaire follow the French model and bestow an advisory role on the High Council of the Judiciary. In Chad such a role is granted to the Supreme Court itself.

It is thus evident that the clemency power is not universally regarded as the sole prerogative of the head of state. The body designated for an advisory role may thus be associated with any of the three branches of government, or it may constitute an *ad hoc* combination.

3.3. Should the Secondary Authority get primacy in decision making?

As is seen above, in many jurisdictions the clemency process involves more than a petition from the offender directly to the pardoning body. The procedure usually adopted involves the examination of the petition and the issuing of an opinion on the part of some other body. The question arises as to the power of such 'secondary' body *vis-a-vis* the 'primary' decision-making

[37] Joseph Medill arguing in the Illinois Convention of 1869-70
[38] *Supra Note* 1, p. 400

body. Under some systems it is explicitly stated that the ultimate decision belongs to the primary body alone. Some other systems deny that the primary pardoning authority is entitled to exercise this function all alone, but is dependent on the initiative or recommendation of another. This is the case under the constitutions of Austria, Greece, Irish Republic, Japan, New Zealand, Niger, Rhodesia, Singapore, South Africa and Sri Lanka. In these cases it seems clear that the 'secondary' authority has been granted the effective decision making power.

Yet in some other constitutions no such advisory role is explicitly attributed to the government or its representatives. Rather the same result is achieved in practice by the device of ministerial countersignature. These constitutions specify that decisions emanating from the primary authority require the countersignature of the prime minister, or a particular minister responsible for the matter to which the decision relates. Such a requirement appears, *inter alia*, in the constitutions of Belgium, Burundi, Italy, Lebanon, Luxembourg, Mauritania, Spain and Turkey.[39]

4. The Limits of Pardon power

Next issue that concerns the experts more is the circumstances in which pardons may be issued. Delegates to the US Philadelphia Convention of 1887 decided to grant the President nearly unlimited discretion in the exercise of the power, on the ground, as Hamilton argued in *Federalist No. 74*, that 'humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.' Yet the US Constitution itself imposed two definite restrictions on the President's clemency authority – one as to the non-pardon ability of crimes not 'against the United States' and of crimes inviting an impeachment procedure in the Congress. A cursory look on the

[39] *Supra Note* 33, pp. 113-115

usually prescribed limitations on the pardon power would reveal two categories of the limitations – Substantive and Procedural.

4.1. Substantive Limitations include prohibitions on pardoning some offences

This approach emphases on prohibiting pardons for certain offenses in certain circumstances. In addition to seeking to prevent pardons for offenses such as treason, murder, or for multiple felony convictions, etc. Again, some other constitutions put it positively by providing that the President may grant pardon in so and so offences.[40]

Offences against the State as opposed to offences against individual – Offences against individuals are usually considered not pardonable. For example, by limiting pardons to "Offences against the United States," the US Constitution means to place private civil and state criminal cases beyond the President's reach.

Pardon in cases of impeachment – Since the English Parliament refused to permit King Charles II to make use of his pardon power in 1678 to block the impeachment of the Earl of Danby, constitutions usually exclude 'cases of Impeachment,' from the scope of Presidential pardon power. The US Constitution stays the President's hand when Congress is doing the prosecution. The President cannot stop the House from impeaching a federal official, nor can he undo the punishment the Senate inflicted upon conviction.

Pardoning Treasons - Another of the limitation often proposed is that of barring pardons in the case of treason or requiring the

[40] Article 72(1) of the Indian Constitution confers the power on the President to grant pardons and commute sentences in the following cases: 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; and c) In all cases where the sentence is a sentence of death.

parliament to approve pardons for treason. This proposal, however, is usually rejected on the excuse that in seasons of insurrection or rebellion, a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the state. Consequently, it is considered unwise to exclude pardons for treasonable offenses or to require the president to wait for the legislature to convene in order to approve pardons of this sort.

Pre-conviction pardon – A limitation on the pardon power as put forth in the US Philadelphia Convention by Luther Martin, was to require that pardons be issued only "after conviction." Martin withdrew his motion after James Wilson objected that pardon before conviction might be necessary in order to obtain the testimony of accomplices, particularly in the case of forgeries.[41] Regarding the pre-conviction pardon, attention may also be drawn to instances where a man is arrested and imprisoned, charged with crime, and his accuser seeks to punish him by the accusation and imprisonment before trial, without the slightest expectation that the trial will result in conviction. He has his personal revenge to satisfy. Then, would it be proper to leave the State without the power to relieve a man thus imposed upon? It is to meet such and kindred cases that the power of 'previous pardon' is granted.[42] However, there are frequent supports for bans on pre-conviction pardons. Many cannot simply conceive of any legitimate circumstances under which a pardon should be issued prior to conviction. Pre-conviction pardons also tend to attract less public scrutiny than other pardons, and thus it would be more difficult to prevent the misuse of the power in these instances.[43]

A careful look at the Article 49 of the Constitution of Bangladesh reveals that the President may pardon '*any sentence passed by any court, tribunal or other authority*'. The intention of

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[41] *Supra Note* 1, p 404
[42] *Ibid*, p. 410
[43] *Ibid*, p. 407

the framers of the Constitution to prohibit pre-conviction pardon is, therefore, clear. Sections 401, 402 and 402A of the Code of Criminal Procedure 1898 also confirm the interpretation that the power to grant mercy in Bangladesh is no where 'pre-conviction'. So the pardon offered by the President to the son of an influential Awami-League leader is not conceivable within the four corners of the law.

Pardon in Contempt cases – There is a dilemma regarding the scope of Presidential pardon in contempt of court punishments. Thus there are four possible cases: (i) criminal convictions, with a fine payable to the State, which being an offence against the State is considered pardonable;[44] (2) criminal convictions with a fine payable to an individual person, which is generally believed not to be pardonable, though there are opposite views as well;[45] (3) contempt commitments to enforce a decree in favor of an individual person, considered not pardonable since it is not an offence against the State;[46] and finally (4) contempt commitments to vindicate the dignity of the court. In class (4) the question squarely arises whether it is the judiciary or the executive that shall be the final judge of the manner in which a court is to preserve its dignity and enforce obedience. [47] A possible distinction might be

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[44] In *Osborn* v. *United States*, 91 US 474 the Court so held in light of the Presidential power "to grant reprieves and pardons for offences against the United States, except in cases of Impeachment."

[45] Series of the US judicial decisions, though not harmonious and mostly decisions of state courts, indicate that the power does not exist, because its exercise would interfere with vested rights of the individuals (*United States* v. *Thomasson*, 4 Biss (U. S. Dist. Ct.) 336).

[46] *Hendiryx* v. *Fitzpatrick*, I 9 Fed Rep. 8

[47] In *Re Nevift*, II 7 Fed. Rep. 448 (C.C.A.), reported in Harvard Law Review, Vol. 16, No. 4 (Feb., 1903), pp. 291-292, (Stable URL: http://www.jstor.org/stable/1323477), Judge Sanborn of the Circuit Court of Appeals of the Eighth Circuit, most vigorously assailed the proposition that "contempts of court are public offenses, pardonable like any other." There Judge

made between cases where the defendant is punished for a past act and that where he is punished till he complies with the order of the

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Sanborn strongly advised that the operation of the pardoning power be excluded from all contempt cases.

In *ex rel. Rodd* v. *Verage*, (1922) 177 Wis. 295, I87 N. W. 830 *State* v. *Shumaker*, 164 N. E. 408 (Ind. 1928) reported in Virginia Law Review, Vol. 15, No. 6 (Apr., 1929), pp. 597-598, Virginia Law Review (Stable URL: http://www.jstor.org/stable/1065938), the Defendant was Superintendent of the Anti-Saloon League of Indiana. In his annual report to the trustees of that organization, he made certain statements concerning the Supreme Court of Indiana that were construed under a certain legislative enactment as a violation of the prohibition against "indirect contempt" of court. Upon trial, the defendant was found guilty and fined $250.00 and sentenced to sixty days on the state farm. The state constitution gave the governor the power to "pardon after conviction, for all offenses except treason and cases of impeachment." Another section defining all offenses in terms of crimes and misdemeanors failed to mention contempt of court. The Governor of Indiana issued a pardon to the defendant and he was released. Subsequently the Attorney General filed an information denying the governor's power to pardon for contempt of court. The Court held that contempt of court is not an offense for which the governor may grant a pardon.

However, in the federal Court for the Northern District of Illinois, *United States* v. *Grossman* (1924) I F. (2d) 941, noted in 38 HARV. L. Rev. 685, it was decided negatively confirming the executive's power to pardon contempt of court offences. Later the US Supreme Court confirmed it in *Ex Parte Grossman* (1925) 45 Sup. Ct. Rep. 332, 267 U.S. 87 reported in Michigan Law Review, Vol. 24, No. 2 (Dec., 1925), pp. 189-190 (Stable URL: http://www.jstor.org/stable/1280053). The Supreme Court in the instant case based its decision upon the historical argument, interpreting the clause by reference to the common law and to British institutions as they existed when the US Constitution was framed and adopted and upon the established practice of the executive in granting pardons in this class of cases. The Supreme Court seemed to be of the opinion that the fear of the usurpation by the executive of the judicial power was unwarranted since it was unlikely that coordinate departments would seriously cripple one another by the undue use of overlapping functions. In view of the legislative tendency to increase the exercise of the restraining power of the court as a means of control of criminal conduct it would seem wise not to leave an absolute power to punish in any one officer or department, the Court inferred.

court. It is arguable that in the one case he has passed out of the hands of the court, and so the President or the Executive may deal with him as he pleases, whereas in the other he is still under the direct control of the court.

4.2. Procedural limitations seeks to ensure fair and reasoned decisions

In so far as the purpose of the pardon power is understood in a strictly limited fashion, then it is necessary to regulate the process by which pardon applications are submitted, considered and granted, in order to ensure that pardons are issued only to remedy cases of demonstrable injustice. A principal device for accomplishing this goal is to require the decision-making process to be as public as possible.

Requiring public notice - One means to this end is to stipulate that public notice be given and in some instances that a public hearing be held in advance of a pardon being granted. Requiring advance notice would not only protect the public from the secret pardons that brings so much mischief, brings justice into contempt and puts a stain upon our courts, but would also ensure that the officials who exercise the power would benefit from all relevant information in their decision making process.[48]

Publication of relevant materials of and reasons behind the decision - Another approach is to require the publication of reasons and occasionally the letters and petitions along with the accompanying signatures that had been submitted in favor of a pardon. This would prevent pardon applicants from circulating inaccurate petitions and, at the same time, encourage citizens who were thinking of signing these petitions to be more conscientious

[48] Nilesh, *Presidential Pardon - Can it be Subjected to Judicial Scrutiny*, Available online: http://clemency.net/articles/presidential-pardon-can-it-be-subjected-juduicial-scrutiny (Accessed on: 25/9/11)

about verifying the information presented to them.[49] However, opposing the requirement of writing reasons some say, justice proceeds by equal law and equal rule, but mercy proceeds from sympathy, kindness, charity and better impulses of the human heart. If a reason is to be always assigned, then the impulses of the heart are restrained by the logic of the head.[50]

5. Judicial Review of Pardon Exercises

At various times the US Supreme Court has rendered different judgments about the purpose of the power. In a 1833 case, *U.S* v. *Wilson*, Chief Justice John Marshall wrote for the Court that: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate."[51] Then, in a 1927 case, *Biddle* v. *Percovich*, Justice Oliver Wendell Holmes offered a quite different interpretation of the purpose of the power when he wrote for the Court that: "A pardon in 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."[52] Despite these different interpretations of the purpose of the power, on the main question of whether the power can be altered by congressional statute or judicial interpretation the US judiciary has been consistent in viewing the power as a plenary grant of authority to

[49] *Supra Note* 1, p. 406
[50] *Ibid*, p. 410
[51] 32 US 150, 160-61 (1833)
[52] 274 US 480, 486 (1927)

the President.[53] And so, many advocates of limited judicial review believe that pardons, as exercises of an extraordinary power, should remain barely reviewable.[54]

However, today it has been accepted in all hands that the mere fact that an exercise of prerogative power involves an element of policy does not exempt it *per se* from supervisory jurisdiction of the superior court.[55] Obviously the power is rare and extraordinary and exceptional. Hence there may be no review of the process by which the President reaches the decision to pardon. But limited review of the reasons for the decision that shock the conscience or violate constitutional restraints on Presidential authority is never unwarranted.

The Indian Supreme Court considered it as early as in *G. Krishna Gouda v. State of A.P*.[56] In this case the President refused to commute a death sentence. The applicants moved a writ petition in Indian High Court and the matter ultimately came before the Indian Supreme Court. The court pointed out that 'all power, however, majestic the dignitary wielding it, shall be exercised in good faith, with intelligent and informed care and honesty for the public weal'.[57]

Another one of the landmark cases that brought the issue of Presidential Pardon in the lime light was *Maru Ram* v. *Union of India*.[58] In this case the court expressly stated that the power of

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[53] *Supra Note* 1, p 391; See also: *Ex parte Ridley* (Oklahoma) 106 Pac. 549, 551, *Ex parte Garland* 1 U.S.3 33, 380 (1866), *Schick* v. *Reed*, 41 9 U.S.2 56, 266 (1974)

[54] Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, The University of Toronto Law Journal, University of Toronto Press, Vol. 56, No. 3 (Summer, 2006), pp. 185-222 at p. 213; Stable URL: http://www.jstor.org/stable/4491692 (Accessed on: 09/09/2011)

[55] *R* v. *foreign Secretary, Ex parte Everett* (1989) 1 QB 811

[56] AIR 1974 SC 2192. 60

[57] *Supra Note* 48

[58] 1981. (1) SCC 107

pardon under Article 72 of the Indian Constitution cannot run riot and must keep sensibly to a steady course and that public power, "shall never be exercisable arbitrarily or *malafide* and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power". A similar opinion was presented by the court in *Kehar Singh* v. *Union of India.*[59] In this case the court reiterated, "It appears to us clear that the question as to the area of President's power under Article 72, falls squarely within the judicial domain and can be examined by the court by way of judicial review". While these two cases did not call for judicial intervention, relying on the law laid down in them, the Supreme Court invalidated the remission of sentence by the governor of Uttar Pradesh in *Swaran Singh* v. *State of UP*,[60] because some material facts were not brought to the knowledge of the Governor. Rejecting the argument that governor's action under Article 161 of the Indian Constitution was beyond judicial scrutiny, the court held: 'If such power was exercised arbitrarily, *malafide* or in absolute disregard of the finer canons of the constitutionalism, the by product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it.' In a recent case, famously known as the 'remission case,' the Indian Supreme Court's landmark verdict somehow changed the scenario. In *Guru Venkata Reddy* v. *State of AP*[61] the dramatic remittal of congress activist Gouru Venkata Reddy, who was undergoing a 10 year imprisonment sentence in connection with the killing of the two persons, raised the eyebrows of many apex authorities. Thus after an appeal to the Supreme Court by the sons of the deceased a bench consisting of Justice Arijit Pasayat and Justice S.H. Kapadia overturned the pardon granted by the then governor of Andhra Pradesh Sushil Kumar Shinde, and warned that the exercise of the clemency power would be tested by

[59] 989 AIR 653
[60] (1998) 4 SCC 75
[61] 1985 AIR 724

the court against the maintenance of Rule of Law. Therefore the position now stands that it can no longer be said that prerogative power is *ipso facto* immune from judicial review. An undue exercise of this power is to be deplored.[62]

The sole Bangladeshi reference on the issue is *Ehtesham Uddin Ahmed alias Iqbal* v. *Bangladesh* 1 BLD (1981) where it was held that pardon decision was within the absolute discretion of the President. Keeping in mind the Military rule prevailing then in Bangladesh, the submissive judicial stance does not seem very unnatural. However, the time has changed drastically now-a-days. And the Court is now bold enough to hold that there may never by any absolute and inherent power in a democracy. The essence of democracy being a limited government, every power entrusted to every stately functionary, how high so ever, is essentially a limited power.[63] In so many judgments over the years, the Supreme Court of Bangladesh has categorically established that Presidential Ordinance making power under Article 93 power and emergency power under Article 141 are always reviewable. Then what makes the President's pardon power under Article 49 an exception? Regarding the authority granted under Section 402 of the Code of Criminal Procedure, renowned Advocate Mr Zahirul Huq argues that being an exercise of grace and not of judicial discretion, it is not judicially reviewable.[64] This argument also is not tenable at all. Rather question may be asked, while even exercise of constitutional powers are subject to judicial review then how could a statutory power remain unaffected?

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[62] *Supra Note* 48

[63] *Advocate Sultana Kamal* v. *Bangladesh* 14 MLR (HCD) 105, Para 176(4)

[64] Zahirul Huq, *Law and Practice of Criminal Procedure,* Ayesha Huq, Dhaka, (1986) pp. 1064 at p 532

6. Things to be done

Given alarming increase of perverted use of the 'prerogative' of mercy, it is absolutely important that we react immediately. The discussions made above may provide some keys to the solution:

Firstly, the sweeping power granted in Article 49 should not be left untouched. There must be prohibition regarding the pardon of some offences like high treason, abruptly uprooting the constitutional order and criminal contempt of the Superior Court, etc. All sorts of pre-conviction pardon must be prohibited.

Secondly, Article 49 may provide a clause to the effect that the President's power to pardon shall be exercised in consultation with the Pardon Board comprising the representatives from all the braches of the Government – executive, legislature and judiciary. The Attorney General is a natural choice for inclusion on such a board. Presence of such an official would ensure that the integrity of the law may be sustained; conversant as he is with the facts of the case, equally conversant is he, probably, with the law belonging to the case. In addition, other members of the executive department, such as representatives from interior ministry, law ministry, public relations department, police or even from civil society may be counted on to bring some degree of common sense and of practical ideas to the pardoning decision.

Thirdly, the primacy of the opinion of the Pardon Board may be ensured constitutionally, while details of the procedure to be followed in dealing with a mercy petition may be provided through a separate Parliamentary statute. There are so many instances in the Constitution of Bangladesh where the duty to supply detailed provisions has been left with the Parliament.[65] In that case, the

[65] As for example: Article 4 of the Constitution provides that provision relating the National Anthem, Flag and Emblem shall be made by Law. Article 6 provides that details of the citizenship law shall be supplemented by Act of Parliament. Almost all the fundamental rights in Part III of the Constitution has been made subject to restrictions imposed by law of Parliament. Article 33 (3)

revised Article 49 would have to provide that the exercise of the power shall be regulated by an Act of Parliament. But the independence and credibility of the Pardon Board must be ensured in the Constitution itself.

Fourthly, apart from providing the constitution of the Pardon Board, specific guidelines regarding the exercise of the power may be provided in the law. The assertion of Mr. Soli Sorabjee sums up some sample guidelines that the proposed law may accommodate:

1. Interest of the society and the convict
2. The period of imprisonment undergone and the remaining period
3. Seriousness and relative recentness of the offence
4. The age of the prisoner and the reasonable expectation of his longevity
5. The health of the prisoner especially any serious ill ness from which he may be suffering,
6. Good prison record
7. Post conviction record, character and reputation
8. Remorse and attornment and,
9. Deference to public opinion.[66]

7. Concluding Remarks

While the pardoning power is normally regulated by the constitution, its exercise occasions an enactment of a pre-constitutional power, the power to self-impose and suspend the

provides for arrest or detention under preventive detention law. Article 48(1) provides that the election of president shall be held in accordance with the law made by Parliament. Many other provisions like these may be mentioned to show that bulk of the constitutional law of Bangladesh is made by legislation.

[66] The written submissions of senior counsel Soli Sorabjee as *Amicu curie* in the case of *Epuru Sudhakar & Another* vs. *Government of Andra Pradesh & Ors* WP (cr) No 284 – 285/2006 quoted in *Supra Note* 35, p. 17

rule of law. The pardoning power emits the shiniest aura of sovereignty among executive powers. In the exercise of the pardoning power, the head of state declares the exception and brings to naught the deeds of other branches of government. This holy duty is expected to be exercised only for the greater justice not for political convenience or inconvenience. Unfortunately this power, instead of having been a mantle in the hands of the executive, to be thrown over the innocent or unfortunate, to shield and protect them from unmerited suffering, has too frequently been instrumental in rescuing the guilty murderer from that punishment which the malignity of his crime so richly deserved. Instead of operating in particular cases in mitigation of the rigid rules of law, which must be general in its provisions, and may therefore sometimes be oppressive, it has been instrumental in turning lawless felons loose again upon society, to commit even more daring outrages. And thus this most important power has been shockingly perverted and abused and hence we need to drastically change our idea about a plenary 'Lockean' prerogative of mercy.[67] Time in fact is ripe enough to discard the attribution of any 'prerogative; an essentially colonialist perception of executive power to any Executive of any democracy.

[67] The claim that the President possesses an extra-legal plenary "Lockean prerogative" cannot survive a close reading of Locke. 'Lockean' prerogative of mercy expounded by the presidnetialist is absent in Locke himself, but the *Second Treatise* contains powerful reasoning against a broad construction of grants of executive power in a democratic constitution. Even if it is allowed that the Constitution grants a distinct "executive power," an analysis of John Locke's Second Treatise, the authority most commonly cited as a guide to what the framers of the US Constitution and their contemporaries understood by "the executive power," suggests that the President, in a Lockean reading of the Constitution, possesses far less discretionary power than the presidentialists allege. See: Thomas S. Langston and Michael E. Lind, *John Locke & the Limits of Presidential Prerogative*, Polity, Palgrave Macmillan Journals, Vol. 24, No. 1 (Autumn, 1991), pp. 49-68, Stable URL: http://www.jstor.org/stable/3234984, (Accessed on: 09/09/2011)