

LEX SCRIPTA MAGAZINE OF LAW AND POLICY, VOL-1, ISSUE-1
ISSN-2583-8725

LEX SCRIPTA MAGAZINE OF LAW AND POLICY
ISSN- 2583-8725

VOLUME-1 ISSUE-1
YEAR: 2023

EDITED BY:
LEX SCRIPTA MAGAZINE OF LAW AND
POLICY

LEX SCRIPTA MAGAZINE OF LAW AND POLICY, VOLUME-1: ISSUE-2

[COPYRIGHT © 2022 LEX SCRIPTA MAGAZINE OF LAW AND POLICY]

All Copyrights are reserved with the Authors. But, however, the Authors have granted to the Journal (Lex Scripta Magazine of Law and Policy), an irrevocable, non-exclusive, royalty-free and transferable license to publish, reproduce, store, transmit, display and distribute it in the Journal or books or in any form and all other media, retrieval systems and other formats now or hereafter known.

No part of this publication may be reproduced, stored, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other non- commercial uses permitted by copyright law.

The Editorial Team of Lex Scripta Magazine of Law and Policy Issues holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not necessarily reflect the views of the Editorial Team of Lex Scripta Magazine of Law and Policy.

[© Lex Scripta Magazine of Law and Policy. Any unauthorized use, circulation or reproduction shall attract suitable action under application law.]

THE PARDONING POWER OF GOVERNOR AND PERARIVALAN JUDGEMENT: A GLIMMER OF HOPE?

AUTHOR: NITESH RANJAN CO-AUTHOR: AMAN UPADHYAY

"Forgiving is more courageous than punishing. The weak cannot forgive. Forgiveness is the prerogative of the strong"

- Mahatma Gandhi

ABSTRACT

The Supreme Court recently released AG Perarivalan, one of the seven convicts in the Rajiv Gandhi Assassination Case which took place in Sriperumbudur town of Tamil Nadu in 1991¹. In this case, the Governor had a major role to play. Article 153² mandates for each state to have a governor. It is appointed by the President and can address his resignation only to the President. The Governor has the executive authority of a state. The powers and jurisdiction of a governor have been a debatable issue in India. The Governor's use or abuse of the pardoning power is not exempt from judicial review. In some circumstances, a limited judicial review is an option. However, the Court may intervene if the Governor exceeds his authority under the constitutional framework. The Court will refrain from evaluating the propriety or sufficiency of the reasons for exercising this power in a specific case. For instance, the courts will intervene when the clemency power is used arbitrarily, dishonestly, or in complete disregard of constitutional law. In the context of the case, we will be analyzing the pardoning power of the Governor in India.

Keywords: Supreme Court, Article 153, president, governor, judicial review.

INTRODUCTION

Perarivalan was convicted of purchasing batteries that were used for triggering the bomb to assassinate the former Prime Minister Rajiv Gandhi. The conviction of Perarivalan was under, the Foreigners Act, 1946², The Passport Act, 1967³, Explosive Substance Act, 1908⁴, Terrorist and Disruptive Activities (Prevention) Act, 1987⁵, and The Wireless Telegraphy Act, 1933⁶.

While releasing Perarivalan, the Apex Court exercised its extraordinary power conferred to it under Article 142⁷ of the Constitution of India which states that,

—In the exercise of its jurisdiction, the supreme court may pass any decree or make any order required to complete justice in any case or matter standing before it."

¹ Swamanwaya Rautray (2022, May 18), Rajiv Gandhi Assassination Case: SC of A G Perarivalan. The Economics Times. <https://economictimes.indiatimes.com/news/india/rajiv-gandhi-assassination-case-sc-orders-release-of-a-g-perarivalan/articleshow/91634476.cms?from=mdr> ² The Constitution of India 1949.

² The Foreigners Act, 1946 Act

³ The Passports Act, 1967

⁴ The Explosive Substances Act, 1908

⁵ Terrorist and Disruptive Activities (Prevention) Act, 1987,

⁶ The Indian Wireless Telegraphy Act, 1933

⁷ The Constitution of India 1949, art. 142

He spent sixteen years of his imprisonment time on execution row before his sentence was remitted⁸ to life imprisonment in 2014 by the Supreme Court. In 1998, TADA Court awarded⁹ the death penalty to Perarivalan and 25 other convicts, which was upheld by the Supreme Court in 1999. They filed¹¹ a mercy plea before the President of India in 2001 which was rejected only in 2011 after 11 long years. In 2014, his death sentence along with other convicts was commuted to life imprisonment by the Supreme Court. In the following year, they filed a mercy plea before the governor of Tamil Nadu under Article 161¹² of the Constitution of India only to get no reply, and finally, the Apex court pronounced its judgment on 15/05/2022. In this case, the Supreme Court made some noticeable observations regarding the remission of sentences by the Governor.

UTILIZATION OF PARDONING POWER BY THE GOVERNOR

Pardon- When the governor pardons, all sentences, punishments, and disqualifications associated with the convict's conviction and sentence are completely wiped away.

But he is not permitted to commute the court-martial sentence. The President's pardoning authority under Article 72 is broader than the Governor's pardoning authority under Article 161.

The State government, not the Governor alone, is the one who actually exercises the Governor's exclusive right under Article 161 to pardon a prisoner.

Respite- When the Governor exercises his "Respite" pardoning authority, he decides to substitute a lesser sentence for the one that would have been imposed on the convict initially. The President may use this power, for instance, due to a special circumstance, such as a convict's physical disability or a woman offender's pregnancy.

Reprieve- When the governor exercises his pardoning authority to "Reprieve," he temporarily halts the execution of a sentence, especially a death sentence. He gives the prisoner enough time to ask him for a pardon or commutation by doing this.

Remit- The length of the sentence is reduced when the President uses the remitting power of pardon, but the nature of the sentence is left unchanged. For instance, a sentence of strict imprisonment for two years may be reduced to strict imprisonment for one year, but the strictness of the imprisonment is maintained.

Commute- The governor has the authority to commute a death sentence or the punishment or sentence of any person found guilty of a violation of state law.

PARDONING POWER OF GOVERNOR AND PRESIDENT: A COMPARISON

The theory of punishment and pardon is not new, monarchs are also used to pardon convicts. The same concept has been carried forward to modern times as well. In the process of drafting the constitution, the members of the constituent assembly took it as a matter of concern and vested the pardoning power to the president as well as the governor, both these authorities use this power under their domain. There are distinctions between the pardoning power of a Governor and that of a

⁸ Megha Kaveri (2021, January 25) Perarivalan's Long Wait: A Timeline of Events since Rajiv Gandhi Assassination. *The News Minute*. <https://www.thenewsminute.com/article/perarivalan-s-long-wait-timeline-events-rajiv-gandhi-assassination-142139>

⁹ *ibid*.

¹⁰ Bureau ITGD, President Pratibha Patil Rejects Mercy Pleas of Rajiv Gandhi's Killers. *India Today*. <https://www.indiatoday.in/india/north/story/president-pratibha-patil-rejects-mercy-plea-rajiv-gandhikillers-139164-2011-08-11>

¹¹ *The Constitution of India 1949*, art. 161

President. It is wider in the case of the president. Governors cannot pardon a death sentence whereas a president can. Also, the former cannot pardon the sentence by a Court Martial but the latter can.

By the effect of Article 161, the governor of a state can grant pardons reprieves, respites, or remissions of punishment. In addition to that, he can also commute the sentence of any individual convicted of any offense against any law relating to a matter, to which the executive power of the State extends. The power is vested to the governor to avoid any kind of discrimination as the governor does not represent any political party and is not expected to support any either. But he doesn't have the authority to pardon death sentences and sentences imposed by a court-martial, however, he can suspend, remit or commute a death sentence.

SUBSTANTIAL DEVELOPMENT

The pardoning power of a governor has passed through many amendments over time. However, it is being challenged in the court of law on various grounds such as jurisdiction, uncertainty on the limitation of time up to which a governor may address the mercy plea, and whether the power has been exercised by the governor arbitrarily or with malice, etc.

in *State v. K.M. Nanavati*, the validity of the Governor's order suspending the sentence imposed by the Bombay High Court on Commander Nanavati was challenged on the ground that an appeal was pending before the Supreme Court, and as such, the trial had not concluded. A Full Bench of the Bombay High Court dismissed this contention on the ground that the word 'trial' did not include the proceedings in an appeal and in any case, the powers under Article 161 could be exercised at any stage. The court relied upon the judgment of the Madras High Court in *In re Channugada*, and held that the framers of our Constitution intended to confer on the President and the Governors, within their respective spheres, the same power of pardon, reprieve, and clemency, both in its nature and effect, as was possessed by the Sovereign in Great Britain and by the President in the United States.

After the sentence was suspended, Nanavati appealed his conviction to the Supreme Court, where he entered a plea to be exempted from the requirements of Order 21 Rule 5¹² of the Supreme Court Rules which required that while a criminal appeal is pending, the appellant, before the appeal could be heard, had to accept his sentence. This pleading was executed per the Governor's order to suspend the sentence. The Governor had the authority to grant a full pardon at any point in the proceeding, including while the appeal was pending, but he could not grant a suspension of the sentence while the matter was under judicial review before the Court, the Constitution Bench ruled by a majority of four against one¹³.

The courts have therefore come to the following conclusions regarding the stages at which the various types of pardoning power can be exercised under the Constitution:

- (a) A pardon may be granted before or after conviction, or at any point after the commission of the offence.
- (b) Pardons may be granted while an appeal to a higher court is pending.
- (c) A sentence cannot be postponed while an appeal is pending before the Supreme Court.

In *Kehar Singh v Union of India*¹⁴, it was held that the grant of pardon is an act of grace and it cannot be claimed by the convict as a matter of right. In *Maru Ram v Union of India*¹⁵, the Supreme Court held

¹² *Supreme Court Rules, 2013, Order 11, Rule 5.*

¹³ *AIR 1961 SC 112.*

¹⁴ *1989] AIR 653, [1988] SCR Supl. (3)1102.*

¹⁵ *[1980] AIR 2147, [1981] SCR (1)1196. ¹⁷ 2007 (147) PLR 766.*

that the pardoning power of the governor can be exercised only on the aid and advice of the council of ministers of the state. Although the governor can send back the mercy plea to the ministerial council of the state for reconsideration, if no changes are made by the ministerial council, then the governor is obligated to accept it. Hence, the State government wields the actual power in this regard. However, the state government has misused this provision in several instances. Sometimes, the governor is used as a shorthand expression for the State government. The state government has been given this privilege for they are constituted by the people through the direct election and they are accountable and responsible to the people.

In the recent case of *State of Haryana v Raj Kumar*,¹⁷ the Supreme court laid down that the

The Governor's pardoning power supersedes section 433A¹⁶ of the Code of Criminal Procedures, 1860, which mandates that the sentence of prisoners can only be remitted after the completion of 14 years in jail. The supreme court ruled that the governor can pardon inmates before they have served a minimum of 14 years in prison. "The constitutional authority granted to the President/Governor to grant pardons under Articles 72 or 161 of the Constitution cannot and does not in any way be affected by Section 433-A of the Code... The Governor has the authority to grant a pardon if the prisoner has not served 14 years or more of actual imprisonment. Although the Governor is required to act with the assistance and counsel of the State Government, the court noted that the Governor's authority "de hors the restrictions imposed under Section 433-A... Such power is in the exercise of the power of the sovereign."

PERARIVALAN JUDGEMENT: A RAY OF HOPE?

Laws in India are so complex and intricate that they need to be interpreted extensively to arrive at a judgment. While interpreting the laws, if the judges come across any loophole, they try to fill in the gaps by delivering novel judgments. This is sometimes termed judicial activism. This case has also witnessed a trial that was based on precedents and good conscience.

Perarivalan's petition under Article 161 had been languishing for two and half years after his sentence was recommended for remission¹⁷. When the Supreme Court started enquiring about the matter, the Governor sent the plea to the president for consideration and had been pending for more than a year since the governor's referral. The Supreme Court exercised its authority under Article 142 and paved the way for the release of Perarivalan. The Supreme Court questioned the Governor's act of referring the mercy petition to the president of India on the well-established ground of constitutional conventions and judicial precedents. The honorable court observed that, in case there is any difference in opinion, the governor can only send it back to the State for reconsideration and the president has no role to play under article 161. In the course of the arguments, the Additional Solicitor-General of India, K.M. Nataraj, argued that if the offence in question was based on a parliamentary law, only the President, and not the State Governor, could consider a claim for pardon or remission under Article 72 of the Constitution. It was observed that sending the file to the president is contradicting the settled law and that the governor was bound to take a call on the mercy petition as per the advice of the council of the ministers of the state. Though the apex court, through this judgment, tried to address some of the ambiguities under Article 161 and somewhat succeeded in its intention there are still some areas that have some lacunae that need to be addressed. One such area is the time duration up to which a

¹⁶ *The Code of Criminal Procedures, 1908*

¹⁷ *Sohini Chowdhury (2022, May 18). Supreme Court Orders Release of Ag Perarivalan, Convict in Rajiv Gandhi Assassination Case. Live Law. <https://www.livelaw.in/top-stories/supreme-court-orders-release-of-agperarivalan-convict-in-rajiv-gandhi-assassination-case-199403>*

mercy petition can be stayed. If it takes longer for a mercy plea to be addressed, then its purpose might be vitiated. This loophole is used by the government sometimes to serve its purpose.

CONCLUSION

This judgment analyses and advocates the importance of a reformatory degree of punishment.

In the fabric of today's complex social structure, policymakers need to focus more on reforming the convicts and bringing them back to the mainstream of society. This judgment can have an outstanding remark in this regard as the grant of mercy is one of the instrumental ways through which the above-mentioned idea can be practically implemented.

Mercy is granted to a convict by closely monitoring his conduct while undergoing the sentence, remaining period of sentence, health, the gravity of the crime, etc. The whole purpose of granting mercy is to provide a possibility to the convict to be a better person and lead a good life. But, if it is delayed unconditionally or not at all addressed, it is both demoralizing and at the same time worthless for the convict as —*Justice delayed is justice denied*ll.

In the Shatrughan Chouhan case¹⁸, it was observed that because of the President's and Governor's high rank, the legislation does not limit their jurisdiction, although it does provide that they must respond to the mercy petition within a reasonable time frame. Despite the Supreme Court's remark on the status of the pardoning power of the governor and president, the same is not being practiced. This loophole needs to be rectified as soon as possible and provisions must be made in statute to strengthen the provision further.

¹⁸ [2014] 3 SCC 1.