

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume II Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

## **EDITORIALTEAM**

### **EDITORS**

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



#### **Dr. Namita Jain**

*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi. (2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*



## Mrs.S.Kalpana

Assistant professor of Law

*Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr.Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*



## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **THE POWER TO PARDON: COMPARATIVE ANALYSIS OF THE PRESIDENT'S AND GOVERNOR'S CLEMENCY POWERS UNDER ARTICLES 72 AND 161 OF THE INDIAN CONSTITUTION**

AUTHORED BY - DHANYATA KUMAR<sup>1</sup> & KRISHNA KUMAR<sup>2</sup>

## **PROLUSION**

The great power of pardon is given to the President of India at the Central level and to the governor at the state level in the Constitution of India. They hold a significant position in our country.

The power of pardon is an old concept in its rudimentary form when all the powers were given to the King and he was solely responsible to give his final decision either to grant punishment to the accused or to pardon the accused.<sup>3</sup>

In ancient times, when Manu came, he gave three concepts called Dharma, Karma and Nyaya and it was the king who was solely responsible to give final judgment as to what to do with the accused.<sup>4</sup>

Even in earlier times, the theory called 'Divine right of Kings theory' came, which said that it is the king who had derived their powers from God and his powers could not be challenged in any form and so he was completely responsible to give final decision on the accused.<sup>5</sup>

Finally, Article 72 of the Indian Constitution deals with the pardoning power of the President, as in India, it is only the president who can completely pardon the accused and is enshrined under the constitutional framework.<sup>6</sup>

---

<sup>1</sup> LLM student, Amity University Punjab, India

<sup>2</sup> BALLB 6<sup>th</sup> Semester, University of Jammu

<sup>3</sup> Karat Lawz Academy, Index to Bharatiya Nyaya Sanhita (Delhi 2024)

<sup>4</sup> Id. at 158.

<sup>5</sup> Dr. S.R. Myneni, Political Science, India (Allahabad Law Agency, 3<sup>rd</sup> edn., 2018)

<sup>6</sup> V.N. Shukla, Constitution of India (Eastern Book Company, 14<sup>th</sup> edn., 2022)

In fact the governor in state level has also granted with some partnering powers under Article 161 of the Constitution of India, but it is not completely same to that of President. So the governor's pardoning power has some limitations to that of the pardoning power of President. Both the President and the Governor's pardoning powers play a major role in stabilizing the Constitution of India, thereby helping the citizens of India.

## POWER OF CLEMENCY

In our Indian Constitution, the power of mercy or clemency is vested to the President under Article 72 and to the Governor under Article 161 of the Constitution. It is also called as the Extra-ordinary power.<sup>7</sup>

If any person who has been convicted for an offence by the subordinate court, then he/she filed an appeal to the High Court of that state and that High Court also convicted and upheld the punishment has given by the subordinate court, the person then appealed to the Supreme Court of India. If the Apex Court also upheld the punishment given by that High Court, then we know that the ordinary process has completed and now the extraordinary powers come into picture.<sup>8</sup>

The convicted person can apply and go to the governor of that state or the President of India for the mercy, and if thinks reasonable, the President or the governor of that state can use this power of mercy to that person.

Undoubtedly, the president has the power of mercy at the wider level, whereas the power granted to the governor has comparatively lower jurisdiction.

Basically, it is called as extraordinary power because, according to the normal procedure, the person if convicted by the Apex Court of India cannot go anywhere as it is the highest court of India, but the person can go to the president or governor of that state to request them to grant Mercy to the convicted person.

However, the convicted person can go to the governor before going to the Supreme Court of India. It is also done to request for the extraordinary powers of the governor directly to the convicted person.

---

<sup>7</sup> Karat Lawz Academy, Index to constitution of India (Delhi 2024)

<sup>8</sup> Id.at 189

This is the last step, and if that person has not been granted with the power of mercy, he/she has to go under punishment.

Simply means, 'Where the ordinary power ends, the extraordinary power starts.'

## THE CONSTITUTIONAL HEADS

As given under the Constitution of India, both the President and the governor are considered as the constitutional heads of the government. The President is the constitutional head at the central level, and the governor as the constitutional head at the state level.<sup>9</sup>

Both the heads are also referred to as De jure Heads. The President as the De jure head of the country and the governor has the De jure head of the state government.<sup>10</sup>

As we know that de facto heads are basically the Prime Minister at the Central level and the Chief Minister at the state level.<sup>11</sup>

Moreover, the President of India is regarded as the head of the state at the central level and governor as head of the state at the state level.

Therefore, all the decisions are taken in the name of the President of India as it is given under the constitution.

## ARTICLE 72 OF THE INDIAN CONSTITUTION

Article 72 of the Indian constitution basically deals with the powers of the President to grant pardon, respite, reprieve, remit and commutation.<sup>12</sup>

Basically, the pardoning powers of the President come into picture when some person has been tried and convicted for any offence-

- When the sentence of imprisonment or otherwise is given for an offence, which is for the offence mentioned in union law.
- When the punishment is given by a military court, also called as Court Martial.

<sup>9</sup> V.N.Shukla, Constitution of India (Eastern Book Company, 14<sup>th</sup> edn., 2022)

<sup>10</sup> Dr. S.R.Myneni, Political Science, India (Allahabad Law Agency, 3<sup>rd</sup> edn., 2018)

<sup>11</sup> *Ibid.*,

<sup>12</sup> The Constitution of India, art. 72

- When the offence is so grave, that death sentence is announced to the person who has been convicted.<sup>13</sup>

In all these three cases, the pardoning powers of the President come into picture and he uses the powers of pardon, commutation, reprieve, remit, respite under which he thinks that it is reasonable to use the power.

Article 72(2) says that the pardoning powers of the President, does not affect or harm the powers of the armed forces if the President has used any of its powers against the decision of the military court.<sup>14</sup>

Article 72(3) says that it does not harm the extraordinary powers granted to the governor under Article 161 of the Indian Constitution.<sup>15</sup>

### **ARTICLE 161 OF THE INDIAN CONSTITUTION**

Article 161 says that the governor of the state has also vested with the extraordinary powers, the power of pardon, commutation, respite, remit and reprieve for the offences of the matter under state law of that respective state.

It basically means that the person gets convicted by the High Court of the state, can go to get mercy to the governor of that respective state.<sup>16</sup>

It must be noted that the President has wider jurisdiction and the parting powers of the governor has reasonable limitations mentioned in it.

There are two main limitations on the pardoning power of the Governor-

- He cannot pardon the death sentence.
- The governor of the state cannot pardon where the sentence of imprisonment or punishment is granted by the Court Martial or the military court.<sup>17</sup>

These two are the major limitations, which actually differentiates and therefore puts limitations on the Governor's pardoning powers from that of the President's pardoning power.

Therefore, these are the aspects which basically help in making the President's jurisdiction wider and Governor's jurisdiction relatively narrower.

---

<sup>13</sup> M Lakshmikant, Indian Polity, India (MC Graw Hill, 7<sup>th</sup> edn.,2023)

<sup>14</sup> The Constitution of India, art. 72 cl 2

<sup>15</sup> The Constitution of India, art. 72 cl 3

<sup>16</sup> The Constitution of India, art. 161

<sup>17</sup> The Constitution of India, art. 72(1)

## POWERS CONFERRED UNDER THE PARDONING POWERS UNDER ARTICLE 72 AND ARTICLE 161 OF THE CONSTITUTION OF INDIA

The five types of powers under Article 72 and Article 161 of the Indian constitution are as follows-

- **Pardon:** It simply means when the President completely acquit that person from all liabilities. That person gets completely free from all the proceedings.<sup>18</sup>
- **Commutation:** In this the President/Governor substitutes, one form with other form of punishment like if any court has imposed rigorous imprisonment, the President/Governor commutes that with simple imprisonment. This is commutation.<sup>19</sup>
- **Respite:** In this the President/ Governor uses the extraordinary power and grants the convicted person lesser form of punishment due to physical disability or maybe the convicted person is female and she is pregnant. For example she was convicted but was pregnant so President/Governor granted her lesser punishment.<sup>20</sup>
- **Reprieve:** In this the President/ Governor grants some time to the convicted person so that he/she can apply and go for the pardon or commutation. It is generally done when death sentence is granted to the convicted person.
- **Remit:** In this, the President/ Governor generally reduce the time period of the convicted person. For example, if the court has granted some person simple imprisonment for 3 years to 2 years. This is called as using the power of remit.

These are the extraordinary powers enshrined to the President of India and governor of the states under Article 72 and Article 161 of the constitution of India.

These pardoning powers majority are the same, which comes under both the articles of the Indian Constitution, but still Article 72 has wider jurisdiction as compared to Article 161 of the Indian Constitution.

Therefore, the Governor's extraordinary powers are not completely same as that of the President of India.

---

<sup>18</sup> Karat Lawz Academy, Index to constitution of India (Delhi 2024)

<sup>19</sup> *Ibid.*,

<sup>20</sup> Narendra Kumar, Constitutional Law of India (Allahabad Law Agency, 11<sup>th</sup> edn.,2022)

These powers basically help the convicted person to get one last chance to get mercy by the persons having the authority, or if the innocent convicted can get mercy from them with the help of these powers.<sup>21</sup>

## PROCEDURE TO APPLY FOR PARDON UNDER ARTICLE 72 OF THE INDIAN CONSTITUTION

Since we know that that when the ordinary process gets completed that is when the person gets convicted, even by the highest court of India, that is the Supreme Court of India, the convicted person can reach either to the President of India or the governor of that respective state to grant him/her pardon.

But there is a procedure to be followed to apply for the pardon to the President of India. The procedure is as follows-

○ **Mercy petition to be filed:**<sup>22</sup>

Firstly, the convicted person or his/ her relative or the legal representative of the convicted person has to file the mercy petition and to address that petition to the President of India. The petition has to be attached with some important documents and details like-

- Name, age, parentage, address of the accused.
- First information report to be attached.
- Bail if given or not, document to be attached.
- Judgments of the lower courts, High Court of that respective state and the Supreme Court of India, all to be attached.
- Any specific reason must be mentioned like if any disability or that person a female is pregnant or any important parameter to be mentioned.
- Any other evidence, if important to be attached or be stated as the case may be.
- The details and the documents must be correct. That is the original and the actual documents to be attached.
- Any other reason, if deems fit.

○ **Ministry of Home Affairs:**<sup>23</sup>

Then the second step is that the petition be given to the Ministry of Home Affairs at the

<sup>21</sup> President's Power to Pardon, India, available at <https://www.drishtiias.com> (last visited on 13December 2024)

<sup>22</sup> Pardoning power of President, India, available at <https://chahalacademy.com> (last visited on 13December 2024)

<sup>23</sup> *Ibid.*,

central level.

○ **Respective State Government:**

The Ministry of Home Affairs sends the petition to the concerned state government for its recommendations.

○ **Review by the Ministry of Home Affairs:**

After getting the recommendations and the report by the concerned state government, the Ministry reviews by its own also.

○ **Petition sent to the President of India:<sup>24</sup>**

After all the review and the recommendations done, the petition with all the relevant facts and report of the state government and the Ministry of Home Affairs is sent to the President of India for its final decision. President can accept, reject or make the decision pending, but only within a reasonable time. The President's decision is based on the recommendations of the Prime Minister.

This is the procedure to be followed. If any convicted person wants to apply for pardon, he/she can request and apply for the petition under Article 72 to the President of India.

**Case: Maru Ram versus Union of India<sup>25</sup>**

“The Supreme Court said that the President of India has to give decision on the advice of the central government, and not by his own discretion, and the advice is binding on the President.”

## **PROCEDURE TO BE FOLLOWED FOR PARDON UNDER ARTICLE 161 OF THE INDIAN CONSTITUTION**

There is a certain procedure to be followed to take pardon from the governor of the state. It has the following steps given below-

○ **Mercy petition to be filed:<sup>26</sup>**

This is the first step in which the petition is to be filed either by the convicted person himself/herself or their legal representatives. Their relatives can also file this. But it should be attached along with a particular details like-

- Name, parentage and address of the convicted person.
- Judgments of the subordinate courts and the High Court of that respective state.

---

<sup>24</sup> Supra note 18

<sup>25</sup> 1980 AIR 2147

<sup>26</sup> Supra note 20

- The judgment of the Supreme Court, also, if the convicted person appealed their also and then filed petition to the governor of that respective state.
  - Copy of the first information report.
  - Any other specification, if considered necessary to be attached.
- **Home Department at the state level:**
- Then the second step is when the petition is being reviewed by the respective State government and may also consult the home department at the state level to review all the necessary credentials, and then the recommendations are sent to the Governor by the state government.
- **Petition sent to the Governor:**
- After all the recommendations done by the concerned state government in reference to the Home Department, the report is sent to the Governor for its consideration.
- **Petition sent to the President of India in exceptional circumstances:<sup>27</sup>**
- If some grave offence has been committed by the convicted person, which is maybe of moral turpitude or on the subject mentioned in the union list or is against the country, the petition is sent to the President of India for its recommendations.
- **Decision of the Governor:<sup>28</sup>**
- After all the procedure, the governor within its permissible limit of the pardoning power under Article 161 of the Indian constitution and along with the recommendations of the Chief minister and concerned state government, gives final decision on the petition. After the decision, it is sent for the execution of the decision to the appropriate authorities.

## **COMPARATIVE ANALYSIS OF ARTICLE 72 AND ARTICLE 161 OF THE CONSTITUTION OF INDIA**

If we simply read the bare language of both the articles under which the pardoning power is given to both the President of India and Governor of the states, a simple law student can also understand that the powers which are given to the President of India is far more superior to that of the Governor of the state.

Undoubtedly, if we do comparative analysis of both the powers, the power of the President of India has a wider ambit and has a wider jurisdiction to that of the Governor of the state.

---

<sup>27</sup> President's Power to Pardon, India, available at <https://www.byjus.com> (last visited on 17 December 2024)

<sup>28</sup> Karat Lawz Academy, Index to constitution of India (Delhi 2024)

After reading with the legal language of both the articles, there are both the similarities and the differences present in between them. It is because of the differences, which makes the power of the president far more than that of the Governor of the state.<sup>29</sup>

## SIMILARITIES

If we see the similarities, these are as follows-

- Both the President and the Governor have the power of commutation that is substituting one form of punishment with that of another form.<sup>30</sup>
- Both the President and the Governor have the power of pardon, but the extent of this varies from article to article of the Indian constitution.
- Both the President and the Governor have the power of respite that is granting lesser form of punishment due to some genuine issues like disability, pregnancy, etc.
- Both the President and the Governor have the power of remit that is reducing the time period of the punishment.<sup>31</sup>
- Both the President and the Governor have the power of reprieve that is granting time to the convicted person so that he/she can apply for pardon or commutation.
- Both the President and Governor's pardoning powers are considered as the extraordinary powers.
- Both the President and Governor have granted with the pardoning powers under the Constitution of India.<sup>32</sup>

These are some of the similarities between the pardoning powers of the President and the Governor.

## DIFFERENCES

The differences between the pardoning powers of the President and the Governor are as follows-

- The major difference between the pardoning power of the President and Governor is that the President can only pardon the death sentence and governor of the state cannot.<sup>33</sup>

---

<sup>29</sup> The Constitution of India, art. 72

<sup>30</sup> Supra note 5

<sup>31</sup> Supra note 12

<sup>32</sup> The Constitution of India, arts 72,161

<sup>33</sup> The Constitution of India, art 72(1)(a)

- Another major difference is that the Governor cannot pardon when the punishment is granted in Court Martial also called as Military Court.<sup>34</sup>
- Moreover, the President grants pardon for the offences mentioned in union law whereas Governor can grant pardon only for the offences mentioned in the state law.<sup>35</sup>
- Another major difference is that if the petition which has been sent to the Governor and if that person has committed offence on the subject mention in union law also, the Governor may take recommendations from the President of India. This also shows that President has a superior power.
- Another difference is that if the Governor of the state has rejected or refused to grant pardon and refuse to exercise his pardoning power, there is no bar in the constitution of India, that convicted person cannot go to the President of India. The convicted person can apply to the President of India to grant him/her Pardon as president of India is present at the top position by the constitution of India to grant pardon.

So, if we comparatively analyze both the similarities and the differences of the pardoning power of the President of India and the Governor of the state, the pardoning powers of the President has secured a more superior position to that of Governor of the states and so the jurisdiction of Article 72 of the Indian constitution has wider jurisdiction as compared to Article 161 of the Indian Constitution.<sup>36</sup>

## CONCLUSION

The pardoning powers which are mentioned under the Indian constitution, and which has been invested on the President of India and to the governor of the state, holds a great importance in the country. It has a great significance in the country as it helps the innocent if being falsely prosecuted, and also helps the convicted person for some relief from the punishment granted by the judiciary. Undoubtedly, the President of India has a wider jurisdiction as compared to the Governor of the states. These articles are basically included for the betterment not only of the people but also of the society as whole, thereby making country a proper place to live with faith, safety and security.

---

<sup>34</sup> The Constitution of India, art 72(1)(c)

<sup>35</sup> The Constitution of India, art 72(1)(b)

<sup>36</sup> Supra note 20