
JUDICIAL INTERVENTION OVER GOVERNOR'S PARDONING POWER: DISPUTE BETWEEN THE EXECUTIVE AND THE JUDICIARY

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ABSTRACT

The discretionary powers of the Governor under the Indian Constitution have been a subject of debate and scrutiny. Article 161, which empowers the Governor to grant pardons, reprieves, respites, or remissions of punishment, raises significant concerns regarding the extent of judicial review. While the provision ensures a check on the rigid application of laws, it also leaves room for potential misuse and arbitrary decisions. The lack of precise guidelines in exercising these powers creates ambiguity, often leading to disputes between the judiciary and the executive. This research aims to explore the balance between the constitutional authority of the Governor and the safeguards against its misuse, with a particular focus on judicial review concerning the pardoning power.

THE PURPOSE

There are diverse perspectives regarding the justification for granting pardons to convicted individuals. The Hegelian view posits that pardons are warranted only when they serve to enhance justice, i.e, when a pardon is necessary to correct an unduly harsh sentence or to rectify a wrongful conviction. This perspective asserts that clemency should be granted only when it aligns with the larger objective of justice, and any exercise of this power outside such considerations would be unjustified. The Hegelian rationale aligns with the broader retributivist theory, which perceives pardon as an extra-judicial corrective mechanism aimed at rectifying failures within the legal system to ensure that an accused individual receives their just deserts. Retributivism is concerned solely with the promotion of justice, without extending beyond this objective.¹

Conversely, the rehabilitative and redemptive school of thought offers a differing viewpoint, advocating that pardons may be justified even in instances where they do not necessarily seek to remedy an injustice - a concept referred to as being 'justice-neutral'. Unlike retributivism, which focuses strictly on rectifying miscarriages of justice, the redemptive approach considers factors such as an offender's post-conviction conduct and achievements as relevant grounds for clemency. This philosophy justifies the grant of pardon not only on legal considerations but also on the broader principles of public welfare and compassion, recognizing the potential for reform and reintegration into society.²

The contemporary practice of granting pardons embodies a convergence of both justice-enhancing and justice-neutral principles. Pardons may be granted either as a means of rectifying judicial errors or for broader considerations of public welfare and state policy. In *Kehar Singh v. UOI*³, the Supreme Court deliberated on the grounds for exercising the pardoning power. Chief Justice Pathak underscored the primacy of the right to life and personal liberty enshrined in Article 21 of the Indian Constitution, emphasizing that the fallibility of the judiciary necessitates a constitutional recourse against erroneous convictions. This safeguard

¹ Wolfe G. B., 'I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts' (2007) 27 B.C. Third World L.J. 417.

² Strasser M., 'The Limits of Clemency Power on Pardons, Retributivists, and the United States Constitution' (2002) 41 Brandeis L.J. 85.

³ (1984) 4 SCC 693.

is embedded in the Constitution through the executive's power to grant pardons.⁴

The Court also observed that, under British legal tradition, the prerogative of mercy was vested in the sovereign, historically exercised both as a corrective measure against judicial fallibility and for broader reasons of state. The Supreme Court concurred that this dual rationale remains relevant within the Indian constitutional framework, though it refrained from providing a detailed exposition of what constitutes such 'reasons of state'.⁵

The phrase 'reasons of state' should be understood as referring to considerations that lie beyond the judiciary's purview - matters that the courts should not and do not take into account when determining an accused's guilt, which must be based strictly on the facts of the case and the applicable law. Consequently, factors such as promoting public welfare or acknowledging the accused's post-conviction rehabilitation and positive contributions fall within the realm of policy-based considerations, which are exclusively within the executive's domain to assess and act upon.⁶

In *Satpal v. State of Haryana*⁷, the Supreme Court set aside the Governor's grant of pardon, noting that the decision failed to consider the convict's conduct and behaviour during incarceration, a factor that should have been evaluated while deciding the mercy petition. This ruling underscore the necessity for executive authorities to assess all relevant circumstances, including post-conviction conduct, before exercising the pardoning power.

Moreover, it is the executive that is empowered to reflect and respond to public sentiment regarding the sentencing of a particular individual, thereby reinforcing the principle of public accountability, which is fundamental to every democratic state. The historical context of the British tradition regarding the grant of pardon by the monarch was discussed by Blackstone, who observed that the primary purpose of this exercise of mercy was to strengthen the sovereign's bond with the people, fostering loyalty and allegiance among subjects.⁸

In modern democratic systems, where the pardoning power is vested in an elected head of state, this principle can be understood as ensuring that public opinion is duly considered, given that

⁴ id

⁵ (1984) 4 SCC 693.

⁶ Baxi. U., "(Critique of the expression 'reason of the state').".

⁷ (2000) 5 SCC 170.

⁸ *Satpal & Anr. v. State of Haryana*, (2000) 5 SCC 170.

the head of state serves as a representative of the people, either directly or indirectly. Thus, the exercise of clemency in such jurisdictions may be influenced by widespread public sentiment, aligning the decision with the democratic mandate.

A literal interpretation of the Constitution does not conclusively establish that the framers intended for the President and Governors to be bound by the advice of the Council of Ministers while exercising their pardoning powers. However, judicial interpretation has consistently upheld a contrary position.

In *Samsher Singh v. State of Punjab*⁹, a seven-judge bench of the Supreme Court ruled that the satisfaction of the President or Governor, as required by the Constitution, does not refer to their personal satisfaction but rather to the satisfaction of the Council of Ministers, whose aid and advice they are constitutionally mandated to follow while exercising executive functions.

This principle was extended specifically to the power of pardon in *Maru Ram v. Union of India*¹⁰, where the Supreme Court clarified that the President and Governors do not possess absolute discretion in granting clemency. Instead, they are constitutionally bound to act in accordance with the advice of the Council of Ministers, thereby reaffirming the executive nature of the pardoning power.

THE DISPUTE BETWEEN THE EXECUTIVE AND THE JUDICIARY

The power to pardon is an executive function that, at times, appears to encroach upon the judiciary's domain, leading to a potential conflict between the two branches of government. Unlike the executive-legislative relationship, where policy decisions and law-making can be reconciled through constitutional procedures, the tension between the executive and the judiciary arises from the fact that both punishment and clemency deal directly with the finality of justice.

The judiciary, through its interpretation of laws, determines guilt, innocence, and the quantum of punishment based on constitutional and statutory provisions. Sentences pronounced by courts are expected to be binding and enforceable as per the rule of law. However, the President and Governors, under Article 72 and Article 161 of the Constitution respectively, hold the

⁹ 1974 INSC 154

¹⁰ AIR 1980 SC 2147.

extraordinary power to grant clemency, which includes pardoning, commuting, remitting, or reprieving sentences. This power creates an overlap, as an executive decision to grant pardon can override a judicially pronounced sentence, leading to a perception that it dilutes judicial authority.¹¹

Judicial View on the Pardoning Power - The Supreme Court has consistently held that the power to pardon is not absolute and is subject to constitutional limitations. While the executive holds this authority, the judiciary retains the power of judicial review to ensure that it is exercised lawfully, rationally, and in good faith.

1. Maru Ram v. Union of India (1980) -The Supreme Court ruled that the President and Governors are bound by the advice of the Council of Ministers while exercising the power to pardon. It emphasized that this power cannot be exercised arbitrarily.¹²
2. Kehar Singh v. Union of India (1989) - The Court clarified that the scope of judicial review over pardoning powers is limited but maintained that judicial scrutiny is justified if the power is exercised on irrelevant or mala fide grounds.¹³
3. Epuru Sudhakar v. Government of Andhra Pradesh (2006) - The Supreme Court reaffirmed that pardon cannot be granted arbitrarily and can be challenged if exercised for extraneous considerations such as political favouritism.¹⁴
4. State of Haryana v. Jagdish (2010) - The Court underscored that public welfare and the convict's conduct must be taken into account while exercising clemency.¹⁵
5. Bilkis Yakub Rasool v. Union of India (2024) – The Supreme Court ruled that the exercise of pardoning power must be transparent and subject to judicial review, especially in cases involving grave human rights violations.¹⁶

¹¹ Kumar P., "THE EXECUTIVE POWER TO PARDON: DILEMMAS OF THE CONSTITUTIONAL DISCOURSE," 2 NUJS L. Rev. (2009).

¹² AIR 1980 SC 2147.

¹³ AIR 1989 SC 653.

¹⁴ (2006) 8 SCC 161.

¹⁵ (2010) 4 SCC 216.

¹⁶ AIR 2024 SC 289.

Balancing Executive Discretion and Judicial Authority- To mitigate conflicts, courts have consistently maintained that while the executive's power to pardon is a constitutional necessity, it must be exercised with due regard for judicial pronouncements and the rule of law. The judiciary does not question the wisdom of granting clemency but ensures that it is not misused for political or personal considerations. The principle of separation of powers dictates that the executive must respect judicial decisions, just as the judiciary respects the executive's discretion in granting pardons.

In conclusion, while the power to pardon and the judiciary's sentencing authority may overlap, both institutions operate within their respective constitutional domains. The courts have sought to balance this tension by upholding executive discretion while ensuring that it remains within the bounds of fairness, justice, and constitutional propriety, **but in certain cases there may yet exists contradiction and overreach of powers in both the organs.**¹⁷

Perceived Risks of Judicial Review in Pardoning Power- A key argument against judicial review of clemency decisions is that pardon-related decisions are inherently policy-driven, much like foreign affairs or resource allocation, areas in which courts lack access to sufficient empirical and factual data necessary for making informed determinations. Given this, it is contended that judicial review of pardoning powers should be exercised in a limited manner, ensuring that the fundamental rights of the concerned individual are not infringed and that procedural norms are strictly followed. The merits of the executive's decision that is, the rationale behind granting or denying clemency should not be subject to judicial interference. Since judicial scrutiny would not extend to questioning the policy objectives underlying executive clemency, concerns regarding judicial inadequacy in this regard are unwarranted.

Another concern is that examining procedural aspects of a pardon decision may inevitably lead to a merits-based review, introducing an element of subjectivity into the judicial process. However, it must be recognized that this criticism is not unique to the judicial review of clemency powers, it applies broadly to the judicial review of most executive actions. Such apprehensions can be dispelled by the judiciary's demonstrated history of exercising review powers responsibly and within established constitutional boundaries.¹⁸

¹⁷ Kumar P., "THE EXECUTIVE POWER TO PARDON: DILEMMAS OF THE CONSTITUTIONAL DISCOURSE," 2 NUJS L. Rev. (2009).

¹⁸ id

Judicial Review of Pardon Decisions: A Self-Restrained Approach - Judicial review of pardoning powers should be conducted with maturity and discipline, ensuring that courts respect the discretionary authority of the President and Governors while preventing arbitrary or mala fide exercises of power. Instead of categorically excluding clemency from judicial scrutiny, courts should assess the appropriateness and necessity of intervention on a case-by-case basis, ensuring that each petition is evaluated on its individual merits.

This measured approach ensures a delicate balance between safeguarding individual rights providing a remedy in cases of procedural irregularity or constitutional violations and maintaining judicial restraint, thereby upholding the constitutional separation of powers while ensuring executive accountability.

For better addressal, a bill proposed may better guide the current dispute between the executive and the Judiciary namely - **The Governor's Pardoning Power (Regulation and Judicial Oversight) Bill, 2025**.

The Governor's Pardoning Power (Regulation and Judicial Oversight) Bill, 2025

To regulate the exercise of the pardoning power of the Governor under Article 161 of the Constitution of India, establish procedural safeguards, and define the scope of judicial oversight to ensure transparency and accountability in the exercise of executive clemency.

CHAPTER I - PRELIMINARY

1. Short Title, Extent, and Commencement

- (1) This Act may be called the Governor's Pardoning Power (Regulation and Judicial Oversight) Act, 2025.
- (2) It shall extend to the whole of India.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions

In this Act, unless the context otherwise requires:

- (a) “Governor” means the Governor of a State appointed under Article 153 of the Constitution of India;
- (b) “Pardon” includes reprieve, respite, remission, or commutation of sentence as provided under Article 161 of the Constitution;
- (c) “Judiciary” refers to the Supreme Court of India and the High Courts established under the Constitution;
- (d) “Clemency Advisory Board” means the body constituted under Section 7 of this Act;
- (e) “Reasoned Decision” means a written order providing detailed reasoning for granting or rejecting clemency;
- (f) “Malafide” means an act done dishonestly, in bad faith, or with improper motives.

CHAPTER II - PROCEDURE FOR EXERCISE OF PARDONING POWER

3. General Principles for Grant of Clemency

- (1) The Governor shall exercise the power of pardon in a fair, transparent, and reasoned manner and shall not grant clemency arbitrarily, capriciously, or for political reasons.
- (2) Every petition for pardon shall be examined on:
 - (a) The nature and gravity of the offence,
 - (b) The conduct of the convict,
 - (c) The impact on victims,
 - (d) The presence of humanitarian considerations.

4. Requirement for Reasoned Decision

- (1) Every decision of the Governor granting or refusing clemency shall be accompanied by a Reasoned Decision, detailing the reasons for the decision.

(2) The Reasoned Decision shall be made publicly available, except where:

- (a) The case pertains to national security or involves classified information;
- (b) Disclosure may endanger public order or the life of any individual.

CHAPTER III - ROLE OF THE JUDICIARY IN EXERCISE OF PARDON

5. Limited Judicial Review of Clemency Orders

(1) The Supreme Court and the concerned High Court shall have the power to review the exercise of pardoning power only on the following grounds:

- (a) Non-application of mind and Arbitrary Exercise of Power
- (b) Malafide intent
- (c) Violation of fundamental rights
- (d) Procedural impropriety

Provided that no court shall interfere in the Governor's decision merely because an alternative view is possible, unless it is demonstrated that the decision was passed in a manifestly unreasonable manner or without consideration of legally relevant factors.”

(2) No court shall review the merits of the conviction or the appropriateness of the punishment, except as provided under this section.

6. Special Provisions for Judicial Oversight in Death Penalty Cases

(1) In cases where the Governor considers granting pardon in a death penalty case, the following procedure shall be followed:

- (a) The Governor may obtain a legal opinion from the Supreme Court before granting a pardon.
- (b) The Supreme Court may, within 30 days, provide an advisory opinion on:

- i. The legal validity of granting clemency,
 - ii. The presence of exceptional humanitarian grounds.
- (c) The Governor shall not be bound by the Supreme Court's opinion but must provide reasons if it is not followed.

CHAPTER IV - CLEMENCY ADVISORY BOARD

7. Constitution of Clemency Advisory Board

(1) A Clemency Advisory Board shall be established in each State to assist the Governor in evaluating pardon petitions.

(2) The Board shall consist of:

- (a) A retired Judge of the High Court (Chairperson),
- (b) A senior member of the State Bar Council,
- (c) A retired prison official,
- (d) A representative from the Law Department of the State Government,
- (e) A human rights activist.

(3) The Board shall review all clemency petitions and submit a report to the Governor within 90 days of receipt.

(4) The Governor may consider the Board's report before passing any clemency order.

CHAPTER V - TRANSPARENCY AND ACCOUNTABILITY

8. Annual Reporting and Legislative Oversight

(1) The Clemency Advisory Board shall submit an Annual Report to the State Legislature, containing:

- (a) The total number of clemency petitions received,

(b) The number of pardons granted and denied,

(c) The reasons for each decision (except in cases involving classified information).

(2) The Supreme Court shall have the power to review the annual reports and recommend procedural improvements if necessary.

CHAPTER VI – MISCELLANEOUS

9. Power to Make Rules

(1) The Central Government may make rules for the implementation of this Act.

(2) The State Government may prescribe additional procedures for consideration of clemency petitions, provided they are consistent with this Act.

10. Penalty for False or Fraudulent Clemency Petitions

(1) If any person knowingly submits false or fraudulent information in a clemency petition, they shall be liable for prosecution under Section 299 of the BNS, 2023 (Perjury).

11. Repeal and Savings

(1) Any existing laws or executive orders inconsistent with this Act shall be repealed to the extent of their inconsistency.

(2) All clemency petitions pending before the Governor on the date of commencement of this Act shall be decided in accordance with its provisions.

12. Balancing Executive Clemency with Judicial Integrity

(1) This Act seeks to maintain the balance between the Governor's constitutional power to grant clemency and the judiciary's authority to ensure the rule of law.

(2) The Governor's discretion shall remain intact, but shall be subject to procedural safeguards and judicial oversight only in exceptional circumstances.