

## THE SCOPE AND CONTENT OF THE POWER CONFERRED ON THE GOVERNOR OF THE STATE UNDER ARTICLE 161 OF THE CONSTITUTION

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### ABSTRACT

*This case note considers the scope and essence of the power conferred on the Governor of a State by Article 161 of the Indian Constitution, with explicit reference to the landmark case: \*K.M. Nanavati v. State of Bombay\*. The case arose over the question of executive clemency exercised by the Governor, the most vital question being the division of powers between the judiciary and the executive. This analysis goes into the details of the constitutional provisions regarding powers of clemency and the interpretation of Articles 142 and 161 of the Supreme Court in respect of suspension of sentences. The case note examines the arguments of the petitioner and the respondent, the implications of majority and dissenting opinions, and several other broad underlying constitutional principles like the doctrine of harmonious construction and separation of powers. It concludes by emphasizing the necessity of judicial supremacy on one hand and the exercise of clemency by the Executive on the other, such that neither organ transgresses its constitutional frontier.*

### 1. INTRODUCTION

In addition to incorporating the intriguing aspects of a naval officer, an affair, and a murder, the K. M. Nanavati case became a key legal milestone during its compelling trial that enthralled India in the late 1950s. Fundamentally, the case raised complex legal issues regarding the division of powers between the executive and judicial branches of government. Critical questions about the boundaries of gubernatorial authority and its relationship with the legal system were raised when the Bombay High Court reversed Nanavati's jury acquittal and sentenced him to life imprisonment.

The Governor then suspended this sentence under Article 161 of the Constitution of India<sup>1</sup>. The Supreme Court's analysis of these matters produced an important interpretation of constitutional law that will influence how executive

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<sup>1</sup> The Constitution of India, art. 161.

clemency is applied going forward and strengthen the ideas of judicial supremacy and balanced governance.

## 2. OBJECTIVES

Some of the main objectives of this case note revolve around:

- Analyze the Constitutional and Legal Concerns: To examine the intricate legal and constitutional issues brought up in the case, with an emphasis on how Article 161<sup>2</sup> of the Constitution of India executive clemency interacts with Article 142<sup>3</sup> of the Constitution's judicial competence.
- Recognize the Scope of Executive Power: To define the parameters of executive clemency, it is necessary to investigate the scope, bounds, and interactions of the governor's authority to suspend sentences in relation to existing legal proceedings.
- Analyze Judicial Interpretations: Examine and comprehend the significance of the rule of law and the separation of powers of the legal analysis and interpretations offered by the Supreme Court's Constitutional Bench, including the positions of the majority and dissent.

## 3. RESEARCH METHODOLOGY

This case note focuses on a comprehensive examination of significant legal sources, including the Indian Constitution, pertinent statutes, and court rulings. An analysis of this case's verdict is part of the study. Along with assessing the judicial reasoning used in the majority and dissenting opinions, the process also entails critically analyzing the arguments put out by the petitioner and respondent.

## 4. FACTS OF THE CASE IN A NUTSHELL

The petitioner, Mr. Nanavati, was Second-in-Command of the I.N.S. Mysore when it arrived in Bombay in March 1959. The petitioner was taken into custody on April 27, 1959, with a murder charge levied under Section 302<sup>4</sup> of the IPC. The jury, by a majority of 8:1, declared KM Nanavati not to be guilty despite substantial proof. The Sessions Judge, not satisfied with the verdict, referred the case to the Bombay High Court under Section 307<sup>5</sup> of Cr.P.C., 1973. A life sentence was imposed on

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<sup>2</sup> *Ibid.*

<sup>3</sup> The Constitution of India, art. 142.

<sup>4</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 302.

<sup>5</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 307.

K.M. Nanavati after the Division Bench of the High Court reversed the jury's verdict.

On March 11, 1960, under the powers vested under Article 161<sup>6</sup> of the Constitution, the Governor, passed an order stating:

*"In exercise of the powers conferred on me by Article 161<sup>7</sup> of the Constitution of India, I, Shri Prakasa, Governor of Bombay, am pleased hereby to suspend the sentence passed by the High Court of Bombay on Commander K.M. Nanavati in Sessions Case No. 22 of IVth Sessions of 1959 until the appeal intended to be filed by him in the Supreme Court against his conviction and sentence is disposed of and subject meanwhile to the conditions that he shall be detained in the Naval Jail Custody in I.N.S. Kunjali".<sup>8</sup>*

As a result, the Sessions Judge issued a warrant of arrest for the accused following the High Court's decision; however, the warrant was subsequently returned unsealed due to the order passed by the Governor.

Following the ruling, a request for permission to appeal was filed with the Supreme Court, and a hearing was scheduled for March 14, 1960. The Division Bench of the Bombay High Court was presented with this case. The Bench was tasked with handling this case. The Advocate General of Bombay made objections, claiming that the Bench lacked the authority to review the legality of the action taken by the Governor. The objection was overruled by the Court, which determined the validity of the Governor's order. It further concluded that, per Rule 5 of O. XXI of the Rules of the Supreme Court (Rule 5), the Governor's order had no bearing on the Supreme Court's authority.

On the grounds that the accused does not need to surrender because the sentence against them has been suspended. Therefore Rule 5 won't apply. According to the Bench, unless the Governor's order had been withdrawn or revoked before the event, the warrant ought not to be issued again until the appeal that was to be filed in the Supreme Court had been resolved.

The petitioner was in naval custody throughout both the trial before the Sessions Court and the hearing of the reference in the High Court, making it

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<sup>6</sup> *Supra* note 2.

<sup>7</sup> *Supra* note 2.

<sup>8</sup> (MANU/SC/0063/1960), Para 2.

impossible for him to follow Rule 5. On April 20, 1960, he filed a Special Leave Petition against the Bombay High Court's order of conviction. He claimed that the Governor's order had prevented him from being free to follow Rule 5, so he prayed to be released from following that rule and to have his petition for special leave to appeal posted for hearing without having to surrender to his sentence.

The Constitutional Bench was then tasked with reviewing this case.

## 5. ISSUES BEFORE THE COURT

- (a) What is the content of the power of Article 161<sup>9</sup> of the Constitution of India conferred on the Governor of the State?
- (b) Whether the orders of the Governor of Bombay override the judicial powers of the Court, particularly with reference to Article 142<sup>10</sup> of the Constitution of India?

## 6. ARGUMENTS OF THE PETITIONER

1. The petitioner contended that while the executive had unrestricted authority to pardon, reprieve, or suspend a sentence, this authority was limited by statute and the Constitution. Specifically, the executive could not exercise this power while a defendant's case was pending before the Supreme Court or any other appellate court concerned.
2. It was argued that the Supreme Court granted certain powers under Articles 142 and 145(1)<sup>11</sup> of the Constitution. If the articles granting powers to the President and the Governors are read alongside the power granted to the Supreme Court, a conflict would result. As a result, it would be necessary to reduce the scope of the powers granted by Arts. 72 and 161<sup>12</sup> of the Constitution to provide a harmonious interpretation of all four articles. It will be beneficial to investigate the legislative background of the pertinent executive and judicial powers that are available for the construction of sentence suspension.
3. It was argued that the powers of the Governor under Article 161<sup>13</sup> of the Constitution and the Court under Articles 142 and 145<sup>14</sup> of the Constitution are inconsistent. As a result, the power of the Governor is limited to the

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<sup>9</sup> *Supra* note 2.

<sup>10</sup> *Supra* note 4.

<sup>11</sup> The Constitution of India, arts. 142 & 145(1).

<sup>12</sup> The Constitution of India, arts. 72 & 161.

<sup>13</sup> *Supra* note 2.

<sup>14</sup> The Constitution of India, arts. 142 & 145.

period wherein the appeal is pending in the court because the law does not anticipate that the executive and judicial branches of government should work together, and this court must interpret them through harmonious construction.

## 7. ARGUMENTS OF THE RESPONDENT

1. The argument put forth was that the authority to suspend a sentence is a component of the greater power to grant a pardon; thereby, it may be pertinent to take into account incidentally the scope and extent of the said greater power. However, the controversy raised by the current petition is limited in scope, so focusing too much on the broad and absolute nature of the pardon power and overemphasizing court rulings that directly address the said question would not be beneficial for our current goal.
2. A further contention posits that while this Court may defer sentencing or provide bail until the special leave petition is heard, this would not impact the executive branch's authority to pardon, construing the term in its broadest sense as previously mentioned. In this regard, *Balmukand and Others v. The King Emperor*<sup>15</sup> were brought up. Here, a guilty person had petitioned His Majesty in Council for special permission to appeal, and the issue of the executive branch's authority to stay the sentence came up.
3. It was also contended that the executive's exercise of authority under Article 161<sup>16</sup> is unaffected by the status of a special leave application pending in this Court; therefore, both the judiciary and the executive must operate concurrently in the same domain and that the Governor's use of the authority granted by Article 161<sup>17</sup> of the Constitution and this Court's use of the authority granted by Art. 142<sup>18</sup> of the Constitution could never conflict since these two sets of powers—executive and judicial, respectively—do not operate in the same domain.

## 8. JUDGEMENT

### (1) THE MAJORITY OPINION

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<sup>15</sup> *Balmukund and Ors. v. The King Emperor*, (1915) 42 I. A. 133.

<sup>16</sup> *Supra* note 2.

<sup>17</sup> *Ibid*

<sup>18</sup> *Supra* note 4.

Chief Justice BP Sinha dissected the Bombay Advocate General's arguments on behalf of Justices Subba Rao, K.N. Wanchoo, and Gajendragadkar.

First and foremost, by comparing the current constitutional framework and the *Balmukund v. King* ruling, he exposes a comparable error committed by the Advocate General. Mr. Seervai contended that as the Judiciary and Executive branches are fundamentally distinct, there can be no contradiction between them and that the Crown's pardoning authority has been "crystallized into the S.401 of Cr. P.C.,<sup>19</sup> Article 72 & 16<sup>20</sup> of the Constitution." The Chief Justice stressed that, in contrast to the Supreme Court, the Judicial Committee of the Privy Council was not a Criminal Court of Appeal. As a result, it lacked the authority to halt the execution of the sentence. The argument that a special leave petition would not impact the executive branch's ability to grant a pardon is unfounded because Article 136<sup>21</sup> grants the Apex Court the authority to grant special leave to appeal to a convict after the Constitution is adopted.

According to the doctrine of harmonious construction, which is outlined in Article 246<sup>22</sup> of the Constitution of India, the provisions of a statute should not be read or interpreted separately but rather as a whole to remove any contradictions or disagreeable components. This rule is founded on the theory that the authors of statutes or the founders of the Constitution would not purposefully include two portions that contradict each other since doing so would be the same as the statute contradicting itself. As a result, the genus that needs to be determined cannot enable something in one clause while prohibiting it in another.

In a nutshell, the argument that Order XXI's Rule 5 is merely a subordinate piece of legislation neglects the fact that Rule 5 and Article 161<sup>23</sup> of the Constitution are not at odds with Article 142<sup>24</sup> of the Constitution. Essentially, the Advocate General's contention "oversimplifies" the situation and ignores the substantive and practical conflict between the two articles by maintaining that there could never be a conflict between Articles 142 and 161<sup>25</sup> of the Constitution, even though both the judiciary and the executive branch must operate in the same field. Both articles work in the same sphere, but the power used depends more on the subject matter than the authority. In terms of textual interpretation, it is frequently

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<sup>19</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 401.

<sup>20</sup> The Constitution of India, arts. 72 & 16.

<sup>21</sup> The Constitution of India, art. 136.

<sup>22</sup> The Constitution of India, art. 246.

<sup>23</sup> *Supra* note 2.

<sup>24</sup> *Supra* note 4.

<sup>25</sup> *Supra* note 4.

argued that Articles 161 and 72<sup>26</sup> of the Constitution are unconstrained. However, since these articles are worded in general terms and lack phrases like “Notwithstanding anything in the Constitution, or anything contained in the Constitution,” it would be erroneous to assume that Articles 142 and 145<sup>27</sup> of the Constitution—which grant the Supreme Court the authority to establish rules and regulations pertaining to its procedure with the President of India's approval—impose any restrictions on these provisions. As a result, it is appropriate to study Articles 142 and 161<sup>28</sup> of the Constitution in tandem.

In conclusion, there are two completely distinct powers involved in criminal proceedings before the court: mercy jurisdiction and the authority to suspend a sentence. The Governor may use both of these powers, while the Court may only use the latter. Nevertheless, the Governors' ability to exercise the latter is restricted while the case is already pending before the Supreme Court. It was decided, therefore, that Article 161<sup>29</sup> does not address the suspension of sentence when Article 142<sup>30</sup> of the Constitution is in effect and the case is under court supervision.

## (2) THE DISSENTING OPINION

Justice Kapur disapproved of the view held by the majority. The decision he rendered was broken down into three sections: (i) the nature, effect, scope, and operation of the powers granted by the Constitution's articles 142(1), 145, and 161<sup>31</sup> of the Constitution; (ii) the interpretation of those powers; and (iii) the degree to which such interpretations contradict or are consistent with one another. He starts by outlining the legislative background of Criminal Procedure Code Section 401 as well as the privilege enjoyed by the Rulers of England.

He discusses the concept of *nolle prosequi*, which gives the state's advocate general the authority to end a criminal trial in a court of law—a power that is not available in a martial court—and is outlined in Section 333<sup>32</sup> of the Criminal Procedure Code.

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<sup>26</sup> The Constitution of India, arts. 72 & 161.

<sup>27</sup> *Supra* note 17.

<sup>28</sup> The Constitution of India, arts. 142 & 161.

<sup>29</sup> *Supra* note 2.

<sup>30</sup> *Supra* note 4.

<sup>31</sup> The Constitution of India, arts. 142(1), 145, & 161.

<sup>32</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 333.

Restrictive language such as "Notwithstanding anything in the, or anything contained in the." is absent from Articles 161 and 72<sup>33</sup> of the Constitution as well as Sections 401 and 426, as was covered in part (b). Therefore, according to J. Kapur's strictly textual reading, the fact that there are no constitutional or statutory limitations suggests that the pardon power is unrestricted and unaffected by legal processes.

J. Kapur highlights a further argument: Supreme Court Rules (Order 21 Rule 5, in this case, created under Article 145<sup>34</sup>) are part of subordinate legislation because they are subject to any law made by the Parliament and can be modified with the President's assent. He further asserts that there is no conflict between Articles 142 and 145<sup>35</sup> and that to believe otherwise would be to misunderstand the nature of the authorities. He goes on to say that the administration pardons people at the expense of the judiciary. It is utilized as a public good that (i) is within the governor's total and unrestricted discretion and (ii) is to be employed on the theory that it is a constructive prerogative for societal welfare. In the same vein, courts must postpone sentences pending further consideration.

The conclusion he arrives at is that Article 142<sup>36</sup> of the Constitution may be hampered by Article 161<sup>37</sup> of the Constitution.

## 9. PRECEDENTS

- » In the celebrated decision of the House of Lords in the case of *Attorney General v. De Keyser's Royal Hotel, Limited*<sup>38</sup> which involved the right of the Crown by virtue of its prerogative, to take possession of private property for administrative purposes in connection with the defense of the realm, it was held by the House of Lords that the Crown was not entitled by virtue of its prerogative or under any statute, to take possession of property belonging to a citizen for the purposes aforesaid, without paying compensation for use and occupation.<sup>39</sup>
- » In America the exercise of the power of pardon has been held to be governed by the same principles as are applicable to the exercise of the King's power

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<sup>33</sup> *Supra* note 27.

<sup>34</sup> The Constitution of India, art. 145.

<sup>35</sup> The Constitution of India, arts. 142 & 145.

<sup>36</sup> *Supra* note 4.

<sup>37</sup> *Supra* note 2.

<sup>38</sup> *Attorney General v. De Keyser's Royal Hotel, Limited*, (1920) A. C. 508.

<sup>39</sup> MANU/SC/0063/1960), Para 11.



of mercy under the English Constitution. In *United States v. Wilson*<sup>40</sup>, Marshall, C.J., referring to the exercise of this power said:

“As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bears a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it”.<sup>41</sup>

- » In *Biddle v. Vuco Perovich*<sup>42</sup>, Holmes, J., in dealing with pardons said: - "Pardon 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"<sup>43</sup>

## 10. ANALYSIS

Analyzing the case *KM Nanavati v State of Bombay*, it seems that the majority opinion as described by Chief Justice BP Sinha and Justices Subba Rao, K.N. Wanchoo, and Gajendragadkar presents a well-reasoned and convincing interpretation of the relevant constitutional provisions. This construction clarifies how inherent importance is attributable to the doctrine of harmonious construction which seeks to reconcile the apparent conflicts between statutes or constitutional provisions in an attempt to make them effective together. It makes certain that the Constitution would be interpreted in a way so as not to distort the other parts of the legal order.

The Majority opinion highlights the difference between executive authority given under Article 161<sup>44</sup> of the Constitution and the powers conferred upon the judiciary under Article 142<sup>45</sup>. Article 142<sup>46</sup> of the Constitution allows the Supreme Court to pass any order or give any direction which in its opinion is required to do complete justice in the case, while Article 161<sup>47</sup> of the Constitution arms the

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<sup>40</sup> *United States v. Wilson*, 8 L.Ed 640.

<sup>41</sup> MANU/SC/0063/1960), Para 55.

<sup>42</sup> *Biddle v. Vuco Perovich*, 71 L.Ed 1161.

<sup>43</sup> MANU/SC/0063/1960), Para 67.

<sup>44</sup> *Supra* note 2.

<sup>45</sup> *Supra* note 4.

<sup>46</sup> *Supra* note 4.

<sup>47</sup> *Supra* note 2.

Governor with power to grant pardon, reprieves, or remissions of punishment. The majority is right in claiming that although both provisions fall under the same legal regime, they perform different purposes and should not trespass on the borders of their respective functions. This examination of the legislative intent and the history of these provisions fulfills the concern that the two branches of government will not be able to exercise their respective powers in conflict or in conflict.

In his dissenting judgment, Justice Kapur is concerned about the dangers posed by an overbroad interpretation of the executive's right to pardon. An unlimited use of the pardoning power by the executive could destroy the judicial processes in such cases and eventually pose a threat to the rule of law. The danger of using this discretion at the hands of the executive to befool orders of a court is a very serious issue in our system of separation of powers.

Although Justice Kapur puts forward an extremely thought-provoking analysis against imminent executive overreach, his dissent fails to see the checks and balances offered in the reasoning on behalf of the majority. The majority read the matter mildly, ensuring that Article 161<sup>48</sup> of the Constitution posited respect for the executive but not encumber the exercise of judicial power. The employment of harmony construction further renders the operation of Articles 142 and 161<sup>49</sup> of the Constitution in beneficently supporting and not conflicting ways. The majority protects the very foundation of the constitutional principle of separation of powers and enables both the judiciary and executive to pass the other and do their respective roles.

To my understanding, Justice Kapur, concerned with a legitimate notion, has unfortunately failed to appreciate that the majority's dissent focuses on their careful consideration of the competing interests in this case. The majority opinion also recognizes the potential dangers of executive overreach. It goes on to provide a remedy in emphasizing power accountability to balance any possible executive overreach against judicial protections. There was an option that guaranteed to keep Article 142<sup>50</sup> of the Constitution active, while the executive's exercise of mercy was not shirking in any sense.

In conclusion, I express in full accord with the majority's opinion that proper judicial interpretation of the Constitution, in this case, was bound to maintain a balance between the competing exigencies provided for in the Constitution.

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<sup>48</sup> *Supra* note 2.

<sup>49</sup> *Supra* note 29.

<sup>50</sup> *Supra* note 4.

Further, by espousing harmonious construction, it provides protection to the interests of both Article 142<sup>51</sup> and Article 161<sup>52</sup> of the Constitution, so that each may operate within its respective sphere without derogating the other. Although the concern that Justice Kapur expresses about the abuse of power by the executive is valid, the majority opinion strengthens the protection of due process and the separation of powers. This judgment, taken within the foregoing context, underscores the importance that no organ of the State must arrogate to itself untrammelled power and that enforcing judicial self-restraint and strengthening constitutional harmony is of paramount importance in providing justice.

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<sup>51</sup> *Supra* note 4.

<sup>52</sup> *Supra* note 2.