

A judicial course that calls for introspection

Why in news?

- Recently, the Supreme Court ordered the release of AG Perarivalan, a convict in the Rajiv Gandhi assassination case, in exercise of the constitutional power under Article 142.
- This decision has stirred up a hornet's nest for its constitutional righteousness and establishing its supremacy as the final arbiter of enforcing constitutional discipline.
- The decision has been hailed by some major political parties as a blow for federalism.

Whether Grant of remission by Supreme Court is constitutional or not?

- The Court has treaded the extraordinary constitutional route under Article 142. The power to do 'complete justice', for grant of remission and consequent premature release.
- The Bench decided to **exercise the power of grant of pardon, remission et al., exclusively conferred on the President of India and State Governors** under Articles 72 and 161.
- Setting aside separation of powers viz. Parliament/Legislature, Executive and Judiciary, whether the course adopted by the Bench to do expedient justice is constitutional calls for introspection.
- The focus is only to evaluate the constitutionality of the decision in the context of Article 142.

Governor's power under Article 161:

- The power under Article 161 is exercisable in relation to matters to which the executive power of the state extends. While the **Governor is bound by the advice of the Council of Ministers** (Article 163), the binding nature of such advice will depend on the constitutionality of the same.
- Article 161 consciously provides a 'discretion' to the Governor in taking a final call, even if it was not wide enough to overrule the advice, but it certainly provides latitude to send back any resolution for reconsideration, if, in his opinion, the resolution conflicted with constitutional ends.
- In *M.P. Special Police Establishment (2004 (8) SCC P.788)* a Constitution Bench had held that the "Concept of Governor acting in his discretion or exercising independent judgment is not alien to the constitution".

Implication of 'consultation':

- In the other Constitution Bench judgment in Sriharan's case (2016), arising out of the core of the Rajiv Gandhi assassination itself, one of the references placed for consideration was **whether the term 'consultation' stipulated in Section 435 Cr.P.C. implies 'concurrence'**.
- It was held that the word 'consultation' means 'concurrence' of the Central government.
- The Constitution Bench highlighted that there are situations where consideration of remission would have trans-border ramifications and wherever a central agency was involved, the opinion of the Central government must prevail.

Murder under Lists II and III the Seventh Schedule:

- Basing its conclusion on the legal position that the subject matter (Section 302 in the Indian Penal Code) murder, falls within Lists II and III (State and Concurrent lists) of the Seventh Schedule to the Constitution, the learned judges concluded that the State was fully empowered to take a call and recommend remission in this case.
- If it is a simple case of being a Section 302 crime, the reason for finding fault with the Governor's decision to forward the recommendation to the President may be constitutionally correct.
- But the larger controversy as to **whether the Governor in his exercise of power under Article 161 is competent at all**, to grant pardon or remission in respect of the **offences committed by the convicts under the Arms Act, 1959, the Explosive Substances Act, 1908, the Passports Act, 1967, the Foreigners Act, 1946, etc., besides Section 302**, is in wobbly terrain.
- According to the decision, it is a simple murder attracting Section 302 of the IPC and therefore the Governor's decision to forward the recommendation to the President is against the letter and spirit of Article 161 meaning it is against the spirit of federalism envisaged in the Constitution.

Article and issues:

- Having unprecedentedly concluded that the executive of the state is competent to decide, the Bench invoked **Article 142 of the Constitution to usurp the power of the Governor** of the State under Article 161. There are

momentous issues that are flagged on the exercise of the power of remission under Article 142, by the Supreme Court in the present factual context.

- The first is **whether Article 142 could be invoked by the Court** in the circumstances of the case when the Constitution conferred express power on the Governor alone, for grant of pardon, remission, etc., under Article 161.
- In the case on hand, the **Bench found fault with the Governor not having taken a decision on the recommendation of remission** by the State Cabinet for a long time.
- The fault of the Governor became more intense in the opinion of the Bench, when the Governor eventually referred the matter to the President of India for his decision, after sitting over the recommendation for more than two years.

Deeper examination needed:

- The **entire investigation of the crime was by the Central Bureau of Investigation alone.**
- In the teeth of the specific ruling in Sriharan, with reference to the invocation of power by the State government in terms of Sections 432 and 433 of Cr.P.C, the power exercisable by the Governor under Article 161 in respect of the subject matter is not so clear and obvious as ruled by the Bench.
- Whether what the State government could not achieve directly by invoking Sections 432 and 433 of Cr.P.C, without concurrence of Centre could be allowed to take a contrived route vide Article 161 and achieve its objectives is a pertinent issue.
- This aspect requires deeper judicial examination for the sake of constitutional clarity.

Delay by the Governor:

- The second aspect is the **delay in taking a decision by the Governor** in the matter. The **Constitution does not lay down any timeframe for the Governor to act** on the advice of the Council of Ministers.
- In a case like the present one, a long consultative process was imperative due to several litigations repeatedly being pursued at the instance of the convicts, under one legal pretext or the other.
- In any event, even if the delay was constitutionally inexcusable or was vulnerable to challenge, the final arbiter of the Constitution (Article 245) could not have trumped Article 161 with Article 142, which is constitutionally jarring. It is usurpation of power of another pillar of democracy.

Sentiments of the victim:

- The Tamil Nadu State Assembly resolution dated September 9, 2018 and the consequent Cabinet recommendation was to 'respect Tamil sentiments'. What of the sentiments of the victims of the crime?
- Earlier, Justice V.R. Krishna Iyer commented that it is a weakness of our jurisprudence that the victims of crime and the distress of the dependents of the prisoners do not attract the attention of law".
- In 2016 (1) SCC P.463 (Rajbala vs State of Haryana), the Supreme Court presciently wrote, "A judge should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective.", the visible collective being We The People.
- The evolving principle of constitutional moralism and justice dispensation by the constitutional courts may as well heed the distressed cries of the real and imperceptible victims before showering their grace on the perceptible offenders.

Conclusion:

- The constitutional clarity on the issues is necessary and hence, a deeper investigation is required.