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## A Judicial Course That Calls For Introspection

### Context

The recent decision of the Supreme Court of India in the case of A.G. Perarivalan has stirred up a hornet's nest.

### Relevance

GS-II: Separation of Powers between various organs Dispute Redressal Mechanisms and Institutions

### Dimensions of the Article

- Use of Article 142 to grant pardon
- Evaluating the constitutionality of decision
- Way Forward

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### Use of Article 142 to grant pardon

- The Court has treaded the extraordinary constitutional route under Article 142.
- 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.
- Against the separation of power: Against the background of 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.



## Evaluating the constitutionality of decision

- The power under Article 161 is exercisable in relation to matters to which the executive power of the state extends.
- Discretionary power under Article 161: 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 Sriharan's case (2016 (7) SCC P.1), 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.
- 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 not certain.
- 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.
- Constitutionality use of Article 142: 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.

## Way Forward



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- Deeper judicial examination: 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.
  - Timeframe for the Governor: The Constitution does not lay down any timeframe for the Governor to act on the advice of the Council of Ministers.
  - 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.
  - To portray the remission as to what it was not in the State is a sad fallout the law lords on the pulpit may not have bargained for. And on the constitutional plane, this verdict deserves a relook, even a review, as it stands on wobbly foundations built with creaky credence.

Source – *The Hindu*

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