

PARLIAMENT IMPAIRS FEDERALISM : A CRITIQUE OF MARURAM VERSUS UNION OF INDIA

I Introduction

THIS PAPER deals with one of the essential facets of federalism, viz., distribution of sovereign power in regard to commutation or remission of punishment under articles 72 and 161 of the Constitution, between the Union and states and in particular with the question: whether Parliament by enacting section 433A¹ in the Code of Criminal Procedure 1973, has encroached upon the state legislative field and thereby damaged the federal or dual structure erected by the Constitution?

A correct answer to the question posed can be given only upon an affirmative reply to the question: whether the Supreme Court has erred in upholding the constitutional validity of section 433A in *Maru Ram v. Union of India*?²

To facilitate discussion of the issue, evolution of the law relating to division of powers since enactment of the Indian Penal Code (IPC) in 1860 and first Criminal Procedure Code (CrPC) in 1861, may briefly, be noticed.

II Division of powers between Government of India and local governments before Constitution

The Government of India and the local governments had concurrent power to commute sentences of death and sentences of transportation for life under sections 54 and 55 of IPC and section 402 of CrPC 1882, and section 402 of CrPC 1898.

The central government and the local governments enjoyed concurrent power to suspend or remit punishments or sentences under section 54 of CrPC 1861, section 322 of CrPC 1872, section 401 of CrPC 1882 and section 401 of CrPC 1898.

The Constitution Act³ under section 295 gave concurrent powers to the Governor General of India and provincial governors only in regard to death sentences. The powers of suspension, commutation and remission of all other punishments were allocated exclusively to the provincial governments without, however, affecting the royal prerogative of the King and his delegate, the Governor General.

The King in Council under section 292 of the Constitution Act, issued Adaptation of Laws Order 1937 for bringing sections 54 and 55 of IPC and sections 401 and 402 of CrPC 1898 into accord with the provisions of section 295 of the Constitution Act. A new section 402A, ancillary to the power conferred

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1. See, Code of Criminal Procedure (CrPC) Amendment Act 1978.
 2. (1981) 1 S.C.R. 1190.
 3. Government of India Act 1935 enforced on 1 April 1937.

upon the Governor General under section 295 of the Constitution Act, was introduced in CrPC 1898, in furtherance of that constitutional power.

III Another phase of division of powers

The Constitution of India,⁴ under articles 72 and 161 distributed, *inter alia*, powers in respect of commutation and remission of punishments between the Union and states except the sentence of death, which remained in the concurrent jurisdiction.

The President of India under article 372(2) of the Constitution by issuing Adaptation of Laws Order 1950, introduced the constitutional division of powers also in IPC and CrPC 1898 by inserting a definition of the expression "appropriate Government" and by otherwise bringing the provisions of sections 54 and 55 of IPC and sections 401, 402 and 402A of CrPC 1898, into accord with articles 72 and 161 of the Constitution.⁵

In 1974, CrPC of 1898, was replaced by CrPC 1973. Sections 401, 402 and 402A of the old Code are sections 432, 433 and 434 of the new Code, without any material alteration.

IV Federal or dual structure under Constitution

The Constitution under article 72 allocates to the President, *inter alia*, the power to commute or remit sentences imposed on any person for any offence against a law relating to a matter to which the executive power of the Union extends. Article 161 vests the governor of a state, *inter alia*, with the power to commute or remit sentences passed on any person for any offence against a law relating to a matter to which the executive power of the state extends.

Article 73 provides that the executive power of the Union extends to matters in respect of which Parliament has power to make laws. Article 162 enacts that the executive power of the state extends to matters with respect to which the state legislature has power to make laws.

Article 246(i) grants exclusive legislative power to Parliament to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (Union List). Article 246(3) gives exclusive legislative power to legislatures of the states to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule (State List).

Entry 93 in the Union List enumerates the specific subject matter, *viz.*, "Offences against laws with respect to any of the matters in this List", which empowers Parliament to make laws regarding offences against Union laws. Entry 64 in the State List gives specific power to state legislatures to make laws in regard to "Offence against laws with respect to any of the matters in the State List".

Entry I in Concurrent List in the Seventh Schedule of the Constitution by the first "excluding clause" trifurcates offences under the existing criminal law

4. Constitution of India 1950.

5. *Ibid.*

including the offences in IPC, on the basis of the same criteria as given in Entry 93 of the Union List and Entry 64 of the State List, between the Union and the states and leaving offences in the existing criminal law against laws in concurrent matters undistributed.

V Federal system : division of powers in Code of Criminal Procedure

The provisions of sections 401, 402 and 402A of the CrPC 1898 were brought into accord with the provisions of articles 72 and 161 of the Constitution by issuing Adaptation of Laws Order 1950.⁵ The opening words in articles 245 and 246, viz., "subject to the provisions of this Constitution"⁶ directed Parliament to enact successor provisions in section 432, 433 and 434 of CrPC 1973 also in conformity to those articles of the Constitution. The division of powers in the Code may be noticed.

Section 432 grants power of suspension and remission of punishments separately to the Union and state governments. Section 433 similarly grants power of commutation of punishments. Section 434 ancillary to article 72(i) (c) of the Constitution provides that "the powers conferred by Section 432 and 433 upon the State Governments may, in the case of sentences of death, also be exercised by the Central Government". The definition of expression "appropriate Government"⁷ in sub section (7) of section 432 comprises within its ambit the language of articles 72 and 161 of the Constitution and thereby keeps sections 432, 433 and 434 in accord with the Constitution.

Section 433A inserted in the Code by Act of 1978⁸ which puts restriction upon the power of "appropriate Government" in regard to remission of sentences of imprisonment for life awarded to convicts for certain offences and is in derogation of the federal principle, will be discussed later.^{8a}

VI Instances of distribution of specific offences and determination of authority to remit sentences

The Supreme Court in *G.V. Ramaniah v. Superintendent Central Jail Rajahmundry*,⁹ had the occasion to determine, whether offences punishable under sections 489A to 489D of IPC fell within the legislative and executive competence of the Union or the legislative and executive competence of the Union or of the states and who or which was the appropriate authority or the appropriate government to remit sentences of convicts for these offences? The Governor of Andhra Pradesh granted remissions under article 161 of the Constitution in sentences of "prisoners, who are convicted for offences against laws, relating to matters to which the executive power of the State extends". The court found that the

6. The expression "Subject to the provisions of this Constitution" to be read in art. 246 vide A.I.R. 1955 S.C. 540 at 547 and A.I.R. 1958 S.C. 956 at 966.

7. Applicable to ch. XXXII of CrPC 1973.

8. *Supra* note 1.

8a. See, pt. VII, IX of this paper, *infra*.

9. A.I.R. 1974 S.C. 31.

offences under sections 489A to 484D for which G. V. Ramaniah was sentenced to ten years rigorous imprisonment relate to matters enumerated in Entry 36 of the Union List, viz., "Currency coinage and legal tender" and Entry 93 of Union List specifically conferred legislative power upon Parliament in regard to "Offences against laws with respect to any of the matters in the Union List." Apart from this, Parliament has also legislative power in regard to offences in IPC referable to matters in the Union List in terms of Entry 1 of Concurrent List in the Seventh Schedule of the Constitution. Since the executive power of the Union under article 73 extends to matters with respect to which Parliament has power to make laws, the President in whom the executive power of the Union, including the executive power of remissions of punishments resides, was the proper authority under article 72 and the central government was the "appropriate government" under section 432 of CrPC to remit the sentence of convict Ramaniah and not the governor of Andhra Pradesh or the state government of that state. Ramaniah was evidently a "prisoner who was convicted for offences against a law relating to a matter to which the executive power of the Union extends" within the meaning of articles 72 and 73 of the Constitution.

Following this criterion, governor of a state or the state government shall be the appropriate authority or appropriate government to remit sentences under article 161 or section 432 of CrPC 1973, of any person or persons who is or are sentenced for capital offences under sections 21, 132, 194(2), 302, 305, 307(2) and 396 of IPC¹⁰ for the reason that all these offences relate to the subject matter of 'public order' in Entry 1 of the State List and the legislative power in respect of "public order" vests in the state legislature under entry 64 of the State List and the said power is extended to the offences in IPC by the "excluding clause" in Entry 1 of the Concurrent List in the Seventh Schedule of the Constitution. The executive power of the state under article 162 being co-extensive or co-terminus with its legislative power, governor or the state government alone can legally be the appropriate authority or appropriate government to remit life sentences of persons sentenced for these capital offences.

VII Section 433A is unconstitutional: impairs federal or dual structure

Section 433A inserted in CrPC by Act of 1978 restricts power of appropriate government to order remission of sentences of imprisonment for life passed for seven capital offences, viz., sections 131, 132, 194(2), 302, 305, 307(2) and 396 of IPC. The legislative power, as noticed,¹¹ in respect of these offences vests in the legislatures of the states and not in Parliament. Parliament by enacting section 433A has acted *ultra vires* its powers and encroached upon the legislative field of the states and thereby damaged the federal or dual structure of the Constitution.

Article 72(1)(c) of the Constitution gives to the President or the Union power over death sentences only, passed in the state field. Section 434 of CrPC which

10. S. 433A of CrPC applies to life sentences passed for these seven capital offences.

11. See, pt. VI of this paper, *supra*.

is ancillary to this constitutional provision also confers this power on the central government only over death sentences. Parliament by further extending legislative power of the Union by section 433A over sentences of "life imprisonment" awarded on persons convicted in the state field, also establishes that the Union legislature has acted beyond or in excess of its powers under the Constitution.

The legislative power of Parliament under articles 245 and 246(1) and (2) of the Constitution is "subject to the provisions of this Constitution." It, therefore, follows that all laws made by Parliament must conform to the Constitution. Section 433A by undoing the distribution of executive power provided under sections 432 and 433 of CrPC between the Union and states also tends to do away with the federalism under articles 72 and 161 of the Constitution. The relationship that has all along existed between those constitutional provisions and these statutory provisions has been aptly described by a Constitution Bench of the Supreme Court in *K.M. Nanavathi v. State of Bombay*.¹² It observed :

Sections 401 and 402 (now Sections 432 and 433) of the Code have continued with necessary modifications to bring them into line with Articles 72 and 161 of the Constitution. It will be seen, however, that Articles 72 and 161 not only deal with pardons, reprieves which were within royal prerogative, but also included what is provided in Sections 401 and 402 (now Sections 432 and 433 of the Code).^{12a}

VIII Opinion of Law Commission

The Law Commission of India^{12b} stated that the provisions of sections 401, 402 and 402A (now sections 432, 433 and 434) are ancillary to articles 72 and 161 of the Constitution. Section 401 (section 432) contains detailed provisions in regard to suspension and remission of sentences, while section 402 (section 433) deals with commutation of sentences. Following article 72(1)(c) of the Constitution, section 402A (now section 434) makes the powers conferred by sections 401 and 402 (section 432 and 433) on the state governments exercisable also by the central government.

The Law Commission also had occasion to consider the question, whether it would be desirable to provide in the IPC or CrPC that some minimum period for persons sentenced to imprisonment for life should elapse before the appropriate government considers them for release?¹³ The Commission felt that in view of articles 72 and 161 of the Constitution, which conferred full powers on the President and governors to grant remissions, provisions in the law fettering those powers might not be valid or proper.

12. A.I.R. 1961 S.C. 112.

12a. *Id.* at 119.

12b. See, Law Commission of India, *Forty-first Report on the Code of Criminal Procedure, 1898*, vol. 1, para 29.1 (1969).

13. *42nd Report on the Indian Penal Code 63* (1971). See also, *id.*, para 29.4.

IX Section 433A suffers from other constitutional infirmities

Sections 433A inflicts rigorous imprisonment of 14 years upon those convicts who are sentenced for capital offences to life imprisonment or whose death is commuted under section 433 to life imprisonment and not on those whose death sentences are commuted to sentences of life imprisonment under section 54 of IPC, section 416 of CrPC 1973 or articles 72 and 161 of the Constitution. Section 433A of CrPC is, therefore, violative of article 14 of the Constitution for causing hostile discrimination to one of the two sets of similarly circumstanced life convicts.

Section 433A does not bar "appropriate Government" from commuting death sentences even of dangerous murderers under section 54 of IPC, or under sections 433(a) and 434 of CrPC to punishments other than life imprisonment. The appropriate government is thus free to commute death sentences to any other sentence provided by IPC even to one of fine only at its whim, but persons for lighter degree of guilt, who are originally sentenced to life imprisonment, have to suffer a minimum of 14 years rigorous imprisonment under section 433A. It is thus arbitrary, unreasonable and unjust, and contravenes articles 14 and 21 of the Constitution for not providing a fair procedure for deprivation of personal liberty.

The non-*obstante* clause in section 433A blocks the exercise of power of remission under section 432 and not the power of commutation of sentences of life imprisonment under section 433(b) to any other punishment even to fine only. Section 433A thus being non-mandatory leaves arbitrary discretion with the government by which it may save one convict and not another from the draconian 14 years term at its whim by commuting life sentences to lesser than 14 years. Thus, it contravenes articles 14, 19, 20 and 21 of the Constitution.

Section 433A by enforcing a mandatory sentence of 14 years even upon physically and mentally handicapped prisoners without exception, involves the infliction of uncivilised and cruel punishment in violation of the requirement of fair, just and reasonable penal law for deprivation of personal liberty under articles 14 and 21 as laid down in *Maneka Gandhi v. Union of India*.¹⁴

X Critique of *Maruram v. Union of India*

The Supreme Court in *Maruram*,¹⁵ has upheld the competency of Parliament to enact section 433A and also its validity against attack on the basis of articles 14 and 20 of the Constitution. It is submitted with great respect, that both the premises for upholding the constitutional validity of section 433A do not stand the scrutiny and the decision is clearly erroneous. The constitutional grounds in support of the submission have been stated.¹⁶ Some specific comments, which appear necessary, are made.

14. A.I.R. 1978 S.C. 597.

15. *Supra* note 2.

16. See, pt. VII-IX of this paper.

For competency, the Constitution Bench relies upon article 246(2) read with Entry 2 of the Concurrent List in the Seventh Schedule - "Criminal Procedure" etc. But when legislative power to make substantive laws in regard to "Offences against laws with respect to matters in the State List" under Entry 64 of the State List and in regard to such offences in the existing criminal law, including offences included in IPC under Entry 1 of the Concurrent List, have been allocated to the state legislatures and the executive power to commute or remit sentences for such offences, has also been allotted under article 161 of the Constitution to the state executives and further pursuant to this legislative power provisions regarding remission and release in section 59(5), (27) of the Prisons Act¹⁷ already exist, a mere procedural law dealing with general procedure was not available to Parliament to enact section 433A which tends to do away with the whole federal scheme of the Constitution as well as the one reflected in sections 432 and 433 of CrPC. There is no doubt that in case of irreconcilable clash under article 246(1)(2) and article 254 of the Constitution, state laws must give way to parliamentary legislation. However, this is subject to several constitutional limitations. *First*, the Constitution grants legislative power to Parliament *vide* opening words in article 245, "subject to the provisions of this Constitution". *Second*, the clashing legislation must be one on a concurrent subject and Parliament must have competence to enact that law.

The contention of counsel for prisoners in regard to giving benefit of prison remissions was very simple; they contended that section 433A merely blocked an order of the government under section 432 remitting whole of the unexpired sentence before the convict undergoes "at least 14 years imprisonment", and the section did not exclude statutory remissions under the Prisons Act and Rules. The expression "at least fourteen years of imprisonment" in section 433A merely meant that the section required such life convicts to undergo a minimum imprisonment of 14 years, in the same manner in which IPC provides minimum sentences of imprisonment for certain grave offences. For instance, sections 397 and 398 provide at their end "the imprisonment with which such offender shall be punished shall not be less than seven years". If Parliament had intended to enact remissionless term of 14 years then its draftsman would have used words "substantive imprisonment" or "actual imprisonment". A Constitution Bench of the Supreme Court in *Sarat Chander Rabha v. Khaginder Nath*,¹⁸ has observed that notwithstanding that a convict suffered only 16 months in lieu of his sentence of 3 years yet he shall be deemed to have undergone 3 years sentence as the remission granted leaves the conviction and sentence untouched. Following this reasoning, a life convict who undergoes 12 years and earns 2 years of remission shall be deemed to have undergone 14 years of minimum sentence for purposes of section 433A or provisions of the *Jail Manual*.

The suggested construction is so clear that one need not rely on the principle of beneficial construction in cases involving personal liberty. Apart from this, the

17. The Prisons Act 1894.

18. A.I.R. 1961 S.C. 334.

construction of section 433A adopted by the Constitution Bench takes the provision beyond the legislative competence of Parliament inasmuch as the grant or refusal of prison remissions is part of the execution of sentences, which function, the Constitution, under Entry 4 of the State List in the Seventh Schedule, exclusively allocates to state legislatures and Parliament has no power to make law on prisons and prisoners or granting or refusing of prison remissions even to the prisoners sentenced for offences against a law with respect to matters in the Union List, including those convicted under the Army, Navy, Air Force, Border Security Force and Coast Guard Acts and who are ordered to undergo sentences by confinement in 'civil jails'. It is the state prison authorities who grant prison remission to these "union prisoners" also.

The contention for the prisoners, was merely this that for purposes of premature release, *i.e.*, for computing the term of 14 years, within the meaning of section 433A, as well as under the provisions of state *Jail Manuals*, statutory remission earned under the prison remission system like the undertrial period detention may be taken into account. The prisoners had not contended in this case of final release without an order of the government under articles 72 and 161 or section 432, CrPC. A subsequent Constitution Bench in *Bhagirath v. Delhi Administration*,¹⁹ approved the decision of a three judge Bench of the Supreme Court in *Suklal Hansda v. State of West Bengal*,^{19a} wherein a direction to set off the undertrial period detention and to take into account the aggregated period of statutory prison remissions, had been given for considering life convicts for premature release under provisions of the *West Bengal Jail Manual*. The other noteworthy thing about this Constitution Bench decision is that it equated provisions of the state *Jail Manuals* with orders of remission or commutation of the government under sections 432 and 433 of CrPC, which quantify "life term" into a term of years both for premature and final release.

The reference by the Constitution Bench in *Maru Ram's case to Gopal Godse*²⁰ was not necessary since in that case the life convict had prayed for direct release under provisions of the *Bombay Jail Manual*, wherein there was no rule sanctioning such release without an order under section 401 (now section 432) of CrPC. But this contention was not raised in the present case as already noticed. It may, however, be stated in passing that the rules in *Bombay Jail Manual* involved in *Godse* operate only in Maharashtra, Gujarat and Karnataka while rest of the states follow the rules made by the Government of India in 1908 under section 59(9) of the Prisons Act 1894, wherein rules 20 and 21, read with rule 2(f)²¹ provide for final release of life convicts after 20 years inclusive of periods of remission, without a formal government order under section 432 of CrPC, of which the Constitution Bench in *Bhagirath* has taken due notice. This is an advance on *Godse*.

19. A.I.R. 1985 S.C. 1050.

19a. 1986 (4) S.C.C. 433.

20. *Gopal Vinayak Godse v. State of Maharashtra*, A.I.R. 1961 S.C. 600.

21. See, paras 631 and 647 of *Punjab Jail Manual 1975*.

The Constitution Bench in *Maru Ram*, in the latter part of the judgment seeing the tremendous potential for reforming of prisoners by grant of prison remissions,²² has recommended retention of the "remission and short sentencing schemes" for the exercise of constitutional power under articles 72 and 161. If the Constitution Bench had construed section 433A as suggested here, then this recommendation would and could have been in the mandatory part of the judgment and section 433A could be in harmony with the Prisons Act and remission and release rules framed thereunder.

Now the state governments have accepted that recommendation of the Constitution Bench and all of them have, without exception, issued orders under article 161 of the Constitution for releasing life convicts under the pre-existing premature release and remission rules before undergoing 14 years remissionless imprisonment with the result that section 433A of CrPC 1973 has become purposeless, otiose and obsolescent.

XI Conclusion

The federal system with division of legislative and executive powers between the central and provincial governments first established by the Constitution Act of 1935 and which later advanced under the Constitution of India, necessitated bringing "existing laws" into accord with provisions of the Constitution for which the King in Council and the President of India respectively issued Adaptation of Laws Order 1937 and 1950, which reflected the federal system in the Constitution in all laws including IPC and CrPC 1898.

For keeping laws to be made after the commencement of the Constitution, in conformity with it, articles 245 and 246 made the grant of legislative power to Parliament and state legislatures "subject to the provisions of this Constitution". Therefore while enacting sections 432, 433 and 434 in the CrPC 1973, Parliament kept these provisions in consonance with articles 72 and 161. Therefore, it could not be held to possess the competency to enact section 433A in CrPC, which dismantles federalism by derogating these provisions of the fundamental law of the land, when the mandate of the latter is that all laws whether existing or to be enacted, must conform to the Constitution.

The wrong construction of section 433A that provided a remissionless term of 14 years to be undergone by life convicts falling in the ambit of the section, had led the Supreme Court to giving an extraordinary finding that section 433A overrides competently made prison laws duly protected by the Constitution and the upholding of section 433A ultimately led it to an unusual finding that the section does not bind the government and they still can ignore it by using higher power under articles 72 and 161 of the Constitution. The state governments, therefore, by issuing orders under articles 161, has rendered section 433A purposeless and redundant. The judgment is also inconsistent with at least two Constitution Benches in *Nanavati v. State of Bombay*²³ and *Bhagirath v. Delhi Adminis-*

22. *Supra* note 2, paras 69, 70, 72 (2)

23. *Supra* note 12.

*tration*²⁴ on certain aspects and also failed to take notice of a three judge Bench decision in *G. V. Ramanian*.²⁵ Hence there is a clear necessity of its reconsideration by a larger Bench of the Supreme Court to lay down a correct law for observance by all the authorities in India.

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24. *Supra* note 19.

25. *Supra* note 9.

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