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Constitutional fault lines

T.N. Governor's inaction on advice to free Rajiv case convicts warrants judicial intervention

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The Governor of Tamil Nadu (T.N.), Banwarilal Purohit, has continued to withhold his decision on an application seeking pardon filed by A.G. Perarivalan, one of the seven prisoners convicted in the Rajiv Gandhi assassination case. In September 2018, the Supreme Court (SC) had observed, while hearing a connected writ petition, that the Governor should take a decision. A subsequent resolution passed by the Council of Ministers in favour of releasing all seven prisoners had rendered the matter *fait accompli*. The inaction by the Governor now has given rise to constitutional fault lines within the Executive arm of the government.

A five-judge Bench of the Supreme Court in *Maru Ram v. Union of India* (1981) held that the pardoning power "under Articles 72 and 161 of the Constitution can be exercised by the Central and the State Governments, not by the President or Governor on their own." In that case, Justice V.R. Krishna Iyer, speaking for the majority judgment, reiterated that the "advice of the appropriate Government binds the Head of the State". Therefore, a Governor is neither expected, nor is empowered, to test the constitutionality of the order or resolution presented to her. That is a power reserved exclusively for constitutional courts of the country.

Past judgments

Only recently, the Supreme Court, had examined the inordinate delay by constitutional authorities – the President and the Governor – in taking decisions on mercy petitions. The Supreme Court, in the case of *Shatrughan Chouhan v. Union of India*, laid down the principle of "presumption of dehumanising effect of such delay". Taking cognisance of undue delay in the cases of the petitioners who were incarcerated prisoners, the Supreme Court confirmed that the due process guaranteed under Article 21 was available to each and every prisoner "till his last breath". The Supreme Court had exercised its powers under Article 32 of the Constitution to commute the death sentences of 15 convicts and essentially

interfered when an inordinate delay to perform a constitutional function was brought to its notice.

For long, Governors, like Speakers, considered themselves to be unanswerable for their actions. However, the apex court has clarified that constitutional functionaries are not exempt from judicial scrutiny. In the recent case of *Keisham Meghachandra Singh v. Hon'ble Speaker* (2020), the Supreme Court was asked to examine the Speaker's inaction with regard to disqualification proceedings. It was hitherto believed that the powers of the Speaker, holding a constitutional office and exercising powers granted under the Constitution, were beyond the scope of a 'writ of mandamus'. However, the apex court, recalling an earlier judgment in *Rajendra Singh Rana v. Swami Prasad Maurya* (2007), had confirmed its view that the "failure on the part of the Speaker to decide the application seeking a disqualification cannot be said to be merely in the realm of procedure" and that it "goes against the very constitutional scheme of adjudication contemplated by the Tenth Schedule".

Consequently, breaking years of convention, the SC, in the Keisham Meghachandra Singh case issued a judicial direction to the Speaker to decide the disqualification petitions within a period of four weeks. By doing so, the Supreme Court has indicated that it would only exercise caution when it comes to providing injunctions in *quia timet* actions, but would not be precluded from issuing directions in aid of a constitutional authority "arriving at a prompt decision".

In the present case, there has been a substantial delay at the hands of the Governor. The fifteenth Legislative Assembly of Tamil Nadu and consequently, the Council of Ministers, will end in May, 2021. This calls for the immediate interference of the Supreme Court, for it otherwise would render the resolution passed by the Council of Ministers and words contained in Article 161 of the Constitution meaningless.

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