

Rajasthan developments: Getting ahead of constitutional practices If constitutional principles and practices no longer excite the citizens, but new political norms do, democracy is in trouble

The Rajasthan High Court's order of July 24 staying the anti-defection proceedings initiated by the Assembly Speaker against the rebel Congress legislators raises important constitutional issues. A simple petition challenging the issuance of notices by the Speaker to the rebel MLAs was turned into a very complex one challenging the constitutionality of Para 2(1)(a) of the Tenth Schedule to the Constitution (anti-defection law). The lawyers brought in by the rebels brought big issues before the court which were not very relevant to decide this matter.

Staying the Speaker's action

The simple plea initially brought before the court by the rebels was that the notice issued by the Speaker was bad in law and should be quashed. To answer this question, one should take a look at the rules framed under the Tenth Schedule. In the context of a challenge to the notice, only those rules which deal with the notice are relevant for this discussion.

These rules were first framed by the Lok Sabha Speaker in 1985 and adopted by more or less all the State Legislatures. Rule 6 of the Lok Sabha rules deals with the filing of the petition and the forwarding of the same by the Speaker to the Member concerned and related matters. Rule 6 (4) says that before making a petition seeking the disqualification of a member, the petitioner shall satisfy himself that there are reasonable grounds for believing that the Member concerned has become subject to disqualification. Thus, the rule requires the petitioner, and not the Speaker, to satisfy himself about the reasonableness of the ground for disqualification. This responsibility is discharged by the petitioner by appending a brief statement to the petition stating clearly that he has so satisfied himself. This statement signifies the petitioner's full compliance with Rule 6 (4).

Rule 7 says that on receipt of the petition, the Speaker shall consider whether the petition complies with the requirements of Rule 6. If he finds that the petition does not meet all the requirements, he shall dismiss it. If it complies with all the requirements, he shall forward the copy of the petition and the annexure to the concerned Member and require him to submit his comments within seven days of the receipt of the copy of the petition. This is the so-called show cause notice which has been challenged. The rules do not mention any show cause notice.

Rule 6(4) makes it abundantly clear that the onus of satisfying himself about the reasonableness of the ground for disqualification is on the petitioner. Once that is done, the Speaker's job is merely to forward the petition to the concerned member and give him a date for submitting his comments. As is obvious, the Speaker cannot go into the reasonableness of the grounds cited in the petition at this stage because the comments of the respondent, evidence he may submit etc., are not before him. Only through a proper hearing will the Speaker be able to know whether reasonable grounds exist for disqualification. It is thus beyond my imagination how a challenge can be brought against a 'notice' at this stage. It can thus be concluded that the Speaker's act of forwarding the petition cannot be legally challenged as he is acting in accordance with the rules. This point does not seem to have received any attention from the court as otherwise the petition would have been dismissed at the threshold.

In *Kihoto Hollohan v. Zachillhu* (1992), while barring any interlocutory intervention by the court in the Tenth Schedule proceedings, the Supreme Court held that a challenge is not barred if there is an imminent threat of disqualification/ suspension before the Speaker takes a final decision on merit. In the Tenth Schedule proceedings, there is no disqualification/ suspension of a Member in the interim period. Therefore, the exception mentioned by the court does not become applicable here, which means no interim intervention by the court is contemplated in these proceedings.

Staying the Speaker's action is unprecedented and unheard of at the 'notice' stage. It will stymie the operation of the Tenth Schedule because any Member can go to court and obtain a stay and put a stop to the proceedings — more so when the court has allowed all the larger issues such as the vires of para 2(1)(a) of the Tenth

Schedule to be tagged together, which will take months to be heard and adjudicated upon. It is also puzzling how a High Court can reopen a constitutional issue that was settled long ago by a Constitution Bench of the Supreme Court.

Date of the Assembly session

The second part of the political drama, about the date of the Assembly session, has just ended, with the Cabinet yielding to the Governor's demand that there should be a 21-day gap between the summoning and commencement of the session. Although the government has averted an ugly situation by agreeing to the proposal made by the Governor with regard to the date of the session, it has opened the way to future confrontations between elected State governments and Governors on matters of governance. Summoning the Assembly is a routine constitutional function of the Governor. That this has created a serious confrontation resulting in a constitutional deadlock underscores the need to comprehend the ferocity of adversarial politics and its potential to disrupt normal politico-constitutional operations in the field of governance.

As per the normal procedure, once the Cabinet decides to call the session on a particular date, that decision is conveyed to the Governor who signs the summons order and sends it back the same day or the next day. Thereafter, the summons is issued to individual members by the Assembly Secretary. By not agreeing to the date decided by the Cabinet, the Governor has shown that he has the final say. This is fraught with many disturbing possibilities in the relationship between the Governor and the State government.

Under Article 174 of the Constitution, the Governor summons the Assembly. But the Governor can act only on the advice of the Council of Ministers. The Cabinet form of government presupposes that the executive power of the state vests in the elected government headed by the Chief Minister. The Governor, being a constitutional head, does not exercise any of the executive powers except where the Constitution assigns him certain functions to be performed in his discretion. Calling the session of the Assembly is a part of the executive functions of the government and the Governor can summon the Assembly only on the advice of the Cabinet. In *Nabam Rebia and Baman Felix v. Deputy Speaker* (2016), the Supreme Court reaffirmed this position when it said, "In such view of the matter, we are satisfied in concluding that the Governor can summon and prorogue and dissolve the House only on the aid and advice of the Council of Ministers with the Chief Minister as the head. And not on his own".

The crucial question in Rajasthan is whether the Governor has any discretionary power in the matter of summoning the Assembly. The Governor asked the government to change the date of commencement recommended by the Cabinet and proposed a date after 21 days. Finally, he got the Cabinet to yield to his wishes.

Serious constitutional questions arise here. The *Nabam Rebia* case makes it clear that so long as the Chief Minister enjoys majority support in the Assembly, the Governor has no discretionary powers and is bound to accept the decisions of the Cabinet in regard to the date of commencement of the session. The decision to convene the Assembly session is taken by the Cabinet; the Governor has to merely sign the summons order. In the case of the Union, the President also does the same. Further, the Governor has no role in the conduct of the business of the House, which is done under the control and supervision of the Speaker. Therefore, it is not open to the Governor to ask the government to clarify whether it wants to bring a confidence motion in the House. The government has no legal or constitutional duty to take the Governor into confidence about the agenda of the House. No rules of the House provide for such a course of action. This position has been amply clarified by the Supreme Court in a number of cases.

And what if the Governor does not sign the summons? This question cannot arise where the Constitution and the rule of law are in force. In *Shamsher Singh v. State of Punjab* (1974), the Supreme Court said: "The Governor has no right to refuse to act on the advice of the Council of Ministries. Such a position is antithetical to the concept of 'responsible government'." The Governor and the Chief Minister should be able to resolve such crisis without damaging the integrity of institutions.

The 21-day period

The last point is about the significance of the 21-day period suggested by the Governor. The Constitution does not provide for this. In 1969, the Rules Committee of the Lok Sabha recommended that the

gap between the date of summons and of the commencement of the House should be 21 days. This was thought of as necessary as the collection, collation and scrutiny of information relating to Questions, at different levels of bureaucracy, before it was placed in the House, was a time-consuming job. Although Parliament changed it to 15 days later, many State Legislatures continue with the 21-day period. It is not an inflexible rule, and says “unless the Speaker otherwise decides”. This rule is generally followed but it has never constrained governments from convening the House at shorter notice. In fact, the Rajasthan House rule itself provides for a session at shorter notice. If the government feels the urgency, it is well within its power to convene the House at shorter notice.

These are well-established constitutional principles and practices. If a Governor overrules the decision of the Cabinet with regard to even the date of convening the Assembly, and a politically helpless government yields, it becomes a precedent, but not an inspiring one. Society needs to debate this seriously. We must know that politics has a way of getting ahead of principles and practices, and establishing its own norms. If our lofty constitutional principles and practices do no longer excite the citizens, but new political norms do, then democracy is in trouble.

DEFINITIONS

- ❖ **get ahead of** (phrasal verb) – to make progress, proceed before others.
- ❖ **defection** (noun) – desertion, absconding, decamping.
- ❖ **proceedings** (noun) – legal action, prosecution.
- ❖ **issuance** (noun) – an act of issuing/providing something.
- ❖ **constitutionality** (noun) – the condition of acting in accordance with an applicable constitution.
- ❖ **Anti-defection law** (noun) – The 10th Schedule to the Constitution, popularly referred to as the ‘Anti-Defection Law,’ was inserted by the 52nd Amendment in 1985. The grounds of disqualification are specified in Paragraph 2 of the 10th Schedule. A member would incur a disqualification under paragraph 2 (1) (a) when he “voluntarily gives up his membership of a party” and under 2 (1) (b) when he/she votes (or abstains from voting) contrary to the directive issued by the party.
- ❖ **quash** (verb) – cancel, reverse, repeal.
- ❖ **context** (noun) – circumstances, conditions, situation.
- ❖ **more or less** (phrase) – nearly, almost, approximately.
- ❖ **ground** (noun) – reason, factor, basis.
- ❖ **append** (verb) – adjoin, include, add.
- ❖ **signify** (verb) – express, indicate, show.
- ❖ **compliance** (noun) – conformity, observation, adherence.
- ❖ **comply with** (verb) – abide by, adhere to, conform to.
- ❖ **annexure** (noun) – an addition to a written document.
- ❖ **show cause notice** (noun) – a notice/order asking an individual/group of person to justify, explain, or prove something to the court/organisation.
- ❖ **make clear** (phrase) – explain, clarify, elucidate.
- ❖ **abundantly** (adjective) – significantly, particularly, especially.
- ❖ **onus** (noun) – responsibility, duty.
- ❖ **merely** (adverb) – only, simply, just.
- ❖ **obvious** (adjective) – evident, apparent, clear, noticeable.
- ❖ **reasonableness** (noun) – fairness.
- ❖ **respondent** (noun) – disputant, opponent, defendant.
- ❖ **beyond imagination** (phrase) – inconceivable, unbelievable, unimaginable.
- ❖ **in accordance with** (phrase) – in agreement with, in conformity with, in line with.
- ❖ **threshold** (noun) – lower limit, starting point, the level (to react to something).
- ❖ **bar** (verb) – block, ban, forbid/prohibit.
- ❖ **interlocutory** (adjective) – relating to a provisional/ temporary/interim one (order, arbitration, adjudication).
- ❖ **intervention** (noun) – arbitration, adjudication, involvement, interference.
- ❖ **hold** (verb) – give (a verdict/judgement).
- ❖ **imminent** (adjective) – close/near, about to happen, approaching/impending.
- ❖ **on merit** (phrase) – concerning inherent/fundamental quality of something instead of other external factors.
- ❖ **interim** (adjective) – provisional, transitional, temporary.
- ❖ **exception** (noun) – anomaly, irregularity, special case, departure.

- ❖ **contemplate** (verb) – look at, view, regard, consider.
- ❖ **unprecedented** (adjective) – not done or experienced before.
- ❖ **unheard** (adjective) – uncommon, unusual, unfamiliar, unknown.
- ❖ **stymie** (verb) – prevent, stop, hamper, thwart, impede, hinder.
- ❖ **more so** (phrase) – to a greater degree; to a greater extent.
- ❖ **vires plural of vis** (noun) – Latin word meaning power, force, strength.
- ❖ **adjudicate** (verb) – arbitrate, judge, decide, settle, resolve.
- ❖ **puzzle** (verb) – perplex, confuse, bewilder/mystify.
- ❖ **yield to** (verb) – agree to, comply with, conform to, go along with.
- ❖ **summoning** (noun) – calling, ordering, demanding (someone to be present).
- ❖ **commencement** (noun) – beginning, start.
- ❖ **avert** (verb) – prevent, stop, avoid.
- ❖ **with/in regard to** (phrase) – in respect of, concerning, with reference to, in connection with.
- ❖ **confrontation** (noun) – conflict, scuffle, face-off.
- ❖ **deadlock** (noun) – stalemate, impasse, checkmate/stand-off.
- ❖ **underscore** (verb) – underline, emphasize, highlight.
- ❖ **comprehend** (verb) – understand, realize, fathom.
- ❖ **ferocity** (noun) – intensity, severity, strength.
- ❖ **adversarial** (adjective) – involving conflict or opposition.
- ❖ **potential** (noun) – possibilities, potentiality, capability.
- ❖ **politico-constitutional** (adjective) – relating to something governed with both political views and established/fundamental principles.
- ❖ **say** (noun) – authority, voice, sway.
- ❖ **fraught with** (adjective) – full of, filled with, loaded with.
- ❖ **presuppose** (verb) – require, think, imply, assume, consider.
- ❖ **executive power** (noun) – the general power to carry out all the functions (lawmaking & etc) of a government in a state.
- ❖ **vest in** (verb) – confer on, grant to, give to.
- ❖ **assign** (verb) – allocate, allot, give, charge/entrust with.
- ❖ **discretion** (noun) – choice, option, preference, disposition.
- ❖ **dissolve** (verb) – disband, disestablish, dismiss.
- ❖ **reaffirm** (verb) – assert, state, assure again strongly.
- ❖ **prorogue** (verb) – to postpone/terminate/suspend a session of a parliament without dissolving it.
- ❖ **aid and advice** (phrase) – real authority to take decisions lie in the elected government. This is the meaning of ‘aid and advice’. Titular head (LG) has to act in accordance to aid and advice. (Courtesy: **The Hindu**)
- ❖ **discretionary** (adjective) – optional, voluntary, non-mandatory, up to the individual.
- ❖ **discretionary power** (noun) – a power that a person can use if that person thinks that it is suitable given the situation and circumstances.
- ❖ **bound to** (adjective) – obligated, obliged, compelled, required.
- ❖ **conduct** (noun) – organization, handling, carrying out.
- ❖ **confidence motion/trust vote** (noun) – a confidence motion, or a vote of confidence, or a trust vote, is sought by the government in power on the floor of the House in order to prove the majority.
- ❖ **amply** (adverb) – sufficiently, satisfactorily, (more than) enough.
- ❖ **rule of law** (phrase) – it is described as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.
- ❖ **in force** (phrase) – in effect, in action, operational, effective.
- ❖ **antithetical** (adjective) – directly opposed to, contrary to, conflicting with.
- ❖ **integrity** (noun) – honesty, uprightness, probity, morality, principles/ethics.
- ❖ **collation** (noun) – an act of comparing, analyzing, weighing against (two or more sources of information).
- ❖ **scrutiny** (noun) – observation, inspection, examination.
- ❖ **bureaucracy** (noun) – officials (in the administration, government, the establishment) as a group.
- ❖ **constrain** (verb) – restrict, limit, restrain.
- ❖ **overrule** (verb) – cancel, reverse, rescind, repeal.
- ❖ **precedent** (noun) – model, example, previous example/instance, prior instance.
- ❖ **lofty** (adjective) – noble, high, grand, worthy