

A TEST FOR JUDICIAL REVIEW IN INDIA

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

The highest court in the U.K., earlier this month, found that the actions of Prime Minister Boris Johnson to prorogue Parliament were unlawful. The matter had come to be heard before a panel of 11 Justices, the permitted maximum quota of serving Justices, of the Supreme Court. The verdict had the effect of quashing the Queen's order to prorogue Parliament on the advice of the Prime Minister. By doing so, the U.K. Supreme Court asserted its majesty in the constitutional framework and functioned as the true sentinel on the qui vive.

As legal ramifications of this decision ripple through common law countries and constitutional democracies, what is equally startling is the time taken by the country's apex court to hold and conclude these proceedings.

It was known that the Boris Johnson-led government had promised to make Britain leave the European Union by October 31, even if that meant an exit without a deal. The suspicion around actions of the government grew when Mr. Johnson advised the Queen to prorogue Parliament for it to reconvene on October 14. The process was widely perceived to be a sharp and calculated move by the government to conclude the Brexit process with minimal parliamentary scrutiny.

This triggered a legal challenge culminating with the Scottish Court of Session finding that the Prime Minister had misled the Queen with regard to the prorogation of Parliament. Simultaneously, the matter was heard by the High Court of England and Wales, which ruled that the prerogative powers of the government were non-justiciable. These conflicting decisions were handed down on September 11. The appeals emanating from these two courts were heard by the Supreme Court between September 17 and September 19 and the judgment was delivered on September 24. The entire judicial approach, in dealing with a matter concerning the "fundamentals of democracy", underlines the effectiveness of the judicial review process when conducted in a timely manner.

The last parliamentary session in the United Kingdom, which began in June 2017 and lasted more than 340 days, was one of the longest in recent history. The government justified that the prorogation was necessary under such circumstances and also for the preparation of the Queen's Speech.

Accepting these arguments, the Scottish Court of Outer House, in the first instance, dismissed the legal challenge on the grounds that this was a matter of "high policy and political judgment" and as such was non-justiciable. Allowing the appeal, the Inner House found that the advice given by Mr. Johnson, which formed the basis for the Queen's order, was justiciable and further, declared it to be unlawful. Upholding this judgment, the Supreme Court confirmed that the prorogation was "unlawful because it had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification." In other countries following the Westminster system of government, this decision should naturally lead to increased introspection of executive actions and provide a boost to due parliamentary processes.

Closer home, there have been at least two key executive actions this year that have undermined parliamentary processes: Reservation for Economically Weaker Sections and the Bills passed around Jammu and Kashmir (J&K). The Constitutional (One Hundred and Third) Amendment

Act 2019 providing reservation for Economically Weaker Sections was brought for consideration of Parliament in less than 48 hours from the time the decision was taken by the Centre. By doing so, the government ensured that there was insufficient time for Parliament scrutiny. The Bills around J&K also suffered from a similar defect.

The Monsoon Session of Parliament was originally scheduled to end on July 26 but was extended to August 7 by the government. On August 5, the Jammu and Kashmir Reservation (Second Amendment) Bill, 2019 was suddenly introduced to the 'Parliamentary List of Business'. When the Rajya Sabha convened, Home Minister Amit Shah, at 11.15 a.m., moved the Statutory Resolution proposing to nullify all clauses in Article 370 apart from Clause(1). Copies of the Bill and the Resolution were not provided to MPs till 11.30 a.m.

The conventional practice is that legislative documents are provided at least a few days before they are tabled. This is done for the MPs understand the contents of the legislation, seek views and formulate their positions better.

The manner in which both these Bills were introduced in Parliament was also in direct violation of the Rules of Procedure and Conduct of Business. In Rajya Sabha, specifically, Rule 69 talks about 'Motions after Introduction of Bills' and 'Scope of Debate'. According to the proviso of Rule 69, there is discretion given to the Chairman in exceptional situations. But, every discretionary power does require that the Chairman must exercise it judiciously and with proper application of mind. There has been no cogent or detailed explanation given by those presiding our Houses of Parliament as to why the government has been allowed to flout parliamentary rules and convention on more than one occasion.

Such actions of governments of Mr. Johnson and Prime Minister Narendra Modi have revealed a complete disregard for established parliamentary processes. This has placed democratic institutions in the peril of being weakened. While the courts in the United Kingdom have made their determinations on these issues, there is sufficient material for Indian courts to assess whether executive actions have indeed undermined parliamentary processes. How the court responds to this challenge will determine the majesty of the judicial review process in India.

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