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Relevant for: Indian Polity | Topic: Comparison of Indian Constitutional System with that of other Countries - Parliamentary & Presidential Systems of Governance

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The United Kingdom Supreme Court, in a slender but significant judgment, decided that the prorogation of parliament by the Queen of England, acting on the advice of the Privy Council, was unlawful on the grounds of parliamentary sovereignty and democratic accountability.

It historically held the action was so patently unlawful that “when the Royal Commissioners walked into the House of Lords it was as if they walked in with a blank sheet of paper”. This unanimous judgment of all 11 justices (the twelfth was not empanelled to avoid the casting vote of the chief justice for which apparently the Constitutional Reform Act 2005, makes no provision).

The situation before the Court was pregnant with the politics of power but it, like the Indian counterpart, focussed merely on constitutionality of the prime minister’s action of prorogation of parliament in mid-session. This was truly a Kesavananda Bharati moment for the British court. But unlike the full Indian court, there was no riot of concurring and dissenting opinions.

Written in elegant and firm language, and accessible to all, the judgment is very brief (71 paragraphs and 24 pages and heard only for three days). The judicial courage, craft, and contention have a common core in India and UK — judicial review has its basis primarily in safeguarding people’s basic rights but in the Indian context, the end is achieved by a prolixity of judicial opinions addressed to multiple constituencies and the high art of speaking to the future.

May be, judicial verbosity emanates in India from the verbosity of the written Constitution itself? Or, each justice values the freedom to write, to concur as well dissent? Or still some are anxious to attain judicial immortality and be remembered by posterity with pride? Perhaps, the ancient Hindu law tradition of nibandkaras (essayists) reincarnates law-giving in the form of an erudite discourse. Different judicial styles reveal both the language of power and the power of language — a subject worthy of study by law and sociolinguistics.

The UK Supreme Court has available to it two diametrically opposed readings. The first was the model of judicial self-restraint or accommodation with other institutions of co-governance; in effect, to treat the questions raised as the pursuit of politics by other means. The second was to check the political executive by insisting on the basic principles of the common law, which protect parliamentary sovereignty. It adopted the latter course saying that although the “United Kingdom does not have a single document entitled ‘The Constitution’, it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice”. Though not codified, “it has developed pragmatically, and remains sufficiently flexible to be capable of further development” and it “includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles”.

The principle of judicial duty stands reiterated: “… the courts have the responsibility of upholding the values and principles of our constitution and making them effective: And it is their particular

responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits."

The courts "cannot shirk that responsibility merely on the ground that the question raised is political in tone or context". The judicial duty then lies in the discovery of the first principles of constitutional law, which regulate the application of constitutional discipline over the uses of political power. I do not think that the Indian Supreme Court's jurisprudence, and its demosprudential co-governance of the nation, is substantially different in result, though the contexts vary enormously.

However, the British Supreme Court does not confine the sway of such principles merely to the "protection of individual rights", but includes "principles concerning the conduct of public bodies and the relationships between them". These principles are "a concomitant of parliamentary sovereignty". Accordingly, the "power to prorogue cannot be unlimited". Indeed, no power is, at least in a constitutional democracy.

The Court boldly faces the question: "How, then, is the limit upon the power to prorogue to be defined, so as to make it compatible with the principle of parliamentary sovereignty?" It dexterously links the doctrine of parliamentary sovereignty with democratic accountability to people at large: "Ministers are accountable to parliament through such mechanisms as their duty to answer parliamentary questions and to appear before parliamentary committees, and through parliamentary scrutiny of the delegated legislation which ministers make.

By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power".

And in the present case, judicial duty consists in applying some "legal limits" because a mere executive fiat proroguing parliament runs "the greater …risk that responsible government may be replaced by unaccountable government …the antithesis of the democratic model". It was precisely this fear of limitless executive power that led the apex court in India to prescribe and develop the principle of the basic structure and essential features of the Constitution.

Neither the monarch, nor the prime minister, may insulate themselves from parliamentary sovereignty and democratic accountability. Considerable judicial regard for "the responsibilities and experience of the prime minister" does not overcome the "court's responsibility to determine whether the prime minister has remained within the legal limits of the power". The Court will intervene if "the consequences are sufficiently serious"; far from being a mere judicial say-so, it has to rest on the discovery and affirmation of sound basic principles of constitutional good governance.

Of course, no judicial decision is beyond socially responsible critique. But in asking parliament to finally decide the terms and conditions of Brexit, the British court has valuably upheld the principles of democratic accountability of a sovereign parliament.

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