**Parliament and judicial review**

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The Supreme Court’s decision (short-order) whereby the deputy speaker’s ruling of April 8, 2022 on a point of order rejecting a no-confidence motion against the former prime minister Imran Khan was declared unconstitutional has initiated a debate across society, more particularly amongst the legal fraternity.

The downside of entering a political thicket is that applause and criticism is largely based on party affiliations or personal likes and dislikes with few exceptions discussing the constitutional principles involved. The SC has shown restraint and maturity by not suppressing dissent following Lord Atkins’ famous dictum that justice is not a cloistered virtue. Justice should be allowed to suffer scrutiny, and be respectful, even though outspoken comments of the ordinary person. It is in that background that an attempt is made to examine the constitutional principles involved in the whole matter to give a sense to a misdirected debate.

In the age of classical parliamentary democracy, A V Dicey axiomatically stated two interlinked principles of parliamentary sovereignty. Parliament, thus defined (Queen in Parliament), said A V Dicey, has the right under the English law to make and unmake laws. The second concomitant principle was that no person is recognized by the laws of England to override or set aside the legislation of that parliament. This legislative sovereignty of the British parliament was achieved after a long struggle between the King and Commons and Lords as reflected in English history. As an ancillary principle to it, parliament also evolved the principle to protect itself by incorporating in Article 9 of the Bill of Rights of 1689 that the validity of any proceedings in parliament could not be called in question on the ground of irregularity of procedure. In addition to avoiding the king’s wrath, members and officers of parliament were immune from the jurisdiction of the courts. For matters relating to its membership and working, parliament was the highest tribunal of the land.

Article 69 of Pakistan’s constitution has been borrowed from Article 122 of the Indian constitution that is based on Article 41 of the Government of India Act, 1935. A long series of cases, from Stockdale v Hansard (1839) to Hamilton v Al-Fayed (1999), interpreted these provisions in different sets of facts. The earliest case from Indian jurisdiction is of the Federal Court of India in Ymayal v Lakshmi (1945). The law in relation to privileges and immunity of parliament has been summed up by the constitution bench in Ramdas Athhwale (2010). These provisions confer privilege and immunity upon the members and officers of parliament.

The above principle was applied to the former colonies with a modification in as much as in the interest of the Empire; the Crown through its representative (governor-general) could override legislative bodies as provided in the constitution. After Independence, things fundamentally changed. It is the written constitution that is now supreme. The powers of all branches of the government are subject to the constitution. Moreover, with the incorporation of fundamental rights and conferment of jurisdiction upon courts to enforce those rights and by prescribing powers of various branches of the government, the courts assumed the power of judicial review on the principles of Marbury v Madison.

Article 8 of the constitution, read with Article 198(4) and Article 199, conferred jurisdiction upon the high courts and the Supreme Court to enforce fundamentals and determine the constitutionality of the actions of the executive, statutory agencies and other constitutional functionaries and bodies. But unlike the German and continental constitutional courts that had power of constitutional review, courts in other jurisdictions evolved doctrines to expand their judicial power by judicially reviewing legislation and constitutional amendments (doctrines of basic structure and implied powers).

The core issue: is the ruling of the deputy speaker on a point of order, rejecting a motion of no-confidence, protected under Article 69 of the constitution on the ground that the matter relates to proceedings in parliament? Without going into the semantics and technicalities, an alternate argument is put forward. The bar under Article 69 is not absolute. Moreover, it does not apply to the exercise of powers of the National Assembly in relation to vote of no-confidence under Article 95 of the constitution for the reasons set out here.

It has been held that matters relating to the defection and disqualification of members or sending of reference to the Election Commission are adjudicatory in nature and are thus not immune from judicial review. Impeachment proceedings in parliament against different functionaries of the state are also subject to judicial review.

The nature of the ‘business’ of a motion of no-confidence under Article 95 and the resultant resolution under Article 95(4) relate to another important principle of the constitution. This business involves the cabinet system of government and responsible government. An executive remains in power so long as s/he enjoys the support of the majority. The votes of confidence and no-confidence are two manifestations of the principles of responsible government which are not a part of the legislative business of Parliament.

Unlike Article 69, which uses the expression of ‘Majlis-e-Shoora’ (Parliament), Article 95 vests power in the National Assembly with whose total majority’s vote the prime minister is elected under Article 91(4). The power to remove the prime minister after the passing of a resolution by the majority of the total membership of the National Assembly under Article 95(4) falls within executive business. A resolution of a legislative house is not legislative business.

The policy argument: apart from the facts of the present matter, where ill advice and presentation spoilt a good case in and outside the National Assembly, in all likelihood a constitutional mischief may be created by a sitting executive by getting the motion for no-confidence rejected by obtaining a prior ruling of chair on a point of order which could enormously undermine several constitutional principles. But in order to stop these mischiefs, the Court must have the jurisdiction under the constitution. It would be noted that the speakers’ powers under Article 73 in relation to the money bill have been judicially reviewed both in India (2019) and Pakistan. Similarly, the speaker’s acts under Article 63(2) were also judicially reviewed. In a case from the Solomon Islands (1990), the court held that if the ruling interfered with a constitutional right then the court had the jurisdiction in the matter. The case related to a no-confidence motion.

The Supreme Court assumed jurisdiction in this case under Article 184(3) of the constitution. The matter was of great public importance but it remains to be seen how any fundamental right was violated. The jurisprudence evolved by the Supreme Court however shows that the court can judicially review a matter if it violates any of the provisions of the constitution. Constitutional principles contained in the constitution have meaning only if people are willing to abide by the constitution in its letter and spirit.

However, in the bid for power by political stakeholders, contempt for basic rules has increased with the passage of time due to ineffective accountability that includes judicial review and lack of social condemnation of the corrupt. These unconstitutional practices, including interference in the working of the constitution and trading of loyalties, will keep undermining democracy and parliament unless a democratic culture takes roots. The finest constitution will not work for bad people and fine people will manage their affairs even without written rules.

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