THE TUMBLING INTERACTIONS BETWEEN ELECTED AND JUDICIARY AROUND THE GLOBE

By Varsha Gulaya[1]

The 21st century has brought forth with it some complex challenges. The most prominent one being the issue of sovereignty of elected ones versus supremacy of judiciary. While the doctrine of separation of power demands that both the institutions must work harmoniously, one finds various instances around the world where they have come in some form of direct or indirect conflict.

Firstly, the legality of UK's PM Boris Johnson decision to advice the Queen to prorogue the Parliament came before the Supreme Court in appeal. And, on 24 September 2019, the Eleven Justice in R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland ([2019] UKSC 41) unanimously ruled, *"50. ... A decision to prorogue Parliament… will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions…"*. Further it legitimised the power of the court to intervene if any decision has serious effects by observing *"39…. The Courts have the responsibility of upholding ... Constitution ... it its their job 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…"*.

In response the ruling, the PM Johnson described the judgment as "unusual" and said, *"…The prerogative of prorogation has been used for centuries without this kind of challenge"*. This aptly sums up that the UK PM had to unwillingly accept the decision of the Supreme Court.

Secondly, in USA it seems President Trump is going to have a tough time reading the Supreme Court Trump et al. v. Mazars, USA, LLP et al judgment that declares, *"Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding."* and reprimanding the court below for disregarding the principle of separation power. This is a serious backlash to the President's protective take on withholding his financial information from public's eye.

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Thirdly, in Brazil the fiasco brews as Supreme Court gave a leeway to conduct an investigation into the involvement of PM Bolsanaro in removal of head of Federal Police. This comes as a result of statement made by Mr. Moro, then Justice Minister.

Later, in May 2020, the Brazilian Supreme Court released a video of the PM Bolsanaro where he can be seen pledging to protect his family. Amusingly, this release led to crashing of the Supreme Court website.

Adding to the turmoil, in June, the PM responded by alleging that the Supreme Court is "committing abuses" and declaring that it was time to put "everything in its rightful place" while taking part in right wing protests. And, one cannot forget how Education Minister Abraham Weintraub (who has now resigned) openly stated that the Supreme Court judges should be locked up in jail. Interestingly, after few days, the Supreme Court can be seen ordering PM Bolsonaro to wear masks as per rules and draping itself with the power to investigate into allegation against "office of hate" which appears to have used fake news to side-line the opponents.

Fourthly, in Israel as the top Court of the nation was hearing the case dealing with the coalition deal of the government, the PM Netanyahu pressured the Supreme Court to not to hinder the coalition plan for the government making or to give way to election once again. This was followed by an unanimous decision by the Supreme Court permitting PM Netanyahu to form the government.

Fifthly, the state of scuffle between the Indian legislature and Supreme Court of India is not new. Till now the legislature has opted for indirect measures to overture the decisions of the Court. While the Court assumes its role of protecting the constitution from any institutional overreach at its own sweet will. From the issue of procedure of judicial appointments where the Supreme Court invalidated the NJAC Act passed by the legislature (Supreme Court Advocates on Record Association and others v. Union of India, 16 October 2015) to the bringing forth of the amendments in SC & ST (Atrocities Act) to nullify the ruling of the Court in Dr. Subhash Kashinath Mahajan v. The state of Maharashtra, (2018) 6 SCC 454 concerning the anticipatory bail. However, the amendments were finally accepted by the Court.

Recently, in the Indian Parliament the Constitution (127th Amendment) Bill 2021 and the Tribunals Reforms Bill 2021 were tabled. While the former was brought forth to nullify the effect of the Supreme Court's judgment in Dr. Jaishri Laxmanrao Patil v. The Chief Minister & ors. (May 5, 2021) (popularly known as Maratha quota case) which ruled that the States do

not have the capacity to determine socially and economically backwards classes after Constitutional 102nd Amendment Act and the latter was introduced to eclipse the Madras Bar Association v. Union of India (July 14, 2021) judgment which invalidated provisions pertaining to minimum age qualification, selection process, term, etc of members of Tribunals.

Ironically, despite the established factum that both wings (i.e. legislature and judiciary) vows to protect the Constitution and work for public welfare, they battle with their ideologies as weapons in their hand.

Two scenarios emerge:

Firstly, the high-handed approach of the elected most of the times leaves the judiciary with two alternatives, that is either to take a defensive approach (which mostly gets criticised in the name judicial overreach) or to mutely agree. It needs to be understood that the "elected" ones cannot escape unscathed if they attempt to mould the Constitution on their own terms without any interference by the judiciary.

And secondly, judiciary till now has not come up with any formula or test to underline the scope of interference. Resultantly, the decisions vary, leaving people in dilemma. The most common argument given on behalf of judiciary is "it depends on the facts and circumstances of a case" but one cannot lose sight of need for consistency by courts in this regard.

This century will undoubtedly witness the standoff between the two institutions around the globe as it proceeds.