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India's Supreme Court and High Courts: Imbalance in the Power Equation

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The High Courts no longer have the powers that were accorded to them in the Constitution, their authority having been whittled away by the Supreme Court. It is time for a reform that introduces a balanced and effective three-tier higher judiciary.

If we look at the original intent of the Constitution, the Supreme Court was the apex body, above the High Courts. The difference from present times is that the High Courts were not considered subordinate to Delhi. They had their full range of jurisdiction and powers over every class of disputes. They exercised full appellate and supervisory power over all lower courts. Their writ jurisdiction was wider than that of the Supreme Court. Some exercised original jurisdiction in full measure, courtesy Queen Victoria's charters, others had less. But within their territories they were the last word. They were self-sufficient worlds, with their traditions and pride and self-esteem, and it was no mean honour to become a High Court judge and retire as one.

In those days legendary chief justices sat in the High Courts. Some were better known than the ones in Delhi. M.C. Chagla presided over the Bombay High Court from 1947 to 1958, becoming an institution nearly as towering as the one he headed. P.V. Rajamannar similarly reigned supreme at the Madras High Court from 1948 to 1961, where he was regarded as the embodiment of justice. Indeed, the First Court in Bombay is still called Chagla's court and the wide-backed regal seat in the First Court in Madras is still called Rajamannar's chair. Both Chagla and Rajamannar were invited to come to the Supreme Court. Both declined; they were masters of their continents, their word was held as law, and profitless they may have thought to get into a group of eight operating from a dull looking building in Delhi, which paled before their magnificent judicial palaces of grey stone at Bombay and red brick at Madras.

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At the time, giants of the bar stayed and practised where their roots were, notable examples being Jamshetji Kanga at Bombay and V.K. Thiruvenkatachari at Madras. Eminent lawyers practising in the Supreme Court like Soli Sorabjee appeared in many High Courts and enjoyed doing so. They got the flavour of the pan-Indian judiciary at work, would size up judges, listen to accounts of other judges good or bad, meet up with lawyer colleagues at that court and get an idea from them what was happening there. For them High Courts were important bastions of judicial power. Sorabjee himself was a proud product of the hugely powerful and influential Bombay High Court, which has prided itself as being one of the best in the country (and for a Bombaywallah, undoubtedly *the* best, from which the Supreme Court could do well to take some lessons from).

In a federal country with multiple state High Courts, it was necessary to have a superior court to sort out differences in opinion between them, as also to provide for an authoritative opinion on important questions of law, and for disputes between one state and another or between the centre and a state. These are obvious needs in a federalist structure. Look closely at the Constitution and this is exactly the role assigned to the Supreme Court.

Inversion of constitutional filters

For a matter to be taken in appeal to the Supreme Court, the High Court was the certifying authority. Articles 133 and 134A provided for a certificate of appeal to be given by the High Court to enable appeal to the Supreme Court. The certification was to be twofold: (a) that the case involved a substantial question of law of general importance and (b) that in the opinion of the High Court the said question needed to be decided by the Supreme Court.

Note that it was not just that the question of law was of importance. It was also that it needed to be decided by the apex court. The latter would arise if the law was not clear and interpretation was needed, if the precedents were mixed, or High Courts served up conflicting decisions or the like.

The focus was on the state of the law and the intent was to obtain clarity and certainty on the law. The focus was not on the facts of the case on hand or its stakes, nor indeed if the law had been properly applied in the case. It was about whether the law needed

examination and clarification and restatement. It was not the petitioner's prerogative to knock at Delhi's doors, or indeed the norm for the Supreme Court to call up the case, but the job of the High Court, in the interest of stability and certainty in the state of the law to carefully examine the case and grant the required certificate. If this state of affairs had remained, the numbers of cases entering the Supreme Court would be calibrated by number and with reason, and appellate scrutiny could have proceeded in orderly fashion.

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The Constitution, however, has Article 136; which empowers the Supreme Court to grant special leave to appeal against any judgement, decree, or order of any court or tribunal in any cause or matter. It was meant for extremely sparing use, and inserted to provide extraordinary remedy against aberrant and gross failure of justice. However the emergency valve has become a flood gate, which has been raised and kept open all the time to permit an unending cascade of monumental proportions of all kinds of cases, from bail to dishonoured cheques to evicting tenants.

Virtually every order, interim or final, of a court or tribunal where the losing party is aggrieved and possessed of money to pay more legal bills becomes the subject of a Special Leave Petition before the Supreme Court. They are heard on Mondays and Fridays. Each bench has a stack of about 70 of these voluminous files, and judges spend much time the day before reading them. Routinely they discard 95% of them as being unfit for admission, but that takes the whole day. The point is that they spend more than half their total time on this exercise of sorting out dismissals, separating the little wheat from the gigantic chaff. It is like a farmer spending half his time just in selecting the seed for the field, and has that much less time for ploughing, tilling the soil and growing his crop.

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At the highest level of the judicial system, the sights should be on the important questions of the law which need to be decided, stated, restated, refined, on doctrines which need to be modified or discarded, on pristine and germinal questions, on the cases which truly matter, on jurisprudence and governance. The highest court should not be dragged down to the mass of individual cases with their complicated fact scenarios and their sad interminable journeys through court corridors. Article 136 is not meant to ensure justice in each individual case, but is a corrective capacity to enable scrutiny in the extreme case where gross injustice demands interference.

The business of the Supreme Court is not to ensure justice in every case. That is the business of the High Court. The business of the Supreme Court is to hear the cases which only it can hear as a federal court, and focus on the important cases, and deal with the important questions of law which need to be settled. Lose sight of this and you have lost the balance, ending up as a court of last gamble. It is one of the wonders of our jurisprudence that such a breach which hampers the efficient functioning of the top court has never been plugged.

The inversion of the use of the constitutional provisions has serious consequences. The constitutional scheme of a careful filter to screen cases going to the top court has been completely upstaged. No one bothers now to seek the certificate of appeal from the High Courts. Everyone now rushes to lodge the petition for special leave. A system designed to handle a trickle now has to deal with daily floods.

One serious consequence is the relegation of the High Courts. They have been reduced to being just one more stage short of the final rung of the ladder. It is now not for them to weigh in on and decide which of their decisions need further examination. Instead virtually every one of their decisions of any value result in a further round of outpourings of unrequited attempts to secure victory.

Inevitably, this constant correction exercised on so many cases also results in a supervisory eye over the functioning of the High Court. A crucial institutional balance between the Supreme and High Courts, both high constitutional courts, has been upset thus. The former has got more supreme, and the latter less high.

Appointment of judges

There is more. Take the scheme of appointment of judges to the Supreme Court and High Courts. This is as important in the constitutional scheme as any other provision, and indeed for the judiciary it is a bedrock provision. The Constitution provided for

appointment of judges of the Supreme Court to be made by the president after "consultation" with the Chief Justice of India (CJI). That was the method followed for more than 40 years. A similar provision was made for judges of the High Court. The First Judges case in 1981 affirmed this.

By its decisions in the Second and Third Judges cases (1993 and 1998) the Supreme Court brought about considerable change in the process, read "consultation" to mean 'concurrence', gave the last word to a collegium of the CJI and his seniormost four colleagues, and reduced the government to a consultee in the process. Parliament and state assemblies tried to rectify the situation by unanimously passing the National Judicial Appointments Commission Act in 2015. The Act it did not seek a return to the pre-collegium days of appointment by the executive, Instead it contemplated a body with three judges, the law minister, and two "eminent persons." The Supreme Court struck down this via media method and thus continued the collegium. [1]

There is an aspect here concerning the High Courts. As per Article 124, the President could, while appointing judges of the Supreme Court, include within his circle of consultees judges of the High Court. This provision has been completely lost sight of now. They do not even figure in the deliberations of the collegium of the Supreme Court. The role of the chief justices and other senior judges of the High Courts is confined to being the originator of proposals from the state in question for High Court judges. At the central decision-making stage for choosing a Supreme Court judge, theirs is an unsought opinion. Of more value are the views of judges of the Supreme Court who have originated from that High Court, even if not part of the collegium.

Worsening hierarchies

The collegium did not just upset the balance between the government and the Supreme Court, it also had the effect of accentuating the hierarchic personal equation between the judges of the Supreme Court and the High Courts. The reason is simple. Remember we are dealing with human beings. If a set of people in Delhi lay down the law in important cases, the respect you pay them is for being the senior mandarins in the business.

But if it is this set who are going to decide if you are going to be appointed to be chief justice of a High Court, or get elevated to the Supreme Court, or receive a transfer as a punishment; then your relationship with them is going to be a lot different. Supreme Court judges, especially members of the collegium, now receive deference crossing into the obsequious. They have become a lot more supreme, and the judges of the High Court much less high.

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A chief justice of a High Court is a senior personage in the judicial ranks. If they are transferred without seeming cause, that does damage to the individual. Worse, it bring down the institutional credit of the office.

In recent times such transfers have taken place where the Bar is left wondering why. Speculation therefore is rife about reasons which on examination do not pass the test. Just one court, the Madras High Court – one of the largest in the country – has lost two chief justices, Vijaya Tahilramani and Sanjib Banerjee. Both were sent to Meghalaya, one of the smallest High Courts, for opaque reasons.

If chief justices can be treated thus, they cannot hold their own. They will look to and become guided and influenced by suggestions from Supreme Court judges, which will acquire the nature of diktats. These could pertain to the running of the court and to recommending particular names for appointment as judges. It is uncomfortable to have the feeling that on refusal, the judge can be bundled out. It is an undesirable feeling that on agreeing, the judge can be transported up, even if the persons asked to be recommended are not of desirable calibre.

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Another indicator of levels is the language used to refer to members of the other class. If obsequious behaviour flows in the direction of Supreme Court judges, intemperate language flows the other way. Earlier when the Supreme Court wanted a High Court to take up a case early or comply with any other requirement it would be couched in the form of a request to consider adopting a particular

course of action. The tone was respectful. Now directions to High Courts have started to come in.

Similarly, criticism of High Court judgments have become more stringent. Justice Arun Mishra took to naming to shame a Kerala High Court judge in open court for daring to intervene in a particular case. High Court judges have been upbraided for their deficiency in the use of the English language. (Here one must admit that some of their efforts make for rather sad reading, which is not to say that all Supreme Court judges are models of judicial craftsmanship.)

There is a disinclination to leave important or notable cases with the High Court. Indeed sans the need to relook the law, there seems to be the need that the Supreme Court should be the last word on anything of note. That not only opens the gates to the floods, it means that the High Court becomes just one stage in the passage of the case, useful to crystallise the issues to some extent but not functioning as the final and absolute determinant. Again a reduction of status.

Another huge profile uplifter for the Supreme Court, especially for public gaze, is public interest cases. These flow in on virtually all aspects of governance and administration, law and policy. All you have to do is to look at a week's newspapers to get the flavour of the depth and range of issues coming up to the Supreme Court, and being entertained by it. The more important the issue, the more the Supreme Court takes seisin. High Courts will then back off. If a matter is before more than one High Court that is excellent reason for transfer to Supreme Court. If a matter has national ramifications, then the Supreme Court is seen to be the more appropriate forum. Even if a High Court rules on a public interest litigation (PIL) case, appeals are entertained by the Supreme Court. All in all, such cases not only give the Supreme Court ascendancy against government; they also increase the profile gap between the Supreme Court and High Courts.

Tribunalisation of the judiciary

Yet another serious aspect is the withdrawal of important jurisdictions and cases from the High Court's docket. Corporate matters have gone to the Company Law Tribunals. Customs and excise cases go to CESTAT Tribunal. Direct taxation goes to the Income Tax Tribunals. Telecom disputes have their own tribunal. Consumer disputes have their special forums at the state and national levels. Armed Forces cases have their special tribunal. All these have been hived off from the High Court docket. However, appeals from these tribunals go to the Supreme Court which thus retains its hold over these cases.

High Courts in fact now only have writ petitions in a restricted field and civil and criminal disputes, a fraction of the work they used to enjoy before tribunalisation of the judiciary started. Much of the work that has gone is paying work, and that leaves the ordinary practitioner in the High Court at a loss. And it leaves its judges doing no part of branches of core legal cases.

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The undermining of the High Court is going to have serious consequences. Traditions of the Bar are in the repository of the High Courts. Those include not only standards of advocacy and adherence to law but also the stuff of stout independence of the Bar and the

Bench. Hark back to the days of the Emergency and recall that it was the High Courts that stood firm in the defence of liberty, and the Supreme Court that gave way in the infamous *ADM Jabalpur vs Shukla*.

We cannot expect tribunals to have the flavour and the legal core that High Courts have. They are compromised in this respect by the presence of non-judicial members functioning in judicial capacity, and by the presence of non-lawyers functioning in advocacy roles. This weakening of the High Courts will reflect in the independence of the judiciary and the strength of the legal system to deliver justice. It has already done so. The tribunals are a far cry from justice delivery improvements, and we are wasting legal talent of judges and lawyers in the High Courts.

Need for reform

We have created an overloaded and cumbersome Supreme Court with appellate streams from all directions, a PIL coverage which covers every important subject under the sun, and overworked judges who can do justice to very few cases. This has resulted in influential cases being handled by benches of two or three judges comprised of one senior judge with the others being newcomers, and the former ruling the roost, a most undesirable bench strength and composition. Major constitutional issues go abegging for consideration and several kept on the backburner till they reach post-mortem status.

The need for reform is much in the air. The creation of an intermediate court of appeal will undoubtedly alleviate some of the problems. It will allow for a better final appellate scrutiny and disposal, and enable a lean and efficient Supreme Court which sits only for the most important cases with adequate bench strength.

In the ultimate analysis, full functioning of High Courts by putting an end to most tribunals, a geographically spread out court of appeal, and a Supreme Court for deep deliberation in select matters make for a far better balanced judiciary. At the moment we lack all three.

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Footnotes:

1 While this is a rewrite of the constitutional intent, it is also true that the convention for many years was for the President (read the government) to go by the views of the CJI till that was rudely upset by Mrs Gandhi in her 1973 supercession of three judges to appoint A N Ray as the head. The root reason behind the Court's insistence on the collegium is the fear of losing an independent judiciary at the hands of a powerful executive which is bent on placing its chosen men and women on the Bench. The crucial relevance of this reason must also be viewed against the backdrop of writ litigation in India where the Court is the arbiter of a huge number of contests where the citizen alleges arbitrary and illegal action by the State including denial of the fundamental rights essential to a democracy. Perhaps the solution may lie in creating a body with primacy to judges, but also a seat for a Bar representative. This would bring an important viewpoint to the deliberations since lawyers well know the merits and demerits of prospective candidates. More, it would ally the Bar with the Bench in the selection process and that would present the executive with a very formidable defence team not easy to mount an attack on. And with some demonstration by the executive of good faith, perhaps it too can join the table and with that we can put the problem behind us.