
STATUS OF HIGH COURTS VIS-À-VIS THE SUPREME COURT OF INDIA IN THE JUDICIAL SETUP: ARE HIGH COURTS SUBORDINATE TO THE SUPREME COURT?

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ABSTRACT

The debate regarding the superiority of the Supreme Court of India and whether High Courts are subordinate to it still persists. The questions about the intricate constitutional text hauls great minds till date that whether it has provided the supreme court the power of superiority over the high courts. The debate ones again ignited when Hon'ble Justice Chelameswar made remarks at a book launching ceremony that high courts in India are not subordinate to the supreme court although the Supreme Court intervenes to a great extent in administration as well as appointment procedures of judges of high courts. The text of the constitution presents a blurry picture. It neither specifically states nor denies the superiority of Supreme Court over the High Courts. Through various judgments, the Supreme Court has categorically reiterated that High Courts are not subordinate to the Supreme Court. In terms of practicality, the Supreme Court exercises great superior powers over the high courts in terms of administrative justice which is quite opposite to the principles established through the judgments. This paper majorly delves into three major aspects. Firstly, certain articles of the constitution which depicts the position of both the entities are highlighted. Secondly, the take of the judiciary itself, the supreme court only, is presented. And thirdly, we analyze the present prevailing practices to ascertain this position. Following the concluding remarks, we float the idea that there has been indeed the supervision of the Supreme Court over the High Courts, if not constitutionally, then in practice.

Introduction

Back in 2018, the former Supreme Court judge Justice Jasti Chelameswar had stated at a launch of a book that the Supreme Court is not a superintendent court as it does not have superintendence over the High Courts but in practice, it has become superintendent.¹

Justice Chelameswar opines that The Supreme Court is not supposed to be the superintendent court, at least not according to the text of the constitution.² However, in practice, the Supreme Court exercises great deal of superintendence directly in the matters of appointment and transfer of judges and by indirectly dictating the law with respect to various aspects of administration of justice at the High Courts and subordinate courts. Justice Chelameswar was pointing towards the growing authority of the Supreme Court over the High Courts. Although, the Constitution of India does not specifically declare High Courts subordinate to the Supreme Court, but the growing role of the latter in the matters of the former is actually making it happen. The powers of Supreme Court in the matters of transfer of High Court judges and the newly formulated collegiums system is giving control of High Courts to the Supreme Court. Justice Chelameswar also stated that this is a problem whose solution must be found. The Supreme Court, being the highest appellate court in India exercises some authority over the High Courts by virtue of precedents and conventions. However, the constitution is essentially silent on this aspect. This paper thoroughly analyses the position of the high courts vis-à-vis the Supreme Court by carefully examining the precedents and the texts of the Constitution and the present prevailing practices.

Also, in several pleas before the Supreme Court, including plea by the Justice C.S. Karnan in his contempt proceedings in 2017, it has been stated that neither High Court nor their judges are subordinate to the Supreme Court emphasizing the constitutional scheme that under the same, high courts are as much independent as the Supreme Court though the orders of the

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¹ *Supreme Court Not A Superintendent Court According To Constitution: Justice Chelameswar*. Retrieved 30 June 2021, from <https://www.ndtv.com/india-news/supreme-court-not-a-superintendent-court-according-to-constitution-justice-chelameswar-1803447>

² *SC wasn't envisaged as superintendent court: Justice Chelameswar* (2021). Available at: https://www.business-standard.com/article/news-ians/sc-wasn-t-envisaged-as-superintendent-court-justice-chelameswar-118012201222_1.html (Accessed: 30 June 2021).

former could be challenged in the latter which is the court of appeal.³

Background

The Indian judiciary in its present form has evolved from the judicial system established during the colonial era. It was largely based on the Anglo-Saxon jurisprudence. Under The Royal Charter of 1661, each presidency of the company rule was given power to judge all persons belonging to the said presidency or that shall live under them in all causes, whether civil or criminal, according to the laws of this Kingdom and to execute judgment accordingly.

The next substantial development in the colonial judiciary took place in 1861 with the establishment of the High Courts at Calcutta, Madras and Bombay.⁴ These 3 were the presidency towns at that time. The high courts were established by the virtue of Indian High Courts Act, 1861⁵ passed by the British Parliament. This act consolidated the parallel legal systems of the Crown and the East India Company. These 3 high courts along with the Prayagraj High Court are regarded oldest high courts of the Indian Subcontinent. During the entire colonial era, total 8 High Courts were established all over the subcontinent.⁶ Currently, there are 25 high courts in India latest being the Telangana High Court established in 2019.⁷

The High Courts were the highest appellate courts in India until the establishment of the Federal Court of India. The Federal court was established by the virtue of the Government of India Act, 1935.⁷ Government of India Act 1935 was passed by the British Parliament and contained provisions for establishment of the Federal Court, the Reserve Bank of India, et al. This newly created court had jurisdiction to solve disputes between provinces and federal states and hear appeals against judgment of the high courts. However, the final appeal lied before the Privy Council which resided in United Kingdom.⁸

³ *HCs, their judges not subordinate to SC, says Justice Karnan in plea* (2017). Available at: <https://indianexpress.com/article/india/hcs-their-judges-not-subordinate-to-sc-says-justice-karnan-in-plea-4651534/> (Accessed: 30 June 2021).

⁴ Juhi Bhangde Ladha, *The First High Court in India*. Available at: <https://www.aironline.in/legal-articles/The+First+High+Court+in+India> (Accessed: 4 July 2021).

⁵ 24 & 25 Vict. c. 104

⁶ K. Ballabh, *A History of Indian Jurisdiction*, 2 AM. INDIAN J.2 (1976).

⁷ *Andhra Pradesh, Telangana to have separate high courts from January 1*. Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/andhra-pradesh-telangana-to-have-separate-high-courts-from-january-1/articleshow/67260748.cms?from=mdr> (Accessed: 4 July 2021).

⁸ J.P. Eddy, *India and the Privy Council: The Last Appeal*, 66L.Q.REV.206 (1950).

The Constituent Assembly of India passed the ‘Abolition of Privy Council Jurisdiction Act, 1949’⁹ to abolish the jurisdiction of the Privy Council in respect of appeals from Indian courts. Consequently, Supreme Court of India was established which became the highest appellate court in the Indian Territory and replaced the Federal Court of India.¹⁰ Currently, all appeal from High Courts lies before the Supreme Court of India.

Constitutional position of the Courts

The High Courts are the institutions much older than the Supreme Court. While High Courts exercise power and authority over the District Courts and all other judicial authorities within a state, the Supreme Court has not been provided any such power by the Constitution of India except by procedure established by law in deliverance of justice.

Supreme Court of India is a court of record.¹¹ Any aggrieved person may appeal to the Supreme Court against any judgment, order or final decree of The High Court if it is certified by The High Court that the dispute involves a substantial question of law.¹² It was observed by The Meghalaya High Court that Article 134 is not an independent article but it is ancillary to Articles 132(1), 133(1) and 134(C)(1).¹³ Moreover, in certain matters, the Supreme Court has been provided with the original jurisdiction to the exclusion of any other court.¹⁴

Article 132 of the Indian Constitution is of prime importance for the present debate. Article 132(1) of the Constitution of India reads as follows:

“132. Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases- (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under article 134A that the case involves a substantial question of law as to the interpretation of this Constitution.”

⁹ Constituent Assembly. Act 5 of 1949

¹⁰ M. Ramaswamy, *The Supreme Court of India*, 2U.W. Austl. ANN. L. REV.215 (1952).

¹¹ Article 129 of The Indian Constitution.

¹² Article 132 of Indian Constitution

¹³ Shri Dhiresh Kr. Chakraborty v. Superintendent of Police Cbi Acb (Crl. Appeal No. 14 of 2010)

¹⁴ Article 131 of Indian Constitution.

On a closer inspection, by virtue of A. 132, the Supreme Court shall be the highest appellate court only if the High Court certifies that the matter for whom appeal is sought involves a substantial question of law as to the interpretation of the Constitution.¹⁵

In practice, the litigants do not need to obtain such a certificate from the Supreme Court. The blatant use of mechanism developed by the Supreme Court under the guise of 'Public Interest Litigation' through *S.P. Gupta v Union of India*¹⁶ has facilitated the litigants to oversee this procedural requirement.

Additionally, the Constitution of India provides for yet another kind of petition that can be filed in the Supreme Court of India.¹⁷ Article 136 under which 'Special Leave Petitions' are filed has given another way to litigants to supersede the procedural requirement of seeking permission of a High Court to file an appeal in the Supreme Court against any judgment given by that High Court. Additionally, Articles 133 and 134 provides that an appeal shall lie against any judgment, decree or final order of The High Court with respect to civil and criminal matters respectively. One such condition for the appeal is if in the opinion of The High Court the said question needs to be decided by the Supreme Court.¹⁸ This clearly establishes the superiority of the Supreme Court with respect to deciding the question of law in authoritative manner.

In other words, the constitution originally made the High Courts the highest appellate authority within their jurisdiction. Going further into the deliberation, the Supreme Court was purposely established for adjudicating disputes among two or more states and between the union and state(s)¹⁹. This has also been clearly mandated by the Constitution of India in Original jurisdiction of the Supreme Court.

It is notable at this junction that the High Courts have been made the court of record similar to the Supreme Court of India.²⁰ Also, the Supreme Court of India cannot issue writ to any of the High Courts. Although it is not explicitly provided by the constitution that The Supreme Court can issue writs to any of the High Courts, the parliament, by law, confer on the supreme court power to issue writs for any purpose other than mentioned in Article 32.²¹

¹⁵ Jagat Narain, *Constitutional Changes in India -An Inquiry into the Working of the Constitution*, 17 INT'L & COMP. L. Q. 878 (1968).

¹⁶ AIR 1984 SC 802

¹⁷ English original text of the Constitution of 1949. 80 (1950), Chapter IV: The Union Judiciary.

¹⁸ Article 133(b) of Indian Constitution

¹⁹ Article 131, Constitution of India

²⁰ Article 215 of Indian Constitution

²¹ Article 139 of Indian Constitution

The Supreme Court also possesses the power of transfer any pending cases before it in case where the case substantially involving the same questions of law are pending before the supreme court and one or more high courts or before two or more high courts if the supreme court is satisfied on its own motion or on basis of an application made by the attorney-general of India or by party to any such case.²² Moreover, the supreme court is empowered to transfer any case, appeal or other proceedings before any high court to any other high court.²³

The most luminous provision of the constitution depicting the superiority of the Supreme Court is article 141 which specifically states that the law declared by the supreme court shall be binding on all courts within the territory of India. Words *all courts* clarifies that this provision does not distinguish between the high courts and other subordinate courts.

The Supreme Court has original, appellate and advisory jurisdiction.²⁴ The president may consult the supreme court in case it is likely that a question of fact or law has arisen or is likely to arise which is of such nature and of such public interest that it is essential and expedient to obtain the opinion.²⁵ As of 2021, Presidents have asked for such advice fourteen times, and the supreme court has responded with opinions in twelve.²⁶

There is no provision in the entire constitution that a governor of a particular state can obtain the opinion of the high court under similar circumstances and hence, it can be said that a high court does not have advisory jurisdiction. It is also clear that the decision of one high court holds only a persuasive value and does not create a binding precedent. On the contrary, as stated above, the decision declared by the supreme court is the law of the land and binding upon all the courts in India including high courts.²⁷

The High Court is empowered to transfer any case pending before a subordinate court either to itself or to any other court under its jurisdiction at its discretion.²⁸ Moreover, control, with respect to, including but not limited to, posting and promotion, grant of leave to persons

²² Article 139A(1) of Indian Constitution

²³ Article 139A(2) of Indian Constitution

²⁴ *Jurisdiction | SUPREME COURT OF INDIA* (2021). Available at: <https://main.sci.gov.in/jurisdiction> (Accessed: 30 June 2021).

²⁵ Article 143 of Indian Constitution

²⁶ Mary Kozlovski, *A Brief Introduction to the Indian Judicial System and Court Hierarchy*, *ALC BRIEFING PAPERS*, 5, 11 (2019).

²⁷ S. Mohammed Raiz, *"High Courts vs Union Of India": Uniformity In Law Prevails Over Territorial Fetters?*, Available at: <https://www.mondaq.com/india/trials-appeals-compensation/695284/high-courts-vs-union-of-india-uniformity-inlaw-prevails-over-territorial-fetters> (Accessed: 30 June 2021).

²⁸ Article 228 of Indian Constitution

belonging to the judicial services of a state and holding position inferior to the post of district judge is vested with the high court.²⁹ Similar powers, although in wider sense, lies with supreme court but the constitutional provisions empowering the supreme court do not address high courts as subordinate courts.

The Take of the Judiciary

*Tirupati Balaji Developers (P) Ltd. V State of Bihar*³⁰ (2004)

In the abovementioned case, the Supreme Court had discussed this matter at length and laid down a few ground rules for the interaction between the High Courts and the Supreme Court. The Court has rightly noted that **a High Court is not “subordinate” to the Supreme Court of India**. Some notable pronouncements by the Hon’ble Court in this matter are as follows:

- The High Court exercises power of superintendence under Article 227 of the Constitution over all subordinate courts and tribunals; the Supreme Court has not been conferred with any power of superintendence.
- The Union judiciary and the State judiciary are undoubtedly independent of each other except for a few areas relating to jurisdiction. The Constitution has clearly divided the jurisdiction between the two institutions and while doing so these institutions have to have mutual respect for each other. The framers of the Constitution did not think it necessary to specifically confer power on the Supreme Court to give a command to the High Court for they were the men of vision and foresight.
- During or at the end of exercise of the appellate jurisdiction any direction made by the higher forum shall have to be complied with by the lower forum, otherwise the hierarchy becomes meaningless.
- The power of appeal implies the power to reverse, confirm, annul or modify the decree of the High Court including the direction to rehear the matter and comply with such directions as may accompany the order of remand.

²⁹ Article 235 of Indian Constitution

³⁰ AIR 2004 SC 2351

- This direction by supreme court is of utmost importance as it annuls every order passed by the high court including those under article 227 of the constitution and section 482 of criminal procedure code.³¹

So, it is a well-established notion of law in India that the High Courts are the courts not inferior to the Supreme Court of India. It is highly desirable from the Supreme Court to be courteous in making communications to the high court or overturning any judgment of the High Court. Yet, in the present it is meagerly observed. The Supreme Court also do not have power to issue writs against the High Courts as rulings by a High Court are deemed to be not violative of Fundamental Rights of a person.³²

The Supreme Court reiterated the same in *Ram Saran Tewari v Raj Bahadur Varma*³³, where it observed:

“The Constitution uses both the phrases "a court subordinate to" and "subordinate courts". The highest court in India is the Supreme Court and though it has appellate jurisdiction not only over High Courts but also over other courts and tribunals, they are not declared to be subordinate to it; they are inferior to it but not subordinate to it. It has the powers of a court of record including the power to punish for contempt of itself; it has no power to punish for contempt of any High Court or other court or tribunal.”

Present Practices

In theory, it is a well-established principle in India that the Supreme Court of India does not has superintendence over the High Courts or any court over that matter. However, with evolving jurisprudence and precedents, the practices have changed and the position is what Justice Chelameswar described back in 2018 as cited in the opening of this paper. This section will analyze the present practices and determine what the instant position is.

- Superintendence via Appointment and Transfer of High Court Judges:

³¹ D. Chinnappa, 2021. *Supervision By The Supreme Court Over The High Courts: A Constitutional Quagmire*. [online] Bar & Bench -Indian Legal news. Available at: <<https://www.barandbench.com/columns/supervisionsupreme-court-high-courts-constitutional-quagmire>> [Accessed 2 January 2021].

³² K.T. Sangameswaran, “Writs can’t be issued to High Court Judges” (2021). Available at: <https://www.thehindu.com/news/national/tamil-nadu/writs-cant-be-issued-to-high-court-judges/article6237044.ece> (Accessed: 4 July 2021).

³³ AIR 1962 ALL 315

The appointment and transfer of judges of the higher judiciary has been the subject matter of 2 significant judgments of the Supreme Court.³⁴ The first case is *S.P. Gupta v Union of India*³⁵ and *Supreme Court Advocates-on-Record Association v Union of India*³⁶. Article 217 of the Constitution of India provides the procedure regarding the appointment of judges in the High Courts. The appointment can be done only after consulting the CJI and the Governor of State. Further, for the transfer of judges of the High Court, the same procedure is followed by the virtue of A. 222. In both the cases, the CJI also takes help of other senior most judges (collectively, a collegium) to arrive at a decision.³⁷ This gives large authority to the Supreme Court collegium over the High Court Judges.

- Superintendence via directions:

The Supreme Court of India often gives directions to the High Courts for certain matters. Constitutionally, Supreme Courts has the power to transfer a case from one Supreme Court to another.³⁸ Also, Supreme Court can withdraw a case from a high court to itself. But it has to be exercised only in rare cases for meeting ends of justice.

In *Asian Resurfacing of Road Agency v CBI*³⁹, the Supreme Court issued the following direction:

“...in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended.

In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay is more important than having the trial finalized.”

(emphasis added)

³⁴ Arghya Sengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, 5 INDIAN J. Const. L. 99 (2011-2012).

³⁵ *Supra* note 7, at 6

³⁶ 1993(4) SC 441

³⁷ Khagesh Gautam, *Political Patronage and Judicial Appointments in India*, 4 INDON. J. INT'L & COMP. L. 653 (2017).

³⁸ Sec. 406(1), Code of Criminal Procedure, 1973.

³⁹ (2018) 16 SCC 299

The direction expressly mandated the High Courts to act and proceed in the cases where stay has been granted whether civil or criminal. Such an order is largely a constitutional suspect, if not unconstitutional.

Eminent jurists such as D.D. Basu and K.K. Venugopal have pointed towards the fact that despite the limitation placed on the role of the supreme court, it has been regularly and leniently accepting the appeals thereby changing its original purpose significantly which was not the purpose for which the supreme court was established.⁴⁰

When the apex court struck down the National Judicial Appointment Commission bill as unconstitutional, the bench admitted that the collegium system of judges appointing judges is not all well and the need has arisen to change the twenty-one year old system.⁴¹ Nevertheless, this observation was made in 2015 and has not been implemented even after passage of almost five years. The judiciary is sturdy in maintaining the independence in terms of appointment and transfer of judges. For instance, the supreme court observed⁴² while hearing the plea of Gujarat HC Advocates Association on transfer of Bombay HC judge Justice Akil Kureshi that “*Appointments and transfer go to the root of the administration of justice and where judicial review is severely restricted. Interference in system of administration of justice does not augur well for the institution.*” The SC was highlighting its dislike towards the inaction of the government on the recommendation of justice kureshi for appointing him as a chief justice of Tripura High Court. This clearly shows that the apex court warrants minimal or no intervention from any outsider entity.

In practice and by conventions, the Supreme Court practices substantial control over the High Courts. Although, originally the framers of the constitution did not intend to make the Supreme Court as the superior court to the High Courts, past years since the independence have made it happen. One may rightly point finger at the Judicial Activism for this, however, it was primarily

⁴⁰ Akshata Kumta & Naman Lohiya, *The Supreme Court: To Change or Not to Change? An Analysis of the Proposed Idea of National/Regional Court of Appeal*, SCC OnLine, 3.3 CALQ (2017) 90

⁴¹ Krishnadas Rajagopal, *SC Bench strikes down NJAC Act as ‘unconstitutional and void’*. Available at: <https://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece> (Accessed: 30 June 2021).

⁴² *Interference in appointments, transfers of judges doesn't augur well: Supreme Court* (2019). Available at: <https://theprint.in/judiciary/interference-in-appointments-transfers-of-judges-doesnt-augur-well-supreme-court/295600/> (Accessed: 30 June 2021).

because of the precedents of the Supreme Court. Certainly, constitutional provisions like Articles 32 and 136 have also made it possible.⁴³

Conclusion

In India, judiciary is integrated although there is hierarchical simile among them. The constitution is destined towards delivering justice and the courts are watchdogs and custodians of the constitutional rights of the people. However, the analogy of the superiority of the supreme court over high courts holds importance from the pragmatic aspects.

As Justice Chelameswar stated, this is certainly a problem involving the spirit of the constitution and integrity of the judges. And it needs to be remedied for securing independence and majesty of the High Courts. A silver lining that needs to be underlined here is that the Supreme Court has noted this position and refrained itself from going overboard through the cases like Tirupati Balaji Developers.

Conclusively, the Supreme Court of India does have superintendence power over High Courts maybe not in terms of theoretical manner but certainly in functional and realistic manner. By precedence, although the Supreme Court itself has established that it does not have any superintendence. However, when the repeated practices about overruling cases, appointment of judges and the invention of collegium by the Supreme Court itself and other matters mentioned before indicate a different picture altogether. This arrangement needs to be ratified in the interest of judicial independence and autonomy of the High Courts.

⁴³ Arthad Kurlekar & Jaimini Vyas, *Special Leave Petitions, an Impediment to Justice: Need for Structural Changes to Ensure Efficient Time Allocation of the Court*, 3 NIRMA U.L.J. 87 (2014).