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A CASE FOR JUDICIAL FEDERALISM

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

In comparison to the legislature and the executive, what the judiciary can deliver in the realm of socio-economic rights is limited. Courts cannot build better health infrastructure or directly supply oxygen; neither are they functionally bound to. Courts often lack the expertise and resources to decide social rights issues. What they can do is to ask tough questions to the executive, implement existing laws and regulations, and hold the executive accountable in various aspects of healthcare allocation. In *Parmanand Katara v. Union of India* (1989), the Supreme Court underlined the value of human lives and said that the right to emergency medical treatment is part of the citizen's fundamental rights. As such, constitutional courts owe a duty to protect this right.

In the face of a de facto COVID-19 health emergency, the High Courts of Delhi, Gujarat, Madras and Bombay, among others, have done exactly that. They considered the pleas of various hospitals for oxygen supply. The Gujarat High Court issued a series of directions, including for laboratory testing and procurement of oxygen. The Nagpur Bench of the Bombay High Court was constrained to hold night sittings to consider the issue of oxygen supply. It directed immediate restoration of oxygen supply that had been reduced from the Bhilai steel plant in Chhattisgarh. The Delhi High Court directed the Central government to ensure adequate measures for the supply of oxygen. It cautioned that we might lose thousands of lives due to lack of oxygen.

On April 22, the Supreme Court took suo motu cognisance of the issue in 'Re: Distribution of Essential Supplies and Services During Pandemic'. It said, "Prima facie, we are inclined to take the view that the distribution of these essential services and supplies must be done in an even-handed manner according to the advice of the health authorities" and asked the Central government to present a national plan. In addition, it issued an order asking the State governments and the Union Territories to "show cause why uniform orders" should not be passed by the Supreme Court. The court thus indicated the possibility of transfer of cases to the Supreme Court, which it has done on various occasions before.

Under Article 139A of the Constitution, the Supreme Court does have the power to transfer cases from the High Courts to itself if cases involve the same questions of law. However, what make the court's usurpation disturbing are two well-founded observations regarding its contemporary conduct. One, the court has been indifferent to the actions and inactions of the executive even in cases where interference was warranted, such as the Internet ban in Kashmir. Two, where effective remedies were sought, when activists and journalists were arrested and detained, the court categorically stayed aloof. It acted as if its hands were tied. Lawyers will find it difficult to recall a significant recent case of civil liberty from the court where tangible relief was granted against the executive, except for rhetorical statements on personal liberty.

These features, coupled with the unhealthy characteristics of an executive judiciary, makes the court's indication for a takeover disturbing. On April 23, presumably due to widespread criticism of the court's move, especially from a section of the legal fraternity, the court backtracked and simply adjourned the case.

The matter might be heard by the Supreme Court in the coming days. Significantly, the developments so far offer some crucial lessons for judicial federalism in India. The very fact that many from different High Court Bar Associations spoke up against the move to transfer the

cases from the High Courts to the Supreme Court is a positive signal that underlines re-emergence of internal democracy within the Bar. Navroz Seervai, a noted lawyer from the Bombay High Court, critiqued the views of the top court saying that they reflected “arrogance of power” and “rank contempt for and disregard of the High Courts in the country, and the extremely important and vital role they play in the constitutional scheme”.

In the Supreme Court, the judges sit in Benches of two or more. The purpose of this practice is to encourage deliberation on the Bench to have a higher level of deliberative justice. This necessarily presupposes dissent. A characteristic feature of the apex court in the recent years is general lack of dissent in issues that have serious political ramifications. This deficit occurs not only in the formally pronounced judgments and orders; dissenting judges on the Bench are rare, and the hearing on the COVID-19 case was no exception.

According to the Seventh Schedule of the Constitution, public health and hospitals come under the State List as Item No. 6. There could be related subjects coming under the Union List or Concurrent List. Also, there may be areas of inter-State conflicts. But as of now, the respective High Courts have been dealing with specific challenges at the regional level, the resolution of which does not warrant the top court’s interference.

In addition to the geographical reasons, the constitutional scheme of the Indian judiciary is pertinent. In *L. Chandra Kumar v. Union of India* (1997), the Supreme Court itself said that the High Courts are “institutions endowed with glorious judicial traditions” since they “had been in existence since the 19th century and were possessed of a hoary past enabling them to win the confidence of the people”. Even otherwise, in a way, the power of the High Court under Article 226 is wider than the Supreme Court’s under Article 32, for in the former, a writ can be issued not only in cases of violation of fundamental rights but also “for any other purpose”. This position was reiterated by the court soon after its inception in *State of Orissa v. Madan Gopal Rungta* (1951).

Judicial federalism has intrinsic and instrumental benefits which are essentially political. The United States is an illustrative case. Scholar G. Alan Tarr of Rutgers University hinted, “Despite the existence of some endemic and periodical problems, the American system of judicial federalism has largely succeeded in promoting national uniformity and subnational diversity in the administration of justice”. Justice Sandra Day O’Connor rightly said in a 1984 paper that the U.S. Supreme Court reviews “only a relative handful of cases from state courts” which ensures “a large measure of autonomy in the application of federal law” for the State courts.

This basic tenet of judicial democracy is well accepted across the courts in the modern federal systems. The need for a uniform judicial order across India is warranted only when it is unavoidable — for example, in cases of an apparent conflict of laws or judgments on legal interpretation. Otherwise, autonomy, not uniformity, is the rule. Decentralisation, not centrism, is the principle. In the COVID-19-related cases, High Courts across the country have acted with an immense sense of judicial responsibility. This is a legal landscape that deserves to be encouraged. To do this, the Supreme Court must simply stay away.

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To reassure Indian Muslims, the PM needs to state that the govt. will not conduct an exercise like NRC

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