Devaluing high courts

For the framers of our Constitution, high courts, occupied a central position. They were conceived as a forum for adjudicating disputes under the Constitution, Central and State statutes before they moved to the Supreme Court; their jurisdiction was more extensive than the Supreme Court's. In contrast to the American model of a bifurcated federal and state judiciary, our high courts resolve all disputes.

In the initial years, several constitutional issues came to the Supreme Court after high courts grappled with those issues. The First Amendment to the Constitution was triggered by a Patna High Court ruling declaring a land reform law as unconstitutional.

Increasingly, the jurisdiction of our 24 High Courts has been subject to relentless attack from Parliament, and, unfortunately, even the Supreme Court.

Parliament has inflicted damage on high courts with rampant tribunalisation. Tribunals have replaced high courts for disputes under the Companies Act, Competition Act, SEBI Act, Electricity Act, Consumer Protection Act among others. Any person aggrieved by an order of an appellate tribunal can directly appeal to the Supreme Court, side-stepping the high court. This raises three institutional concerns

First, these tribunals do not enjoy the same constitutional protection as high courts. The appointment process and service conditions of high court judges are not under the control of the executive. The enormous institutional investment to protect the independence of high courts is dispensed with when it comes to tribunals. Many tribunals still owe allegiance to their parent ministries.

Tribunals are also not as accessible as high courts. For example, there are just four benches of the Green Tribunal for the whole country. In comparison, high courts were easily accessible for environmental matters. A shareholder in Kerala or the Northeast would have to travel to the Securities Appellate Tribunal in Mumbai to challenge any order by the Securities and Exchange Board of India. This makes justice expensive and difficult to access. Further, when retired high court judges invariably preside over every tribunal, the justification of expert adjudication by tribunals disappears.

Second, conferring a direct right of appeal to the Supreme Court from tribunals has changed the Supreme Court from being a constitutional court to a mere appellate court. It has become a final clearing house for every appeal under every statute. The Supreme Court should be a court of last resort deciding cases of the moment, and not a final forum with an all-embracing jurisdiction over disputes ranging from a custody battle to the scope of a municipal by-law.

A backlog of over 58,000 cases in the Supreme Court precludes it from being a deliberative court reflecting over critical questions of law. It can affect the quality of the court's jurisprudence. If high courts were to exercise appellate jurisdiction over orders of tribunals, they would act as filters, enabling the Supreme Court to confine itself to those substantial questions where there is divergence among high courts.

Third, high courts are the training grounds for future Supreme Court judges. When high court judges deal with several cases under a particular area of law, they carry with them the benefit of their experience and insights to the Supreme Court. When high courts are side-stepped in favour of tribunals, Supreme Court judges hearing appeals from tribunals would have to deal with the finer nuances of disputes under specialised areas of law for the very first time. This is not ideal for

a court of last resort.

The rationale advanced for avoiding high courts is the colossal backlog. This is a problem of the government's making as it consciously chooses not to appoint judges of the sanctioned strength for each high court. The way ahead lies in the creation of specialised divisions in high courts for tax, company law and environmental disputes.

The jurisdiction of high courts is also undermined by the Supreme Court when it directly entertains various writ petitions. When the Supreme Court exercises original jurisdiction, it deprives the citizen and the state of the right to challenge potentially erroneous orders. A classic instance is the Supreme Court's ruling in the 2G case. To overcome this ruling, the President had to invoke the advisory jurisdiction of the Supreme Court. The ordinary citizen enjoys no such privilege.

This difficulty becomes even more acute when the Supreme Court takes on a legislative role by framing guidelines in the larger public interest. Neither the individual nor the state has an effective remedy to challenge these norms.

In contrast, there are several institutional benefits when a case travels from high court to the Supreme Court. The Supreme Court is wiser by a well-considered high court ruling. Notably, the U.S. Supreme Court takes up cases where there is a divergence of opinion among the Circuit Courts of Appeal.

It has been asserted that when the Supreme Court decides an issue, it avoids conflicting judgments of the high court. This is untrue. The Supreme Court is in a better position to resolve a dispute when it is confronted with two conflicting high court rulings on the same issue. In the triple talaq ruling, it benefited from prior high court decisions on the nuances of Muslim personal law.

If high courts lose their prominence, India's justice delivery system will be the principal loser.

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The new U.S. Fed Chairman is unlikely to opt for policies that might upset the President's plan

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