



Supreme, but not superior

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A few weeks ago, one of India's finest judges, Chief Justice A.P. Shah, retired from judicial office at the age of 62. The occasion of his retirement was marked by glowing tributes, even as the legal community deeply lamented the fact that he was not elevated to the Supreme Court. While Chief Justice Shah's retirement raises questions concerning the methodology of judicial appointments, the consequent debate surrounding the elevation of capable judges to the Supreme Court of India tends to underestimate the value of the high court judges of this country. What his retirement ought to do, however, is remind us that the Supreme Court of India is not the only place where the capable judge is found, or good law made.

Chief Justice Shah had an illustrious career, first as a senior lawyer, then as a judge on the high courts of Bombay, Madras and Delhi. The perseverance, intellect and integrity which he brought to his work stood out. However, Justice Shah's retirement as a "mere" high court judge should not be seen as an affront to his accomplishments. Many seem to believe that allowing a great judge of his stature to "languish" in India's high courts without an eventual elevation to the Supreme Court constitutes a "waste" of talent. However, the fact that Justice Shah was not elevated to the Supreme Court should be irrelevant in how we measure his accomplishments.

There seem to be two discernible schools of thought surrounding Justice Shah's retirement: first, that the Supreme Court of India is in some way qualitatively superior to the high courts and that therefore Justice Shah would have benefited by elevation; second, that elevation to the Supreme Court constitutes some form of reward to high court judges, and that Justice Shah was denied this privilege. Each of these beliefs is rooted in a questionable understanding of India's judicial system.

While Joseph Story may have been appointed to the US Supreme Court at age 32, most judges on the Indian Supreme Court tend to be significantly older: the primary criterion for appointment is seniority. This means two things. First, that judges in India are seldom appointed young; and second, that good judges may never get "promoted" if someone younger was appointed before them. That a judge's elevation would depend more on her age than her performance speaks as much to the near absence of qualitative standards for Supreme Court elevation as it does to the commendable insulation of India's judiciary from executive discretion. SC judges would therefore necessarily represent the oldest of the old, those fortunate enough to have been appointed at a young age, and with no judges even younger ahead of them. While the quality of the Supreme Court of India should not be underplayed, its qualitative "superiority" to India's high courts must seriously be questioned.

Indian lawyers often romanticise a Supreme Court practice, and judges dream of serving in its clustered courtrooms as a "reward" for doing good work, but we often confuse the fact of the SC's appellate finality with qualitative superiority. Indeed, our perception seems to have suffered a

tectonic shift from what it once was: judges were often rumoured in the past to have turned down offers to rise to the SC, if they were in contention for the post of high court chief justice. Today, that post is viewed by some as a mere stepping stone to the Supreme Court.

However, experience tells us that it is not the court's "status" which determines the identity or quality of the judge. For example, the erudition that M.C. Chagla, former chief justice of the Bombay HC, brought to the judicial office stands out as a shining example not merely in the corridors of that court, but equally in the curtained courtrooms of India's Supreme Court. Similarly, although the opinions of Judge Learned Hand, a former American circuit court judge, did not bear the stamp of having originated in the US Supreme Court, they nonetheless carried the impress of his erudition and learning. In today's globalised world, judges such as Richard Posner of America's seventh circuit and Dennis Davis of South Africa's high court at Cape Town, are perhaps more widely respected than many of their brethren on their country's supreme courts. Even Lord Denning, arguably the most widely known judge in the Commonwealth, retired (after serving in the House of Lords) as a judge on the Court of Appeals. Chief Justice A.P. Shah, no doubt, belongs to this league of extraordinary judges.

The quality and calibre of a judge, thus, cannot be equated or confused with the court to which she belongs. Similarly, the elevation of a judge to the Supreme Court cannot be used as a yardstick to measure success. Let us not forget that the high courts have produced some of India's finest legal moments: during the Emergency, the high courts of Madhya Pradesh and Bombay recognised the writ of habeas corpus while the Supreme Court floundered, while the foundational "basic structure" theory in India's constitutional jurisprudence is said to have originated in a High Court.

Chief Justice Shah, despite being senior and able enough, may not have been appointed to the Supreme Court — but the hierarchy of the court on which he sat will not matter in how his judicial contributions are remembered. We must ask why high court judges retire at 62, when supreme court judges continue until 65. We must also seek greater transparency for the basis on which capable senior judges like Justice Shah are denied elevation. However, in so doing we must continue to celebrate Justice Shah not for the court on which he sat, but for what he achieved as a judge, and the example that he set for India's supreme yet fallible judiciary.