Judicial primacy is not the same as exclusivity

Take a music-loving couple who, for, all their mutual accord, can never agree on who is the greater—Ustad Rashid Khan or Pandit Ajoy Chakraborty. On a night when both maestros are regaling audiences at two parallel music festivals in town, each has to pick where to go. If they both decide to go the Rashid Khan concert, the husband would be delighted and the wife a trifle wistful. With the Ajoy Chakraborty performance, the situation is reversed. Of course, should they choose to go to different concerts, they would both be upset.

This story, referred to as the Battle of the Sexes in game theory, captures the tension between the need to coordinate choices against the desire to achieve the maximum reward for oneself. The game has two intuitively obvious equilibria—one in which the couple goes to the Rashid Khan concert and the other in which they both choose Ajoy Chakraborty. However, as in all games with multiple Nash equilibria , players may have difficulty coordinating their behaviour.

Recent events suggest that the judges of the Supreme Court may have caught the bug of the Battle of the Sexes. The Chief Justice of India (CJI) allegedly decides the roster the way he sees fit but the judges next to him in seniority are equally keen that it be done the conventional way. The conclusion that a certain trust deficit exists within the fraternity of judges is inescapable. Would a different process to select judges as embodied in the National Judicial Appointments Commission (NJAC) proposed in the 99th Amendment Bill and the NJAC Act have reduced such a possibility?

The NJAC was conceived as a six-member body comprising, ex-officio, the CJI, the two senior-most judges of the Supreme Court, and the Union minister of law. In addition, there were to be two eminent persons who would be selected by a committee comprising the CJI, the prime minister of India, and the leader of the opposition in the Lok Sabha. In the matter of the appointment of the Supreme Court and the high court judges, two members combined could exercise a veto power on a candidate.

The ideal of judicial primacy as embodied in Articles 124 and Articles 217 of the Constitution has been lauded as a guarantor of judicial independence in appointments. Going beyond the letter of the law, in my view, primacy should imply that if the judges are united, the candidate they back must get appointed. However, the ideal of judicial primacy need not be equivalent to the demand of judicial exclusivity, which refers to the exclusive right of judges to be involved in the selection process as in the current system of the collegium. Taking into account the views and votes of entities outside the judiciary in the event the judges are disunited violates exclusivity but not primacy as defined above.

In the absence of exclusivity, it is possible for a candidate not preferred by the CJI to become a judge. When consulted by the president, as required by the Constitution, the CJI would have to convey its support for a candidate not of its choice. However, it seems neither necessary nor desirable to give the CJI untrammelled power over its colleagues or over the NJAC as a whole, just as it is undesirable for a prime minister to exercise unfettered sway over cabinet colleagues.

Based on a holistic consideration of these normative criteria, the present proposal of the government fails to uphold the spirit of the Constitution. The Shapley-Shubik power index measures the power of entities in a committee based on their relative numerical strengths. In the proposed NJAC, the judiciary, with three members in a six-member committee, where a two-member coalition can exercise a veto, would have only 50% of the voting power. For instance, if the remaining three members are united, then the judiciary can make its candidate win only with the support of the rest of the NJAC, which we can assume would happen 50% of the time

(optimistically speaking!).

A five-member NJAC consisting of the CJI, two Supreme Court judges, the Union law minister, and one person of eminence chosen as in the current NJAC Bill should be considered. Because of the veto, this would increase the power of even a united judiciary only to 66%. To preserve judicial primacy, it is best to do away with the veto altogether and allow any member to file a dissenting note that can be shared for public consumption after a certain amount of time has elapsed. While B. R. Ambedkar warned against the overweening influence of the executive in judicial appointments, this does not imply that executive participation should be wholly absent. However, the selection of the person of eminence must work on consensus to prevent the collusion of the political class.

The proposed composition fulfils the requirements of primacy but what do we gain by the relaxation of judicial exclusivity? The possibility of external intervention in the process would exercise a salutary effect on the judges despite the judiciary enjoying a Shapley-Shubik power index of 100% in the proposed NJAC. In view of allegations of corruption in the judiciary, especially related to the alleged collusion between some judges and lawyers, the relaxation of judicial exclusivity in the manner proposed allows a certain degree of social oversight on judicial appointments. The voice of Parliament is brought to bear on the process of judicial selection, with a decisive role only in the event of a serious disagreement within the judiciary.

The government may like to consider submitting a new proposal to the bench.

With inputs from Vinay Singh.

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Comments are welcome at views@livemint.com

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