Debating Supreme Court Reform

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On 9 April 2021, United States (US) President Joseph R Biden announced that he was setting up a 30 member commission to study the functioning of the Supreme Court of the United States (SCOTUS) and propose reforms where needed. The composition of the commission was decidedly bipartisan with leading legal academics and lawyers, irrespective of their political or jurisprudential views, forming part of the commission. The immediate impulse for the creation of the commission seems to be circumstances under which the last three appointments to the SCOTUS were made (Shear and Hulse 2021).

According to the US Constitution, appointments to the SCOTUS are made directly by the President but the same has to be based on the "advice and consent" of the US senate.[1] Intended as a check on the President's powers this means that nominees to the SCOTUS need to receive the approval of a majority of the current 100 member senate.

When Justice Antonin Scalia passed away in 2016, then President Barack Obama's nominee to the SCOTUS, Merrick Garland was not even given a confirmation hearing by the then Republican controlled senate. The justification offered, by then senate majority leader, Mitch McConnell (a Republican) was that outgoing Presidents should not be nominating judges in their final year (Elving 2018). Yet, when Justice Ruth Bader Ginsburg passed away in September 2020, towards the final months of President Donald Trump's tenure, McConnell had no qualms about confirming Trump's nominee, Justice Amy Coney Barrett, to the Supreme Court in quick time (Hulse 2020).

Just as controversial proved to be the appointment of Brett Kavanaugh by the Trump administration. Kavanaugh stood accused of having committed sexual assault against multiple women in his high school and college days (Kessler 2018). The confirmation hearings were marked by much acrimony, and included the testimony of Christine Blasey Ford who testified to the fact that she had been assaulted by Kavanaugh (Zurcher 2018). However, the Republican Party–controlled senate voted 50–48 (almost entirely along party lines) to confirm Kavanaugh as a judge of the SCOTUS.

The moves by the Republican–controlled senate prompted calls within the Democratic Party to "pack the court"—alluding to Franklin Delano Roosevelt's threat to increase the size of the court in response to SCOTUS striking down labour-friendly and social welfare legislation as part of the "New Deal" (Phillips 2020). The idea, floated by some commentators, was that now that Democratic Party was in control of the senate, they should not hesitate to increase the size of the court and add more justices to decisively tilt the balance away from Republican-appointed judges.

President Biden himself has professed that he is not "a fan" of the idea of court packing. However, the setting up of the commission does acknowledge the concerns expressed by some sections in his own party—that key legislation relating to voting rights, gun control, anti-discrimination, may be struck down by a court which does not share the same values as the wider American public.

Questioning Reductionist Assessments

Just prior to the setting up of the commission, a strong critique of the idea of "packing the court" was delivered by Justice Stephen Breyer—an acknowledged "liberal" on the SCOTUS—in his Scalia lecture addressed to the Harvard Law School.[2] In defending the judiciary and the judiciary process, Breyer pointed out that while it was natural for people to disagree with the judgments of a court, the judgments were inevitably complied with because of the public acceptance of the idea that the court decisions must be complied with even if they were wrong. He pointed out that among the three branches of the federal government in the US, the Court still enjoyed the highest level of public trust.

However, he acknowledged that the court was being perceived as a "political" body thanks to the growth of larger public distrust in institutions of government and the manner in which the media covered the court. Wary of the labels of "liberal" and "conservative" used by the press to describe judges, Breyer argued in his speech that it was mostly jurisprudential differences and not political differences that accounted for the different outcomes.

Pushing back against the notion that judges are "politicians in robes," Breyer argued that considering the judiciary as such would deeply harm notions of the rule of law and hamper its ability to act as a check on the other arms of government.

While Breyer goes on to discuss many further issues, it is his pushback against the proposal to "pack the courts" now that the Democratic Party controlled the senate that made news. Coming as it does from one of the three "liberal" judges of the SCOTUS (a term he himself seems to dislike), this was seen as a riposte to the demands of certain sections of the Democratic Party which called for such court packing (Barnes and Marimow 2021).

Justice Breyer's comments and recent judgments suggest that perhaps there is a danger in simply reducing judges to their political appointments and views. There is an eerie echo here of the notion of "committed judges" propagated during the 1970s in India by ministers H R Gokhale and Mohan Kumaramangalam (Noorani 1994) to justify the supersession of three senior judges of the Supreme Court of India (SCOI) in the appointment of the then Chief Justice of India. The supersessions, coming immediately after the judgment in *Kesavananda Bharati v State of Kerala*,[3] seemed to be targeting the judges for having delivered a judgment that limited the powers of Parliament to amend the Constitution. In that context, as Noorani points out, it seemed as if judges were expected to be committed to the regime in power rather than the Constitution itself.

While it is fair to say that judges, whatever their ideology, are required to be committed to the Constitution, the Constitution itself is not a completely uncontested text. Debates over what it means and it should mean are not just legal quibbling over textual interpretation but go into the heart of core principles, such as democracy, liberty and freedom. The interpretations of the Constitution are also informed by an individual's own life experiences, world views and sense of morality. This is just as true of judges as anyone else. To expect therefore that judges have to accept all the ideological shibboleths of those who appointed them is destructive of the very idea of an independent judiciary.

Justice Breyer therefore makes a valid point about assessing a judge purely on the basis of outcomes on partisan issues. The dangers with treating "packing the court" as a solution to whatever the perceived problem with the SCOTUS is that it might result in a court's legitimacy resting purely on majority acceptance of its conclusions and not the soundness of the legal or constitutional reasoning. This, as he rightly points out, has grave implications for the rule of law itself and hampers the court's ability to hold the government accountable.

Conclusions

As the Indian experience has shown, appointment of judges is just one variable in determining the independence of the judiciary. While the collegium system was theoretically supposed to ensure neutrality from the government among judges, recent experience (Kumar 2020) and academic research (Aney et al 2017) has shown otherwise. Much more goes into ensuring independence of judges than determining "who" appoints judges.

While it is quite unlikely that the present union government is going to set up any similar commission in India to propose institutional reform of the Supreme Court, nevertheless the debates in the US can help shape the thinking into what makes a judiciary truly independent and impartial in its functioning. While it is hard to map Indian judges with labels such as "liberal" and "conservative," one does find lawyers describing judges as "relief oriented," "pro-labour," "pro-revenue," etc, depending on the kinds of orders and judgments that they pass. While these may reflect certain kinds of jurisprudential thinking on the part of the judges, they do not yet neatly map into partisan political positions among India's major political parties. As such, while there has been little debate over whether the SCOI should be expanded or not (given the large mountain of pending cases at the Court), much more of the debate focuses on "how" the judges are appointed.

Even in the debate over "how" the judges of the SCOI should be appointed, the unstated premise is that the union government should not be able to appoint such judges as it believes agrees with its ideology or unlikely to hold the government accountable for its failings. This however fails to acknowledge the problem that Aney et al (2017) have pointed out—that judges, irrespective of who appointed them, start to favour the union government in the hope of getting a favourable post-retirement position. The union government therefore achieves indirectly what the collegium seeks to stop directly.

Picking single-point agendas for "reform" (whether in "packing the court" or "keeping the executive out") are thus likely to fail, and worse, may end up damaging the court. Reforming the court may therefore require a deeper understanding of the systemic failings and a structural understanding of the institution itself.

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NOTES

1 Article II, Section 2, Clause 2 of the US Constitution.
2 Full lecture at https://www.youtube.com/watch?v=bHxTQxDVTdU&ab_channel=HarvardLawSchool viewed on 14 April 2021.
3 *Kesavananda Bharati v State of Kerala* (1973), 4 SCC 225.

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