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POPULISM AND CONSTITUTIONALISM: ANALYSING JUDICIAL APPOINTMENT REFORMS IN INDIA AND ISRAEL

Ritikaa HR ±

Abstract: *This article explores the intersection of constitutionalism and populism through a comparative analysis of judicial independence in India and Israel. By examining the judicial reforms in these nations, it highlights the tensions between populist governments and the judiciary, a key institution in liberal democracies. The study underscores how populist leaders, driven by majoritarian mandates, often attempt to weaken judicial checks to consolidate power, which threatens the foundational principles of constitutionalism. In Hungary and Poland, populist regimes have successfully undermined judicial independence through legislative reforms, while in India, attempts to alter judicial appointments were thwarted by the Supreme Court invoking the "basic structure" doctrine. Israel presents a more complex scenario where incremental changes in the judicial appointments process, although not immediately threatening, suggest a gradual erosion of judicial autonomy. The article argues that while populism presents significant challenges to constitutionalism, the resilience of judicial institutions varies across contexts. It calls for enhanced transparency, stronger constitutional safeguards, and global cooperation to protect judicial independence. This comparative study provides critical insights into how different legal frameworks respond to populist pressures, offering a roadmap for safeguarding constitutional democracy in an era of rising populism.*

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I. Judicial Independence And Populism

The concept of constitutionalism entails the existence of a separation of powers, yet does not prescribe a significant degree of divergence beyond this fundamental principle. It should be acknowledged, however, that constitutionalism itself is understood in various ways by scholars,[1] with differing emphasis placed on elements like the rule of law, fundamental rights protection, and specific procedural guarantees, making a single rigid definition elusive. However, there is one notable exception often highlighted across these interpretations: the interpretation and application of legislation must be conducted by an independent judiciary, free from the influence of the legislative and executive branches.[2]

A law can only be applied to an individual when it is consistent with a reasonable interpretation of the law. This implies that the courts must interpret the law in order for it to be applied. The majority of contemporary constitutions permit the courts to declare statutes unconstitutional or to "*disapply*" them in specific cases, although this is not a universal feature.[3] The majority of constitutions permit the courts to declare executive actions unlawful in instances where such actions are not authorised by either the constitution itself (in cases where the executive utilizes "*decrees*" to exercise prerogative powers) or by statutes (in cases pertaining to a distinct category of "*decrees*" as employed in civil law systems, "*secondary legislation*" in the United Kingdom, or "*regulations*" in the United States). Furthermore, the majority of constitutions direct courts to interpret statutes in a manner consistent with the constitution, provided that such interpretations fall within the bounds of reasonable interpretation.[4]

[1] Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. Chi. L. Rev. 239 (2018).
[2] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).
[3] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 285 (1957).
[4] Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* 140 (1992).

Notwithstanding the fact that constitutional review is authorised in certain instances, it is not always comprehensive. It is not uncommon for courts to decline to hear certain constitutional claims. For instance, they may do so if the challenger would not gain from a favourable ruling on the constitutional issue in question or if the constitution itself has committed the matter in dispute to the resolution of the political branches. This is known as the 'political questions' doctrine.[5] Furthermore, some constitutions permit legislative bodies to override judicial decisions declaring statutes unconstitutional through the application of ordinary majority voting procedures.

In the context of constitutionalism, understood broadly as a system of limited government under law,[6] the domain of the courts encompasses the interpretation of statutes and, to a limited extent, the evaluation of statutes and executive actions for conformity with the Constitution. In light of the aforementioned considerations, what is the appropriate conduct for courts within this domain? The prevailing view is that the principle of constitutionalism entails the necessity for judicial independence.[7] However, this response is clearly incomplete. One example of a lack of judicial independence is what is known as "*telephone justice*," in which a judge calls a politician before deciding a case to request a desired outcome.[8] Furthermore, the concept of judicial independence becomes intricate when one considers that judges must also be answerable to a higher authority, while maintaining their independence. Accountability is a crucial aspect of judicial independence, as it ensures that judges are not unduly influenced by personal biases or idiosyncratic views when enforcing the law. Without accountability, there is a risk that judges may rely on a distorted interpretation of a clear statute, potentially

[5] Bernstein, Anya and Staszewski, Glen, "*Judicial Populism*," (2021). Minnesota Law Review. 3298. https://scholarship.law.umn.edu/mlr/3298.
[6] Gunther Teubner & Anna Beckers, *Expanding Constitutionalism*, 20 Ind. J. Global Legal Stud. 523 (2013).
[7] J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. Ann. Surv. Am. L. 241 (2001).
[8] Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, XLIX Delivering Justice No. 4 (2012).

enforcing the law based on personal biases against one of the parties or on idiosyncratic views about what constitutes good public policy.[9]

It is surprisingly challenging to articulate a precise definition of accountability. One aspect appears relatively straightforward: judges should be held to account in accordance with the law. The rationale behind their decisions must be derived exclusively from the legal system itself. This is one reason why telephone justice is problematic. It causes judges to make decisions based on "*politics*" in a narrow sense, which is not a valid basis for legal decisions.[10] No legal system that is worthy of the name (or at least no legal system that satisfies the requirements of constitutionalism, however specifically defined) includes such reasons within the set of permissible ones.

Complications emerge beyond the fundamental principles. Some legal systems permit judges to consider policy implications when interpreting statutes, whereas others require that judges rely solely on the text of the statute, a task that is itself complex. Furthermore, some legal systems permit judges to reference unwritten principles of fundamental human rights when assessing a statute's constitutionality, whereas others require adherence only to the written text.[11] In general, the concept of a legal decision is understood in different ways across different legal cultures.

The concept of constitutionalism necessitates that judges substantiate their decisions by invoking the types of reasons that are deemed legitimate within the framework of their legal culture. It is inevitable that there will be reasonable disagreements about what the law actually requires. Those who oppose a decision may claim that a judge is merely feigning reliance on legal reasons, and on occasion, this criticism may have merit.

[9] United Nations Office on Drugs and Crime (UNODC), Judicial independence as a fundamental value of the rule of law and of constitutionalism, available at https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--general-issues--judicial-independence-as-a-fundamental-value-of-the-rule-of-law-and-of-constitutionalism.html.

[10] Enide Maegherman, *Accountability in Legal Decision-Making*, 29 Psychiatr. Psychol. L. 345 (2022).

[11] Raeesa Vakil, *Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights*, 16 Int'l J. Const. L. 475 (2018).

Nevertheless, the distinction between pretence and reasonable disagreement is frequently a matter of political rather than legal analysis.

In light of the aforementioned variety, it is not feasible to specify any further than that constitutionalism permits (and may require) a reasonable form of judicial accountability to the public. It is common for questions regarding judicial independence and accountability to emerge when politicians propose alterations to the manner of judicial appointment or removal.[12] On occasion, detractors characterise such modifications as threats to judicial independence, despite representing a transition from one reasonable form of accountability through appointment to another that would have been deemed acceptable had it been in place from the outset. Such criticisms raise a broader issue for constitutionalism, namely the problem of retrogression.[13]

Populists often claim that courts obstruct the "*will of the people*" by upholding constitutional constraints on majoritarian rule. They may specifically critique the prevailing judicial interpretation of constitutionalism as being out of step with popular sentiment or overly focused on minority protections. This narrative facilitates efforts to curtail judicial independence through legislative reforms, appointments of sympathetic judges, or attempts to bypass judicial review. The comparative experiences of India and Israel demonstrate how judicial institutions respond to these pressures and highlight the effectiveness of constitutional safeguards in preserving judicial autonomy.

II. How Global Judiciaries Navigate and Respond to the Rise of Populism

Populist leaders often characterise judicial institutions as elitist and unaccountable, portraying them as barriers to the "*will of the people*."[14] Populists seek to centralise

[12] Shivaraj S. Huchhanavar, *Conceptualising Judicial Independence and Accountability from a Regulatory Perspective*, 110 (2023).
[13] John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 Cal. L. Rev. 1211 (1998).
[14] Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*, 56 Isr. L. Rev. 502 (2023).

power by limiting judicial review, restructuring appointment processes, and curtailing judicial oversight. This dynamic creates an inherent conflict between the judiciary's role in upholding constitutionalism and populist efforts to erode institutional checks and balances.

Scholars such as *Erica Frantz* highlight that undermining the courts is a critical tactic used by leaders in declining democracies, as it removes institutional checks on executive power.[15] Similarly, *Samuel Issacharoff* argues that populist regimes view the judiciary as an obstacle to their agendas, leading them to challenge counter-majoritarian institutions that uphold democratic principles.[16] This trend is evident in countries like Poland and Hungary, where reducing judicial power was central to the populist agenda. Other governments, including those in South Africa and Argentina, have also sought to limit judicial oversight, using political rhetoric to delegitimise the judiciary.

In the contemporary context, judiciaries across the globe are confronted with substantial challenges in the face of mounting populist movements.[17] These populist movements, typified by their mistrust of established institutions, aspire to assert heightened political influence over the judiciary, often under the guise of enhancing democratic legitimacy. In response, judiciaries have adopted a range of strategies, encompassing legal fortification, institutional resistance, and strategic accommodation. The efficacy of these responses is contingent on the prevailing constitutional framework, the robustness of democratic norms, and the extent of public support for judicial independence.[18]

[15] Erica Frantz, 'Opinion dated 11 August 2023' in Suzie Navot and others, *Opinion on the Annulment of Judicial Review of Governmental and Ministerial Decisions for Unreasonableness*, Israel Democracy Institute, Annex B, 112, https://www.idi.org.il/knesset-committees/51189 (in Hebrew).

[16] Samuel Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* Oxford University Press (2023).

[17] Amichai Cohen and Yuval Shany, *'Reversing the "Constitutional Revolution": The Israeli Government's Plan to Undermine the Supreme Court's Judicial Review of Legislation*', Lawfare, 15 February 2023, available at https://www.lawfaremedia.org/article/reversing-the-constitutional-revolution-the-israeli-government-s-plan-to-undermine-the-supreme-court-s-judicial-review-of-legislation.

[18] Mark Landler, *'Appeals Court Rejects Request to Immediately Restore Travel Ban'*, The New York Times, 4 February 2017, available at https://www.nytimes.com/2017/02/04/us/politics/visa-ban-trump-judge-james-

Comparative examples illustrate that democratic decline does not occur through a single law but rather through a gradual weakening of independent institutions, particularly the judiciary. Poland and Hungary serve as key examples, where judicial erosion was followed by attacks on the media, civil society, and academia, further consolidating government control.

A salient response of the judiciary to populist pressures is the reinforcement of legal safeguards and procedural checks.[19] Courts frequently rely on constitutional provisions that protect judicial independence, invoking these legal guarantees to resist executive encroachments. For instance, in Poland, the Supreme Court and the European Court of Justice have repeatedly challenged judicial reforms promoted by the populist government, contending that these changes violate European Union standards for judicial independence. By leveraging international legal mechanisms and constitutional provisions, judiciaries can counteract efforts to erode their autonomy; however, this strategy requires robust institutional support and international backing, which may not always be present.

Another significant response is institutional resistance through judicial activism. In certain instances, judicial bodies have adopted an assertive posture, proactively issuing rulings that contradict populist policies that are detrimental to democratic principles. In the United States, for instance, the judiciary has played a crucial role in blocking certain executive orders perceived as unconstitutional, such as travel bans targeting specific nationalities.[20] While the judiciary's activism can be a potent instrument in the struggle against populist encroachments, it carries the risk of further politicising the judiciary,

robart.html; Alan Rappeport, *'That Judge Attacked by Donald Trump? He's Faced a Lot Worse'*, The New York Times, 3 June 2016, available at https://www.nytimes.com/2016/06/04/us/politics/donald-trump-university-judge-gonzalo-curiel.html.

[19] Amichai Cohen, Yuval Shany "*The Fight Over Judicial Appointments in Israel"* Lawfare*"* (2023) https://www.lawfaremedia.org/article/the-fight-over-judicial-appointments-in-israel.

[20] James Slack, *'Enemies of the People*', The Daily Mail, 4 November 2016.

rendering it a target for populist leaders who accuse it of being an unelected, elitist body obstructing the will of the people.

In contrast, some judiciaries adopt a strategy of cautious accommodation, seeking to maintain their relevance by adapting to the political climate without completely surrendering their independence. This approach involves the judicious concession to the prevailing government while maintaining the fundamental principles of the judicial system. For instance, in Hungary, the judiciary has, in certain instances, sought to engage in negotiations with the populist leadership to preserve a measure of autonomy rather than engaging in direct confrontation. This pragmatic approach, however, is not without its risks, as it may result in a gradual erosion of judicial independence if concessions become excessive or if the judiciary loses its credibility as an impartial arbiter.[21]

Finally, public engagement and coalition-building have emerged as vital strategies for judicial institutions seeking to withstand populist challenges. Judicial institutions have come to acknowledge the significance of public perception and have thus pursued strategies to enhance public trust through initiatives promoting transparency, outreach programmes, and collaborative efforts with civil society organisations. In countries such as Brazil and South Africa, judicial figures have been active participants in public discourse, emphasising the judiciary's role in upholding constitutional values. The cultivation of public support can function as a pivotal bulwark against populist assaults, as evidenced by instances where mass protests and civil society activism have effectively safeguarded judicial independence.

The manner in which judiciaries respond to populist tides is ultimately contingent on the broader political and institutional landscape. While legal fortification, judicial

[21] Zoltán Fleck, *"Judges under Attack in Hungary"*, Verfassungsblog, 14 May 2018, available at https://verfassungsblog.de/judges-under-attack-in-hungary.

activism, cautious accommodation, and public engagement each offer different pathways, the most resilient judicial systems are those that effectively combine these strategies. A judiciary that remains adaptable yet firm in its commitment to constitutionalism stands the best chance of preserving democratic governance in the face of populist pressures.

In light of the mounting challenges to judicial independence observed in global trends, it is imperative for courts to undergo continuous evolution to ensure the preservation of the rule of law amidst the evolving populist political landscape. The battle between judicial independence and populist movements is emblematic of a larger struggle over the rule of law. Courts must navigate this delicate balance, employing activism, public engagement, and strategic adaptation to safeguard democratic principles.

III. India: Creating A Judicial Nominating Commission

The Indian judiciary has long maintained its independence through a unique system of judicial appointments, where judges select their successors via the collegium system. An analysis of such independence of the judiciary illuminates the manner in which populist influences interact with constitutional structures and the resilience of judicial institutions across the various dimensions of our independence matrix[22] (Appointment Process, Tenure Security, Scope of Power, Institutional Autonomy, including case assignment, Protection from Undue Influence, and Public Legitimacy).

In terms of the matrix, the Indian system heavily prioritised *Protection from Undue Influence* and judicial control over the *Appointment Process*, aiming to insulate selections from the executive.[23] This practice, while ensuring autonomy from political

[22] Frans van Dijk & Geoffrey Vos, *A Method for Assessment of the Independence and Accountability of the Judiciary*, 8 no. 2 International Journal For Court Administration 1 (2018).
[23] P. J. Malysz, *Nemo iudex in causa sua as the Basis of Law, Justice, and Justification in Luther's Thought*, 100(3) Harv. Theological Rev. 363 (2007).

influence, has been criticised for its opacity and lack of accountability (a weakness within the *Appointment Process* dimension regarding transparency and accountability).

In April 2015, the 99th Amendment to the Constitution of India was adopted by the Parliament of India. As evidenced by the number of amendments that have been made, it is relatively straightforward for a parliamentary majority to amend the constitution. The amendment established a judicial nominating commission to select candidates for appointment to high courts in India's states and to the national Supreme Court. Six months later, the Supreme Court ruled the amendment unconstitutional, stating that it violated the principle of judicial independence, which was an unchangeable part of the constitution's "*basic structure*."[24] The Court's reasoning centred on the perceived threat the NJAC posed primarily to the *Appointment Process* dimension, arguing that executive involvement would compromise the judiciary's ability to function without political interference, potentially impacting future *Security of Tenure* indirectly and increasing vulnerability to *Undue Influence*. The current Indian government is often described as populist, and the Supreme Court's decision can be seen as an example of how a populist government may attempt to alter the balance within the judicial independence matrix, specifically targeting the *Appointment Process*.

The perception of the Supreme Court (SC) as an entity dominated by a select group of elites was, at the time, only limited in its accuracy. The SC currently has an authorised membership of 34, although there are frequent vacancies. Nevertheless, some cases with constitutional-like overtones pertain to the formal interpretation of statutes or allegations of administrative misconduct. In such instances, the case may be heard by a smaller panel. The panel system has resulted in a lack of coherence and consistency in the development of precedent on a range of significant legal issues.[25] The legal status

[24] Supreme Court Advocates-on-record Association v. Union of India 2015 INSC 787.
[25] Vishnu Parshad & Vishnu Prasad, *Independence of Judiciary in India*, 25 no. 3 Indian Journal of Political Science 307 (1964).

of a given matter at any given time is frequently contingent upon the identity of the judges who constitute the most recent panel to address the issue.

Furthermore, beyond the external appointment process handled by the collegium, another significant aspect impacting the practical independence and perception of the Indian judiciary relates to the internal assignment of cases within the dimension of *Institutional Autonomy*. The 'Master of the Roster' system,[26] where the Chief Justice holds the sole prerogative to constitute benches and allocate cases, has also faced considerable criticism for its opacity. This concentration of administrative power, while potentially promoting efficiency, lacks transparency and structured accountability, making it difficult even for other judges, let alone the public, to discern the rationale behind specific bench compositions for sensitive cases. This internal mechanism, crucial for *Institutional Autonomy*, can potentially affect *Decisional Independence* if perceived (or actually used) to steer cases towards particular benches or away from others, thereby creating vulnerability. In the context of populist challenges that often thrive on critiquing perceived elitism or lack of transparency in established institutions, such opaque internal processes can undermine *Public Legitimacy*.

While proposing definitive solutions is complex, enhancing this aspect of *Institutional Autonomy* in line with principles of transparency could be crucial for bolstering judicial independence against such critiques.[27] Relevant approaches, pertinent to the core argument of maintaining judicial integrity against populist pressure, might involve developing clearer, pre-established, and publicly accessible criteria or guidelines for case assignment, potentially incorporating principles of random allocation for certain categories of cases, or exploring models for greater collegial consultation regarding the

[26] Sudhir Krishnaswamy and Advay Vora, "*Master of the Roster: Securing Process Legitimacy of the Supreme Court"* Supreme Court Observer, (13th Sep 2024) available at https://www.scobserver.in/75-years-of-sc/master-of-the-roster-securing-process-legitimacy-of-the-supreme-court/.
[27] Aditya Manubarwala, *'From Master of the Roster to Master of all Judges?'* The Hindu, (30 May 2023) https://www.thehindu.com/opinion/op-ed/from-master-of-the-roster-to-master-of-all judges/article66907927.ece.

principles (not specific assignments) governing roster management.[28] Addressing this internal opacity, thereby strengthening perceived fairness and reducing potential avenues for manipulation, could be as vital for maintaining *Public Legitimacy* and resilience as safeguarding the external appointment process.[29]

As the public and the judges observed the historical context of the 1975 emergency rule, it became evident that the judges had been unduly subordinate to the government, exhibiting a high degree of political accountability.[30] The solution was to reduce the accountability of the judges, and the mechanism by which this was achieved was to convert the constitutionally required "*advice*" that the judges gave to the president into a rule that the president was obliged to follow. In effect, the judges were able to select their own successors.[31] By the early 2000s, the system had reached this point: senior justices on the SC convened as what was known as the "*collegium*" and selected "*nominees*" for the SC and state High Courts.[32] The collegium was entirely opaque (again, highlighting the transparency deficit in the *Appointment Process*), providing no information to the public regarding the judges' considerations or the rationale behind their decisions.[33]

One guideline was consistently adhered to: a candidate for the SC must be a relatively senior judge on another court. In conjunction with the mandatory retirement age of sixty-five, this guideline resulted in SC Justices typically remaining in office for a mere six or seven years. The implications of a particular judicial nomination are therefore

[28] Supreme Court (Practice and Procedure) Act, 2023, (Act 17 of 2023).
[29] Shivam Sethi & Shivangi Singh, *Power of Chief Justice of India as a Master of Roster in India*, S no. 1 International Journal of Law Management & Humanities 287 (2019).
[30] Arghya Sengupta, *Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment*, 50 no. 48 Economic & Political Weekly 27-30 (2015).
[31] Scott E. Graves & Robert M. Howard, *Ignoring Advice and Consent? The Uses of Judicial Recess Appointments*, 63 no. 3 Political Research Quarterly 640 (2010).
[32] Dr. Anil Gopal Variath & Ms. Kopal Garg, "*Role of Chief Justice as Master Of Roster - Time To Revisit"* 4 no. 5 Journal Of Legal Studies And Research, 248-259 (2018).
[33] C Raj Kumar, "*Future of Collegium System: Transforming Judicial Appointments for Transparency*" 50, no. 48 Economic and Political Weekly 31–34 (2015).

relatively inconsequential. In conclusion, the court's composition remains elitist overall. Judges who serve long enough on state high courts to develop a reputation among legal elites, to the point where they are serious candidates for consideration by the collegium, tend to move in culturally elite and secular circles. This is not a universal phenomenon; however, the choices made by the collegium tend to favour individuals who are elite and secular.[34] Furthermore, the collegium is entirely unaccountable politically. Nevertheless, its actions, despite the lack of transparency, appear to demonstrate a certain degree of sensitivity to the surrounding political environment.[35] It can be argued that this degree of unaccountability is unique in the world, or at the very least, highly unusual.

The court invoked judicial independence as the rationale for its decision to declare the 99th Amendment unconstitutional. As with numerous judgments handed down by the Indian SC, the precise rationale behind this decision remains opaque. The fundamental premise appears to have been that government-appointed members would possess an excessive degree of authority, or, in other words, that the role of government-appointed members on the commission would render the judges they selected excessively politically accountable, thereby compromising the core independence needed for impartial *Judicial Review* and heightening vulnerability to *Undue Influence*. It is challenging to evaluate this assertion in isolation. Two out of six is not a majority, yet the dynamics of small committees may indeed afford two individuals acting together an excessive degree of power. However, the rationale for this assertion is not evident, particularly in light of the potential for the coordinated authority of the three judges on the commission to serve as a counterbalance.

[34] Prashant Bhushan, "*Scuttling Inconvenient Judicial Appointments*" 49, no. 28 Economic and Political Weekly 12–15, (2014).
[35] Unknown, "*Court vs Government: Independence of the Judiciary Is Not the Issue in the Current Stand-off; It Is Control over Appointments*" 50, no. 43 Economic and Political Weekly 8–8 (2015).

The Indian case study is now incorporated into our broader narrative. Does it demonstrate how populist governments imperil the independence of the judiciary? I propose a definitive response of "*Perhaps, perhaps not*." The following components of the story are considered to be of particular significance and are presented in no particular order. It seems probable that the Indian government proposed the amendment as a result of a long-standing, though arguably misguided, perception of injustice towards a court that had previously impeded its progress.[36] It is likely that the amendment was, at least in part, driven by a flawed motivation.

The collegium system is an ineffective mechanism for selecting high court judges because it lacks structural guarantees that the appointment process will consider political accountability (failing on one aspect of the *Appointment Process* dimension, even while excelling on insulation). The amendment may represent a step towards more accountable governance. The size of the commission and the role of the two government-appointed members may be cause for concern, particularly if there are India-specific factors that have not been taken into account and that make these two features particularly problematic.[37] Furthermore, the amendment enjoyed substantial cross-party support, indicating that it was not solely a project of the ruling government attempting to advance a controversial policy without consensus. However, the Court weighed the perceived threat to independence, particularly concerning future *Appointment Processes* and *Protection from Undue Influence*, as greater than the potential benefits of enhanced accountability.

The decision to invalidate the NJAC reflects concerns that increased government influence in judicial appointments would undermine the judiciary's role as a check on

[36] Dixit, Vinod, "*Role of Non-Legal Facts in Judicial Process"* 60, no. 1 Journal of the Indian Law Institute 32–57 (2018).
[37] Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 49 14(1) Law and Ethics of Human Rights (Forthcoming), London School of Economics, Law School, pp. 13-18 (2019).

executive power (safeguarding the *Scope of Judicial Power and Review*). This ruling exemplifies how constitutional safeguards (affecting *Security of Tenure* and *Scope of Judicial Power*) can thwart populist attempts to diminish judicial autonomy externally. However, it also raises questions about the balance between judicial independence (across multiple matrix dimensions, including internal ones like *case assignment*) and accountability (within the *Appointment Process* and potentially internal administration), a debate that continues in Indian legal discourse.

IV. Israel: Changing A Judicial Appointments Commission

Unlike India's abrupt attempt to reform judicial appointments, Israel's approach has been more gradual. The Israeli judiciary has historically played a powerful role in reviewing government actions and shaping constitutional norms despite the absence of a formal constitution. Its strength has relied significantly on a robust interpretation of the *Scope of Judicial Power and Review* and a generally respected, though contested, *Public Legitimacy*, despite lacking the formal constitutional entrenchment seen in India.

In this case, Israel provides an example of hegemonic self-preservation, whereby a dominant cultural and political elite anticipates the imminent end of its political dominance and increases the power of constitutional review, which it will continue to control due to the discrepancy between political and judicial time. The controversy surrounding the protection of religious freedom in a state whose Proclamation of Independence declared the nation to be Jewish and to observe the fundamental principles of democracy has resulted in the obstruction of the adoption of basic laws dealing with individual rights.[38] Nevertheless, the SC of Israel has succeeded in establishing a corpus of quasi-constitutional law regarding individual rights.[39] Its most prominent technique is a robust version of the *ultra vires* doctrine. A fundamental tenet

[38] Amichai Cohen and Yuval Shany, *'Reversing the "Constitutional Revolution": The Israeli Government's Plan to Undermine the Supreme Court's Judicial Review of Legislation'* Lawfare (2023).
[39] Joseph Laufer, "*Israel's Supreme Court: The First Decade: A Book Report*" 17 no. 1 Journal of Legal Education, 43–62 (1964).

of administrative law is the ultra vires doctrine, which states that actions undertaken by executive officials are considered unlawful unless they are expressly authorised by legislation.[40] In instances where actions might be regarded as unconstitutional infringements on civil liberties in other systems, the SC has required that they be expressly authorised by a clear statute.[41]

Kremnitzer and *Shany* evaluate these developments, along with others, in comparison to the situation in Hungary and Poland.[42] All three countries appear to exhibit a proclivity towards the adoption of more nationalistic policies and a populist discourse, which serves to justify the liberal pressures that they face, and which can be addressed through traditional democratic checks and balances. Despite the observation that less had been achieved in Israel than in Hungary and Poland, *Kremnitzer* and *Shany* nevertheless conclude that "*at least part of the story is the pursuit of an illiberal agenda, aimed against all independent gatekeepers, representing a rejection of traditionally liberal notions of checks and balances."* In this section, we will examine the specific form this concern takes.

Kremnitzer and *Shany* acknowledge that Israeli judges continue to enjoy complete independence (suggesting high *Protection from Undue Influence* in individual cases and strong *Security of Tenure* formally). Modifications to the judicial selection process could be characterized as minor adjustments designed to enhance the political accountability of judges at the appointment stage, while maintaining their independence in adjudicating cases.

[40] Assaf Meydani, "*The Supreme Court as a Political Entrepreneur: The Case of Israel*" 27, no. 2 Israel Studies Review 65–85 (2012).
[41] Triger, Zvi. "*Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts.*" 27 no. 2 Israel Studies Review, 1–17 (2012).
[42] Mordechai Kremnitzer, Yuval Shany, *Illiberal Measures in Backsliding Democracies: Differences and Similarities between Recent Developments in Israel, Hungary, and Poland*, 14(1) Law & Ethics of Human Rights*;* 125–152 (2020).

The proposed judicial overhaul seeks to diminish the Supreme Court's power by altering the judicial selection process (directly impacting the *Appointment Process* dimension by increasing political control) and restricting judicial review over Basic Laws (directly curtailing the *Scope of Judicial Power and Review*).[43] Additional measures, such as restructuring legal advisory roles and removing the binding authority of the Attorney General's opinions, further erode legal oversight, making it easier for the government to operate without checks on its power.[44]

This judicial overhaul aligns with a broader populist constitutional project observed in various democracies, where elected leaders manipulate legal frameworks to entrench their power while maintaining a façade of democratic legitimacy. The government's approach reflects a populist strategy characterised by extreme majoritarianism, instrumental use of the constitution, and a fundamental hostility toward judicial oversight.[45] By framing judicial review as an obstacle to the will of the people, the ruling coalition seeks to legitimise sweeping legal changes without a broad consensus.[46] This rapid push for reform disregards the principle of democratic continuity, where governance should allow for periodic shifts in power and corrective mechanisms. Instead, the government's haste to implement these changes mirrors the populist impulse for immediate and absolute control, undermining democratic resilience and potentially setting Israel on a path of constitutional instability.[47]

[43] Navot S, *An Overview of Israel's 'Judicial Overhaul': Small Parts of a Big Populist Picture*, 56(3) Israel Law Review; 482-501 (2023).
[44] HCJ 5658/23 *Movement for Quality Government in Israel v The Knesset* (3 September 2023), Response on behalf of the Attorney General (in Hebrew).
[45] HCJ 8948/22 *Ilan Sheinfeld v The Knesset* 20–21 (18 January 2023).
[46] Tamar Hostovsky Brandes, *The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?* 56 Israel Law Review 415 (2023).
[47] Yaniv Roznai, Rosalind Dixon and David Landau, *Judicial Reform or Abusive Constitutionalism in Israel* 56 Israel Law Review 292 (2023); Kim Lane Scheppele, *'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work'* 26 Governance 552 (2013).

Nobel laureate Daniel Kahneman, in an interview, described the Israeli judicial overhaul as a "*disaster*," warning that undermining judicial independence could lead to democratic backsliding.[48] Similarly, various sources highlight how the battle over judicial appointments in Israel mirrors global attempts to consolidate political power at the expense of independent institutions.[49]

More than 200 proposed bills and policy decisions target key democratic institutions, including the media, academia, and civil society.[50] Efforts include politicising higher education governance, limiting independent media funding, expanding the powers of religious courts at the expense of civil courts, and restricting foreign funding for NGOs.[51] These broader efforts create a political climate hostile to independent institutions, indirectly pressuring the judiciary and potentially affecting its *Public Legitimacy* and practical ability to operate freely, even if formal *Security of Tenure* remains. These steps mirror patterns seen in other populist regimes, where the weakening of judicial independence serves as a precursor to broader democratic erosion.[52] If these reforms continue unchecked, Israel risks following the trajectory of other nations where democratic institutions have been systematically dismantled.

However, when viewed in the context of other policy changes, *Kremnitzer* and *Shany* express concern. They perceive the developments in Israel to be analogous to those observed in India by *Khaitan*, namely that the judicial reforms represent a series of incremental challenges to the constitutional order. As previously stated, it is our

[48] Hila Weissberg and Idan Eretz, "*Kahneman: The judicial reform is a disaster*", Globes, (2023) available at https://en.globes.co.il/en/article-kahneman-the-judicial-reform-is-a-disaster-1001436559.
[49] Dror Feuer, *End of democracy or democracy manifest? Two Nobel laureates debate judicial reform*, Net News available at https://www.ynetnews.com/magazine/article/bklp4i0082.
[50] HCJ 4267/93 *Amitai, Citizens for Good Administration and Integrity v Prime Minister* (8 September 1993); HCJ 4646/08 *Lavie v Prime Minister* (12 October 2008).
[51] CivA 6821/93 *Bank Ha'Mizrachi and Others v Migdal* (9 November 1995), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/United%20Mizrachi%20Bank%20v.%20Migdal%20Cooperative%20Village_0.pdf.
[52] Landau, David, *Abusive Constitutionalism,* 47 UC Davis Law Review, 255-257 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 University of Chicago Law Review, 545 (2018).

contention that the other policies, which are inherently illiberal in nature, are the driving force behind these developments. Consequently, I believe that incremental adjustments to the judicial selection process, with the aim of enhancing political accountability, do not inherently possess an illiberal character.

V. Comparative Analysis of India and Israel

Despite the occurrence of endeavours to curtail judicial independence in both India and Israel, a comparative analysis of the judiciary in these two nations reveals significant disparities in the approaches, institutional responses, and outcomes. These disparities can be attributed to the distinct legal and constitutional frameworks characteristic of each nation. A comparative analysis of judicial reforms in these countries illuminates the manner in which populist influences interact with constitutional structures and the resilience of judicial institutions.

A. Nature of Reforms: Direct vs. Incremental Approach

The present study sets out to explore the nature of the reforms pursued by India and Israel in their attempts to overhaul their respective judicial appointment processes. The Indian approach was direct and structural in nature (targeting the *Appointment Process* via constitutional amendment), as evidenced by the 99th Constitutional Amendment, which sought to replace the collegium system with the NJAC. This constituted a significant shift, as it introduced executive and legislative influence into judicial appointments.

By contrast, Israel's judicial overhaul (altering the *Appointment Process*, limiting the *Scope of Judicial Power and Review*, and potentially impacting *Institutional Autonomy*) has been pursued through a gradual, incremental process rather than a single constitutional amendment. The proposed changes in Israel include altering the judicial selection process, limiting judicial review powers, and enabling the legislature to override Supreme Court decisions with a simple majority. While India's attempt was

abrupt and met with strong judicial resistance, Israel's reforms are evolving, making their long-term impact more uncertain.

B. Judicial Response and Constitutional Safeguards.

The Indian judiciary's decision to invalidate NJAC demonstrates the efficacy of constitutional safeguards impacting the *Appointment Process* and affirming the judiciary's *Scope of Judicial Power*. The Supreme Court of India invoked the basic structure doctrine, asserting that judicial independence is an integral component of the Constitution and cannot be compromised (viewed holistically across the matrix). This ruling underscores the judiciary's capacity to safeguard against political encroachment.

In contrast, Israel's legal framework is characterised by the absence of a formal written constitution, with judicial precedent and Basic Laws serving as the primary mechanisms for ensuring judicial independence. This institutional difference renders the Israeli judiciary more vulnerable to political interference, as it does not have entrenched constitutional safeguards similar to India's basic structure doctrine.

C. Public and Political Reactions.

In India, the NJAC enjoyed bipartisan support from the executive and legislature, yet was ultimately rejected by the judiciary. This outcome reflects high institutional standing (*Public Legitimacy*) and has led to ongoing debates concerning collegium's transparency (*Appointment Process*) and internal opacity (*Institutional Autonomy/Case Assignment*). While the judiciary successfully resisted the reform, concerns regarding the opacity of the collegium system persist.

In Israel, judicial reforms have triggered widespread protests, both domestically and internationally, with critics warning of a potential erosion of democratic checks and balances. This reflects a strong societal engagement defending judicial independence, impacting the *Public Legitimacy* dimension. In contrast to India, where the judiciary has been known to overturn reforms independently, the proposed changes in Israel have been resisted by means of public mobilisation and civil society engagement.

D. Institutional Resilience and the Role of Legal Frameworks.

The judiciary in India is widely regarded as remaining largely independent, in no small part due to the constitutional protections that serve to prevent political overreach in judicial appointments. The basic structure doctrine, in this context, serves as a formidable safeguard, ensuring that no constitutional amendment can undermine the independence of the judiciary. However, its resilience faces internal challenges related to transparency in the *Appointment Process* (collegium) and *Institutional Autonomy* (case assignment).

By contrast, Israel faces greater challenges in maintaining judicial autonomy, due to the absence of a codified constitution, making dimensions like the *Appointment Process*, *Scope of Judicial Power*, and potentially even *Institutional Autonomy* more susceptible to political manipulation. The absence of a foundational legal framework renders Israeli judicial institutions more susceptible to political manipulation, as evidenced by the government's endeavours to reconfigure the judiciary's role.

E. Long-Term Implications for Judicial Independence.

The Indian case demonstrates that a strong constitutional foundation and an assertive judiciary can act as a bulwark against populist encroachments, particularly preserving *Security of Tenure* and the fundamental *Scope of Judicial Power*, even if debates persist regarding the optimal *Appointment Process* and the need for greater transparency in internal *Institutional Autonomy* (like case assignment). While debates over judicial transparency and accountability persist, the judiciary's ability to strike down legislative overreach remains intact.

In contrast, Israel's judiciary is at a crossroads, as the gradual implementation of reforms could weaken its ability to act as an effective check on government power. The ongoing calls for judicial restructuring in Israel give rise to concerns regarding the long-term democratic stability of the country, particularly in the absence of constitutional safeguards such as those present in India.

The judicial reforms in India and Israel demonstrate the varied strategies employed. This comparative analysis, utilising our matrix of independence dimensions, underscores the significance of legal safeguards (affecting *Tenure*, *Scope of Power*), public engagement (affecting *Legitimacy*), institutional design (particularly the *Appointment Process*), and internal judicial procedures (*Institutional Autonomy/Case Assignment*) in safeguarding judicial independence.

VI. Conclusion

In conclusion, the case studies of India and Israel demonstrate a complex interplay between populism and constitutionalism, illustrating how populist governments can challenge, reshape, and in some instances, undermine the principles of liberal constitutionalism. In India, the proposed establishment of a Judicial Nominating Commission through the 99th Amendment illustrates the inherent tension between the twin objectives of ensuring judicial independence and enhancing political accountability. Although the amendment enjoyed considerable political support, it was ultimately invalidated by the Supreme Court on the grounds that it contravened the 'basic structure' doctrine, thereby reinforcing the court's role as a guardian of constitutional principles. This case study demonstrates the difficulties populist governments encounter when attempting to reform the judiciary, particularly in a system with robust constitutional safeguards.

Israel offers a more complex illustration, where gradual alterations to the judicial selection process have been shaped by evolving political circumstances and the waning influence of a formerly dominant cultural elite. Although these changes have increased political accountability in judicial appointments, they have not yet undermined judicial independence in any fundamental way. However, the broader context of illiberal policies gives rise to concerns that these reforms may be part of a larger trend towards the weakening of liberal democratic institutions. While populism presents significant challenges to constitutionalism, there are pathways to the preservation of the integrity

of democratic institutions. By reinforcing constitutional safeguards, promoting transparency, and fostering international cooperation, democracies can resist the encroachment of populism and ensure that their judicial systems remain independent and robust defenders of the rule of law.

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