
JUDICIAL POPULISM AND THE EROSION OF INTERNATIONAL LAW: A COMPARATIVE CONSTITUTIONAL ANALYSIS OF LEGAL AND POLITICAL NARRATIVES IN HUMANITARIAN INTERVENTIONS

Vishal Vijaya Krishnan. K, LLM, School of Law Christ (Deemed to be) University,
Bengaluru

ABSTRACT

This paper investigates how judicial populism, particularly, is shaped by the Political influence and politicization of the Judicial selection process, with significant impact and dominance by the Executive, subservient to the political whims and fancies of the Populist political regime, and how these influences and politicization corrode international law, with a focus on humanitarian interventions. Through a comparative constitutional analysis of the United States, India, and Israel, the paper tries to examine how the Court has started to align itself with the Populist executive agenda, reframing itself around the aspects of sovereignty, intervention, and Accountability. In each jurisdiction, the process and mechanism of judicial appointment range from partisan elections to executive-dominated selection committees, which have enabled the politicization of judicial appointments and weakened the independence of the judiciary. The study explores how selection procedures that influence the Judiciary through fundamental jurisprudential shifts and methods that eventually legitimize the unilateral intervention often bypass the legal framework and international humanitarian laws. By synthesising and understanding major jurisprudential trends, normative critiques, and institutional dynamics, the paper argues that judicial populism erodes constitutional safeguards domestically and destabilizes the global legal order. The article tries to provide critical insights into the problems and deliver reforms to address the issues raised.

Keywords: Populism, Populist Government, Judicial Populism, R2P (Responsibility to Protect) Principle, Human rights violation, Humanitarian Intervention, Sovereignty, Interventionism.

Introduction

Judicial Populism¹ is a Concoction of Populism with the willingness of the Judiciary to the will and dominance of the Executive's whims and fancies. The Populist regimes tend to control the Organs of Government to assert and legitimize the Populist Policies² needs. The Judiciary acts as a Legitimizing Tool for the Regimes when their acts contravene the Rule of Law and dilute the Separation of Powers. The Global Resurgence of Populist regimes³ has placed the Judiciary at the front of the Crucial institutional struggle, transforming the court from an adjudicating authority to an active player and participant in the Majoritarian populist⁴ regime and their policies. The Phenomenon of Judicial populism comes into play when the Decisions by the court align with the Populist⁵ narratives of the executive by reframing the Identity, Moral imperative, and the Sovereignty of the Nation to justify the unjustified humanitarian intervention⁶ that often bypasses the Multilateral International⁷ as well as the National Legal Framework. This study aims to understand and investigate the relationship between the disruption of International legal norms and Judicial populism, particularly in Humanitarian intervention⁸. It examines how domestic courts try to create a legal narrative to substantiate the intervention on whether these judicial benches, dominated by the Dominance of the executive-appointed judges, often loyal to the clique that appointed them, and are more likely to endorse the actions contravening International Law. The study focuses on the United States, India, and Israel. It examines how appointments diverge from the Presidential system of the USA to the Collegium system of India⁹ and the Parliamentary Partisan System of Israel. Despite growing concerns about the growth of populism in various countries and its impact on Democracy¹⁰, a critical gap exists in the Comparative study of the subject, highlighting the Critical areas of conflict and Subservience of other institutions in the concept of separation of powers. The study also highlights the ideological subservience and the willingness of the judiciary to accept and legitimize the Humanitarian intervention that contravenes the International legal norm. Five

¹ JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016)

² ERNESTO LACLAU, ON POPULIST REASON (2005)

³ Michael Landau-er, From Rhetoric to Action: A Constitutional Analysis of Populism, 20 GER. L.J. 321 (2019).

⁴ Wojciech Sadurski, How Democracy Dies (in Poland): A Case Study of Authoritarian Backsliding, 41 SYDNEY L. REV. 3 (2019)

⁵ Paul Blokker, Populism as a Constitutional Project, 17 INT'L J. CONST. L. 536 (2019).

⁶ HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 1945).

⁷ ANTONIO CASSESE, INTERNATIONAL LAW (2d ed. 2005).

⁸ Peter Hilpold, Humanitarian Intervention in International Law: A Contemporary Analysis, 12 EUR. J. INT'L L. 437 (2001).

⁹ Abhinav Chandrachud, The Impact on Diversity in the Indian Supreme Court: Comparing Collegium and Commission Appointments (SSRN Elec. J., 2019)

¹⁰ Nadia Urbinati, Political Theory of Populism, 22 ANN. REV. POL. SCI. 111 (2019).

interrelated research questions are highlighted to address the study: What is the relationship between Judicial Populism¹¹ and the disruption of International legal norms, particularly in humanitarian intervention? How do domestic courts justify humanitarian intervention by constructing legal narratives to substantiate it? How do the judicial appointment¹² mechanisms in the USA, Israel, and India reflect divergent differences, and what are their practical implications for safeguarding the independence of the judiciary in democratic governance from the pressure of a populist regime? What are the ideological and institutional characteristics of courts operating under populist regimes? Are courts dominated by executive-appointed judges¹³ more likely to support populist humanitarian interventions that contravene international law? To Understand To explore the Link between Judicial Populism and the Disruption of International Legal Norms¹⁴, To understand how the domestic courts justify the Legal narratives behind Humanitarian intervention in Populist regimes To describe the procedure and background of the Judicial appointment mechanism in the USA, Israel, and India, and their practical implication in the Concept of Judicial independence¹⁵, To understand the Ideological and Institutional character of the court in the Populist Regimes, To assess the legitimacy of Executive action by the judiciary in the Populist regime and correlate it to the politicization of Judicial appointments, To test whether the courts that are dominated by the Executive appointment are likely to support the Populist Regime and their Humanitarian Intervention in another country, which contravenes international law.

The Relationship between Judicial Populism and the Disruption of International Legal Norms, particularly in Humanitarian Intervention

Comparative understanding of Judicial Populism

In a modern-day scenario, most populist regimes are using the judiciary to legitimize their populist agenda by depriving the rights of Minorities and vulnerable groups. We can also

¹¹ Ihsan Yilmaz & Galib Bashirov, How Populism Takes Over the Judiciary: Lessons from Turkey, 19 GER. L.J. 1709 (2018)

¹² John Ferejohn & Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U. L. REV. 962 (2002).

¹³ PETER H. RUSSELL & DAVID M. O'BRIEN eds., JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY (2001).

¹⁴ Laurence R. Helfer & Stefan Voigt, International Courts as Agents of Development, 13 YALE HUM. RTS. & DEV. L.J. 1 (2010).

¹⁵ Joshua I. Turner, The Structure of Judicial Independence in Post-Democratic Transitions, 2007 BYU L. REV. 1433.

understand that the judiciary¹⁶ aligns with the majoritarian tendency instead of political neutrality. It is argued that the courts in the populist regimes have been increasingly trying to become the allies of the populist will, subordinating the legal reasoning and principles to the majority's will. It is necessary to critically examine how judicial populism undermines the separation of powers and institutional legitimacy¹⁷ when it becomes a mere tool for enforcing executive action and ideology without critically analysing its jurisprudential understanding. The literature is crucial in understanding the exploitation of legal institutions and the erosion of international norms. The primary analysis is that the judiciary is working on behalf of the populist agenda, and the appointment of judicial officers by the same political party that is implementing the populist agenda. In most countries, judicial independence is a façade.¹⁸ How judicial populism mirrors political populism, favouring the Ultra-nationalist interpretation of the law. They argue that it is against the basic concept of the rule of law, where the judiciary is expected to act as a check and balance in a democracy. It is essential to understand how the judiciary is becoming the vehicle for justifying and legitimizing the populist narrative.

The emergence of judicial populism in the U.S courts¹⁹, where judges adopt populist rhetoric to legitimize their decisions in the eyes of the people. The US judiciary²⁰ is a Jury system where a group of people is selected to decide the case, and in most instances, they have more power than the court judge. There are historical instances where a jury that consists of white Americans often convicts or criminalizes black Americans. It is noted that judicial populism parallels political populism, often marginalizing the people or judicial officers who are experts in jurisprudence. In most cases, it is pointed out that the judges are becoming the harbinger of majority sentiment instead of becoming the guardians of the rule of law or precedent. It is vital to understand how judicial populism is obscuring the rights based on the constitution and thus weakening the courts' role in enforcing international law, particularly involving executive military action in other countries in the name of humanitarian intervention²¹. Literature provides a comparative analysis of how the courts of Hungary and Poland are co-opting the populist regimes in their respective countries. In recent times, countries are becoming

¹⁶ CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

¹⁷ HERBERT JACOB ed., COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE (1996).

¹⁸ Lisa Hilbink, *Judicial Populism: A Conceptual and Normative Inquiry*, L. & Soc. Inquiry (2024)

¹⁹ William R. Salzman, The Structure of the Bench: Characteristics of Judges in American State Courts, 77 JUDICATURE 306 (1994).

²⁰ NICOLE VARNHOLT, JUDICIAL INDEPENDENCE: SELECTION AND ACCOUNTABILITY OF JUDGES (1989).

²¹ Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 Minn. L. Rev. 1 (2021)

increasingly Islamophobic in nature, particularly in the case of Hungary and Poland²², where their respective government are populist regimes and anti-immigrant; their populist tendency is also reflected in the judiciary. It generally argues that the government captures the constitutional courts by politicizing the judicial appointments and manipulating the courts' jurisprudence in its favour. These acts create constitutional narratives to reinforce their political populism, thus enforcing that their actions are judicially legitimate. The judicial review was a tool for constitutional accountability, and authoritarian populism is transforming and redefining the court's role from the checks and balances separation of power to the enablers of the populist narratives. Now it has been transformed into an instrument for enforcing executive dominance in a presidential republic and legislative dominance in a parliamentary democracy. The primary analysis is that the politics of each country are contravening the basic principle of constitutionalism and international legal obligations. The domestic courts can be misused to legitimize the violation of international norms, especially during war or a national security crisis, to bolster nationalist tendencies and suppress any opposition or dissent.²³

Populism and Interventionism in International Law

Populist regimes use international law as an instrument to enforce their dominance over other countries, exploiting their fault line, as the USA did in Iraq, claiming the presence of WMD (Weapons of Mass Destruction). The author also argues that the regimes often reject the fundamental binding international obligation if it is against their populist agenda or the so-called national will²⁴. The critical analysis is that the same regimes that use military intervention in so-called humanitarian intervention²⁵ with the help of international law often do not follow or are obligated to it. In some sense, international law is only on paper. The author explains how the populist government challenges the basic principle of international law by enforcing the nationalist interpretation of the rule of law. We should also critically analyse how European countries are becoming more populist and dismiss the international norms and obligatory treaties they are a party to. These populist regimes perceive the international rules and regulations as an elite-imposed constraint on their domestic authority to undermine

²² Łukasz Radzinowicz & Tomasz Tadeusz Koncewicz, *Constitutional Breakdown in Poland*, 20 GER. L.J. 465 (2019).

²³ Wojciech Sadurski, *Judicial Review vs. Populist Authoritarianism: Comparative Lessons*, Comp. Const. Stud. (2024)

²⁴ R.P. ANAND, *INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES: CONFRONTATION OR COOPERATION?* (2008).

²⁵ Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT'L L. 679 (1999).

national sovereignty. The societies of European countries are becoming radically conservative in aspects of migration and conflicts, subtly undermining international law.²⁶ The risk populist regimes pose to the institutional structure of the polity and international norms²⁷ is enormous. The populist regimes often depict or vilify the global standards as hostile to national self-determination²⁸ or as a tool to undermine national sovereignty, and foreign interference in domestic affairs. This narrative weakens respect for institutions like the ICJ and ICC, and disrespects the enforcement of human rights in the country, increasing the chances of human rights violations. The example of European and Latin American countries states that even liberal democracies may face populist upheaval, during which the judiciary will also take a back foot to stand with the populist regimes, failing to uphold international standards. By emphasizing the erosion of legal solidarism, the article tries to help us understand why the judiciary and populist courts fear or hesitate to enforce the international humanitarian mandate, but support the populist underpinnings. We can take the examples from the history when the judiciary became a tool for legitimizing the actions of totalitarianism far along the populism, during the second world war the totalitarian regimes of nazi Germany and that of the soviet union had the legitimization of judiciary, where the judicial appointments were based on party loyalty instead of legal acumen and capability, but the history is repeating itself in form less potent form of totalitarianism which is populism.²⁹ The analysis of humanitarian intervention examines how the moral and legal narrative is framed in such a way as to legitimize the military action of powerful states in so-called humanitarian intervention. The author explains the notion of muscular intervention³⁰, where countries use force to enforce the basic principle of humanitarianism by military action. Still, the agenda behind it is different, with a subtle goal. Muscular humanitarianism³¹ was used in two instances, Kosovo and Iraq. The countries were bombed with civilian casualties, with the justification of a humanitarian intervention. Irony is that the same humanitarian intervention was killing civilians in the countries, in instance of Kosovo the NATO under the leadership of USA intervened³² in the Serbian civilian which was taking place after the breakup of Yugoslavia, the American which was first an ally Serbia then

²⁶ Heike Krieger, *Populist Governments and International Law*, 30 Eur. J. Int'l L. 971 (2019)

²⁷ SHIRLEY V. SCOTT & CHARLES SAMSON, *THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION* (2007)

²⁸ GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* (2004).

²⁹ Kristian Humble, *Populism and the Threat to International Law*, 11 *Laws* 50 (2022),

³⁰ *Ibid* 25

³¹ *Ibid* 25

³² WILLIAM SHAWCROSS, *DELIVER US FROM EVIL: PEACEKEEPERS, WARLORDS AND A WORLD OF ENDLESS CONFLICT* (2000)

bombed the country in so called humanitarian intervention bombing a particular side assisting the group which was committing the acts of terrorism. When there was an real need of intervention when the Serbian forces were committing the acts of genocide in Kosovo and Bosnia the American didn't intervene and acted only on their convenience, same in Iraq, in 2003 USA invaded Iraq on the grounds of involvement in the 9/11³³ attack when in reality Iraq had no part in it, and invaded Iraq on grounds of humanitarian intervention, then responsible for an artificial scarcity of food which killed 1 million Iraqi kids mostly. And the US court supported the Bush administration, thus legitimizing these actions, contradicting international norms.³⁴

There are procedural ambiguities in defining the lawful intervention of countries in a humanitarian crisis. The article also speaks primarily about the Responsibility to Protect doctrine, also known as R2P³⁵, and the political manipulation for the country's benefit of imposing it on the grounds of humanitarian intervention. This R2P³⁶ doctrine was used in Libya in 2011, mainly by NATO forces aiding the rebel groups by providing them with air support. Still, it was used for regime change in Libya and to topple the Muammar Gaddafi government, which in turn created a rippling effect and paved the way for civil war, which has divided Libya into two parts to this date. The R2P principle is misused mainly by the powerful countries³⁷ to enforce their agenda at home and their will abroad. In the 21st century, the most powerful countries have misused the R2P Principle. The article is also essential to understand how the courts in populist democracies³⁸ navigate the loophole of international law when adjudicating cases involving executive actions that led to so-called humanitarian intervention³⁹. A comparative judicial treatment from the courts of the USA, UK, and INDIA, making it essential to understand the cross-judicial interpretation with the interpretation of interventionism.⁴⁰

³³ Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224.

³⁴ Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 Eur. J. Int'l L. 679 (1999)

³⁵ GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* (2008).

³⁶ ALEX J. BELLAMY, *THE RESPONSIBILITY TO PROTECT: A DEFENSE* (2015)

³⁷ GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* (2004)

³⁸ Tanja Aakkerman, Cas Mudde & Andrej Zaslove eds., *POPULIST POLITICAL PARTIES IN EUROPE* (2014).

³⁹ Jürgen Gerhards, Lukas Antoine & Rasmus Ollroge, *State Sovereignty and the Protection of Human Rights: How Military Humanitarian Intervention Is Supported by Citizens Around the World*, 54 INT'L J. SOC. 155 (2024)

⁴⁰ Oxford Academic, *Humanitarian Intervention and International Law*, in *Oxford Public International Law* (2023)

The tension between the state's sovereignty and humanitarian intervention⁴¹ focuses on the dilemmas between modern warfare and transboundary crises. It argues that populist regimes often use sovereignty as a façade to protect themselves from the scrutiny or criticism they face due to intervention and war crimes, even when there is an accountability mechanism for the interventions of any kind and their outcomes. The article also analyzes the so-called interventions in Iraq⁴², Syria, Afghanistan, and Ukraine. In Syria, the right to protect principle is used to bomb the Assad regime's forces, and it is intended to have a regime they were alleged to have used chemical weapons against its citizens. The US and its allies attacked the government forces, whereas Russia supported the Assad regime. The conflict became a multilateral conflict, with multiple countries involved. It explicitly explains the misuse of the R2P principle in Libya⁴³ with the sanction of the United Nations Security Council resolution of 1973⁴⁴ (<https://acelebrationofwomen.org/tag/the-prime-ministers-office/> n.d.), which allowed the intervention in Libya. Still, it turned a simple protest into a civil war, and it has turned into a prolonged conflict, with the risk of famine and a humanitarian crisis. It is essential to understand the judiciary and its behavior during populist regimes.⁴⁵

Historical Instances of Judicial Populism

To understand how a constitutional structure facilitates authoritarianism⁴⁶ and will eventually lead to a Totalitarian⁴⁷ regime and how populist regimes try to manipulate the constitutional design of the judiciary to legitimize their ideology. The authoritarian actions of Joseph Stalin in the erstwhile USSR (Union of Soviet Socialist Republics)⁴⁸ were legitimized by the constitution of the USSR. The Great Purge of the Soviet Union in 1939, which killed millions, was also legitimized by the Judiciary of the Soviet Union, playing an essential role in the trial of the accused in the Great Trial⁴⁹. The constitution of the USSR of 1936 acted as a billboard

⁴¹ Peter Hilpold, Humanitarian Intervention in International Law: A Contemporary Analysis, 12 EUR. J. INT'L L. 437 (2001).

⁴² Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498

⁴³ The Responsibility to Protect: Libya and Côte d'Ivoire, 3 AMSTERDAM L. F. 45 (2011).

⁴⁴ Akande, F. A. (2022). *Enforcement of human rights and the relevance of the United Nations in the 21st Century: A synopsis of End SARS protest.* <https://core.ac.uk/download/524770172.pdf>

⁴⁶ TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY (2017).

⁴⁷ HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951).

⁴⁸ The USSR, or Union of Soviet Socialist Republics, was a vast, single-party communist state spanning Eurasia from 1922 to 1991, formed by Russia and other socialist republics, aiming for a communist society but evolving into a superpower under leaders like Stalin, eventually collapsing due to internal pressures and reforms, leading to 15 independent nations.

⁴⁹ The "Great Trail of USSR" likely refers to the Great Purge (or Great Terror, 1936-1938), a period of intense political repression under Stalin involving mass arrests, executions (around 750,000), and forced labor in Gulag

for projecting democratic ideas while consolidating powers to a group of elites known as the Vanguard of the working people in the CPSU (Communist Party of the Soviet Union). Then the author highlights the constitution of North Korea, also known as the DEMOCRATIC People's REPUBLIC OF Korea, which ironically guarantees civil liberties, including freedom of speech, religion, and assembly, under Article 13 of the North Korean Constitution, despite being a one-party state and a totalitarian regime. It argues that totalitarian regimes use democratic language to legitimize their action domestically and abroad. Thus, when the constitution of authoritarian⁵⁰ countries is a façade, the judiciary becomes a puppet.⁵¹

The UN report tries to give an overview of how the populist regime undermines cooperation in global human rights. It also explains about reactionary populism, which includes exclusionary nationalism, xenophobia, anti-multilateralism, and many more. The populist leaders try to scapegoat vulnerable social groups such as migrants, minority refugees, and LGBTQ individuals, eroding the foundation of the global human rights framework⁵². The report explains how totalitarian regimes often originate from populist ideology. Populism is a precursor to a totalitarian ideology, manifesting in a regime. The report also describes how populist regimes use rhetorical strategies to delegitimize the international institutional framework, including the UN, to uplift their ideological underpinnings. Populism⁵³ threatens the global framework and the domestic judiciary of the respective countries with populist regimes. Thus, populism influences the judiciary's behaviour and obstructs international legal enforcement and Universal human rights.⁵⁴

How do the judicial appointment mechanisms in the USA, Israel, and India reflect divergent differences, and what are their practical implications for safeguarding the independence of the judiciary in democratic governance from the pressure of a populist regime?

camps for suspected enemies, including party members, military leaders, and ordinary citizens, aiming to consolidate Stalin's power through fear and eliminating dissent

⁵⁰ FRANZ NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE: ESSAYS IN POLITICAL AND LEGAL THEORY (Herbert Marcuse ed., 1957).

⁵¹ Tom Ginsburg & Alberto Simpser, Introduction, in *Constitutions in Authoritarian Regimes* 1–20 (Tom Ginsburg & Alberto Simpser eds., Cambridge Univ. Press 2014).

⁵² JEAN S. PICTET ed., THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY (Int'l Comm. of the Red Cross 1952).

⁵³ Populism's Attack on Multilateralism and International Law (LL.M. thesis, Univ. of Pretoria 2019)

⁵⁴ U.N. Off. of the High Commissioner for Hum. Rts. [OHCHR], Populism and the Threat to International Solidarity, U.N. Doc. A/75/180 (2020)

Executive - Judicial Appointment Mechanism and Influence of Populism

The judicial appointment mechanisms in India, Israel, and the USA have differences in the appointment procedure of the judicial officers in their respective countries, influencing the judicial independence in each country.

USA

The President nominates federal judges to the USA Supreme Court⁵⁵ after confirmation from the Senate. The process is overly political, misbalancing the checks and balances. The US judicial appointments⁵⁶ have a risk of political appointment, where people with political clout, based on favouritism, will be appointed, which would affect the principles of natural justice. But the salary and tenure are the only aspects that the USA Constitution protects under Articles 2 and 3⁵⁷

Israel⁵⁸

In Israel, judges are appointed by a 9-member judicial committee comprising politicians⁵⁹, judges, and representatives from the bar. The primary intent of the appointment procedure is to have professional merit with a democratic procedure⁶⁰. But the Populist regimes in Israel⁶¹ over the course of time, where judgment was aligning with the populist agenda, as in the case of *Gisha vs the State of Israel*⁶².

India

In India, judicial appointments⁶³ are dealt with in Article 124, where the President appoints

⁵⁵ LAWRENCE BAUM, *IDEOLOGY IN THE SUPREME COURT* (2013).

⁵⁶ AM. BAR ASS'N, *JUDICIAL SELECTION: DIVERSE METHODS, COMMON GOALS* (2008).

⁵⁷ USA Constitution Appointment Mechanism

Federal judges, including Supreme Court Justices, are nominated by the President and confirmed by the Senate under the Appointments Clause. U.S. CONST. art. II, § 2, cl. 2

Tenure and Salary Protection

Article III guarantees that judges “shall hold their Offices during good Behaviour” and “shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”: U.S. CONST. art. III, § 1

⁵⁸ Ariel Shimonovitz, *The Knesset as Arbiter of Public Law: Judicial Review in Israel and Other Countries*, 48 *ISR. L. REV.* 405 (2015).

⁵⁹ Yoav Dotan, *Judicial Appointments in Israel: A Comparative View*, 45 *ISR. L. REV.* 399 (2012)

⁶⁰ Barak Medina, *Judicial Review and the Separation of Powers in Israel*, 38 *ISR. L. REV.* 249 (2005).

⁶¹ JOHN J. MEARSHEIMER & STEPHEN M. WALT, *THE ISRAEL LOBBY AND U.S. FOREIGN POLICY* (2007).

⁶² . HCJ 2280/24 *Gisha and others v. Government of Israel and others* – Judgment dated March 27, 2025

⁶³ *Ibid* 9

judges of the Supreme Court⁶⁴ after consulting senior judges. However, the process is protected from political interference. Still, the system has its own loopholes, where the judicial officers are now appointed on a hereditary basis based on the façade of credibility and eligibility.

Justification by domestic Courts on humanitarian intervention by constructing a legal narrative and justification, and the Rule of Law.

The one instance of the judiciary giving a Judgement made on the line of Populism was in the *Gisha v. State of Israel*.⁶⁵ Where the Supreme Court of Israel supported the Intervention of Israel in Gaza⁶⁶, the background of the case mainly goes to the Blockade of food supply by Israel, which was going to Gaza by many foreign aid and Supplies. The *Gisha*⁶⁷ NGO went to the court, and the Court gave a judgment that supported the intervention by stating that it was necessary to protect sovereignty. There is a Historical precedent in which the State of Israel has been violating Human rights⁶⁸ in the Mandate of Palestine, as well as in Gaza. The actions of the State of Israel are mainly based on protecting sovereignty and the citizens. The Same instance can also be seen when Israel invaded Lebanon.⁶⁹ To protect their own citizen, but the Pretext of protecting Christian Minorities in Lebanon, thus an Angle of Humanitarian Intervention also comes up. Again in 2024, the State of Israel invaded Lebanon on the Pretext of Sheltering Hezbollah, shortly after the Hamas attack on October 7, 2023, which killed more than 2000 people. The UN has passed a Security Council resolution 1701 in 2006, and the ICJ has considered the Occupation Unlawful in many instances. Still, the Resolution itself has been violated 7000 times since then by Israel through the means of the Air Force and Aerial vehicles. The state of Israel's action can be seen as a great example of a Populist regime where both the Judiciary and Legislation are on the same footing and support each other. The state of Israel stands together on one thing: to protect its sovereignty and dignity. The legal reasoning and rule of law fade away regarding survivalism and national integrity. The pretext of the *Gisha* case⁷⁰ was the Gaza war; the state of Israel wanted to stop the Aid to Gaza⁷¹ as they were

⁶⁴ Raghav Dharmadhikari, Separation of Powers and the Indian Judiciary (SSRN Elec. J., 2022)

⁶⁵ Ibid 62

⁶⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

⁶⁷ *Gisha* is an NGO working in the Middle East region for protecting Human rights, particularly in Gaza.

⁶⁸ Public Comm. Against Torture in Isr. v. Gov't of Israel, HCJ 5100/94 (Isr.).

⁶⁹ In 1978, Israel invaded Lebanon on the Pretext of the PLO (Palestinian Liberation Organization) Working inside the Lebanese Countryside against the State of Israel.

⁷⁰ HCJ 2280/24 *Gisha v. Gov't of Israel* (Mar. 27, 2025) (Isr.)

⁷¹ Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion (I.C.J. July 19, 2024)

harboring Hamas terrorists there, and all the Aid and funding were funnelled to Hamas coffers and used for terrorist activities. The State of Israel went into a defensive mood where they just wanted to protect their own and did not care about the People on the other side. The situation like this often led to conditions of Human rights violations, where the people of the enemy state would be seen as Belligerents themselves⁷², as there are chances that the terrorists would be hiding among the Public, as there is substantial popular support for Hamas among the People of Gaza. But this was not the Case in Most Instances.

Judicial Pronouncement by the State of Israel in the Context of Lebanon and Gaza

The Kahan Commission and Sabra-Shatila (1982-1983)

The Commission was set up following the Sabra and Shatila Massacre, where the Christian rebels massacred many Muslims in Lebanon. The Israeli Courts created a commission headed by Supreme Court president Yitzhak Kahan and Justice Aharon Barak to review the situation in Lebanon. The Key Findings of the Commission are that the Israeli Leaders were Indirectly Responsible for the massacre, even though there was no direct Israeli connection to it. The decision to allow the Christian Militant of the refugee camp was made without considering the danger they posed to the refugees by the Israeli military. The defence minister of the time, Ariel Sharon, was also found to have personal responsibility and was recommended to be removed from Office. The commission established the principle that the Court of Israel could review and critique military and political decision-making in the context of conflicts.

The Beit Sourik Wall Case (2004)⁷³

The case mainly dealt with the creation of separation barriers in the West Bank, which had implications for the security reasons of the Lebanese border. The Supreme Court of Israel gave a Precedent and Proportionality analysis of the operation. The court held the principle that the Military commanders can construct the security barriers for Security reasons only and not for Political reasons. The International Humanitarian Laws apply to all Military Operations conducted by the State of Israel.

⁷² The Status of Responsibility to Protect in International Law and Whether Doctrine Advances Use of Military Force for Humanitarian Ends, 9 UKH J. SOC. SCI. 1 (2023).

⁷³ Beit Sourik Village Council v. Government of Israel (HCJ 2056/04)
HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel 58(5) PD 807 (Isr.)

US Court Decisions

The US Military, after 9/11, was given power by the Authorization for Use of Military Force (AUMF) Framework, where the President⁷⁴ was authorized to use all necessary force against any nation, person, or organization that was related to the September 11 attacks⁷⁵.

Rasul v. Bush (2004)⁷⁶

The Court held that the Federal Habeas Statutes extended to the Detainees of Guantanamo Bay, who were all aliens to the USA.

Boyle v. United Technologies Corp. (1988)⁷⁷

In this case, it provides immunity to the Private Military Contractors who followed the specifications of the Government. The Doctrine was extensively misused in the Context of Afghanistan and Iraq.

Conclusion

Judicial populism as a phenomenon arises out of two conditions, which are Appointment by the Executive Based on Loyalty and Political Affiliation.

The other is the Ideology or the belief system that the judges carry, ex, in the Instance of the Trial of Adolf Hitler, where the judges were sympathetic to Hitler. Modern instances of Judicial populism are no different from those of the past. The comparative analysis of the USA and Israel provided insight into how, even in a conflict situation, the judgment incorporates fundamental principles that aim to provide justice, albeit with its consequences. Thus, the executive attempts to influence the appointment mechanism through which judicial officers are appointed and controls the same institution, which is considered the Protector and provider of Justice to the Weak and the infringed. The conflicts in the other sub-Saharan regions would be misused across the globe by the Western world powers with their interventionist⁷⁸ and populist

⁷⁴ EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957 (4th rev. ed. 1957).

⁷⁵ Ibid 33

⁷⁶ Rasul v. Bush, 542 U.S. 466 (2004).

⁷⁷ Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

⁷⁸ Peter Hilpold, Humanitarian Intervention in International Law: A Contemporary Analysis, 12 EUR. J. INT'L L. 437 (2001).

tendency, which would come at the cost of the lives of Millions of people who are on the brink of genocide and starvation, even to this day.

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