Judicial Review of Administrative Discretion in the Era of Populism: Safeguarding Checks and Balances

AI Disclosure Statement

"Artificial intelligence tools were used constructively in the preparation of this work specifically to check grammatical errors, improve sentence structure and clarity, and assist with the accurate formatting of citations and references. All intellectual content, arguments, and conclusions remain solely those of the author."

ABSTRACT

This article seeks to investigate the evolving forms and patterns of modern populist rule, how such patterns are subverting the institutional constraint on administrative discretion afforded by judicial review, and in light of such analysis, to identify what new forms of doctrines can be adopted or developed to re-enforce constraints over arbitrary exercises of administrative discretion in the populist context. Drawing on India, Hungary, Turkey, and Brazil, this paper argues populist rulers weaponize administrative discretion to undermine courts, proposing a reconceptualized "separation of checks and balances" doctrine to preserve judicial oversight and rule of law.

During populist rule, administrative discretion checks can be sequentially eroded through political court appointments, executive centralizing constitutional changes, and the conscious delegitimization of the judiciary as an enemy of the popular will. The disregard for administrative transparency, due process, and policymaking based on expert opinion is instrumental in empowering populist regimes with unaccountable discretion, thus disarming the administrative law guarantee of rationality and the principle of separated powers and eviscerating judicial review due to the pervasive hostile political climate. This article argues, however, that courts can counter this with an "adaptive constitutionalism" that uses the principles of proportionality, legitimate expectations, and intensified judicial review as the tools of its resistance, thus maintaining effective constitutional constraint without suffering the backlash that could enable the triumph of populist majoritarianism over lasting authoritarianism.

Keywords: Judicial review, administrative discretion, Populism, Rule of law, Democratic backsliding.

I. INTRODUCTION:

Understanding the Mechanism of Judicial Review in Ensuring Democratic State of Affair.

The subject of administrative law although considered as a subset course within the broader ambit of Public Law but its significance and application in governance and law made it altogether a separate discipline. The proposed topic on judicial review will gauge upon the active and prominent role of judiciary in ensuring that the power and function of execution of policy and its corrective measure in framing of the policy is within its lawful ambit thus not transgressed the limit and make it arbitrary in nature. Administrative law is a heuristic science which means it is subject to inquiry and enabling discovery through evaluation and experiment.[1]

The discussion and discourse on the principle of Judicial review is not merely a provision mentioned in our constitution, but a fundamental safeguard mentioned in the spirit of constitutionalism which upholds the fairness, accountability and judicious action of administrative body in action. Judicial Review is the result of a long-drawn journey of judicial activism which states the pro-active role of judiciary in ensuring the proper functioning of the administration.

The potential challenge in the democratic state of affair emerges when there seems to be a power overreach or a kind of power pull ups functioning by an administration eclipsing the doctrine of check and balance. When it comes to the democratic governance worldwide populism has posed a significant challenge to it, as populist leaders who gain thumping majority try to subdue the symmetry of separation of power and make it a consolidated form of power holding. Where their model of governance is answerable to no one. Judicial review ensures that administrative decisions are not arbitrary, requiring that administrative power be exercised in a reasoned, proportionate, and transparent manner.[2]

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[1] *I.P. Massey, Administrative Law 3 (9th ed., Eastern Book Company 2016).*

[2] Judex Tutorials, Administrative Discretion Meaning Control and Review, JUDEX TUTORIALS, https://judextutorials.com/blog/administrative-discretion-meaning-control-and-review (last visited May 17, 2026) (on file with author).

This proposed research article assignment examines the case studies from four different countries such as India, Hungary, Turkey and Brazil. There exists a common thread among all of these mentioned countries as their populist government firstly acquire power through mass populist movement then after coming into power they maneuver the democratic culture into an undemocratic sphere altogether.

The very democratic process of a country falls into the area of duress and arbitrary threat. Traditionally, political winners are not motivated to make system subservient to their whim and fancy, but this intent has been maligned in the last three to four decades and now becoming a trend which certainly cannot be overlooked.

STATEMENT OF PROBLEM:

The effective judicial review of administrative discretion has been severely hampered by the recent rise of populist governance. In order to undermine courts and get around established checks and balances, populist leaders frequently use divisive rhetoric to portray judicial oversight as an elitist restriction on the will of the people. If unchecked, this posture increases the risk of arbitrariness, undermines procedural fairness, and erodes the protection of fundamental rights within the administrative state by allowing the executive to exercise administrative discretion with little accountability. The problem is especially severe in cases where administrative law, which has its roots in liberal constitutionalism and has historically relied on the judiciary as the main safeguard against the abuse or excess of governmental power, is under constant pressure from populist movements opposed to institutions that aim to weaken institutional oversight and judicial independence.

Furthermore, populism upsets the delicate balance between the legislative, executive, and judicial branches. The doctrinal and structural underpinnings of checks and balances are threatened by populist practices like court-curbing, politicizing judicial appointments, and appealing to direct representation. At worst, these practices could result in the constitutional courts becoming a "charade" with little to no scrutiny or, at worst, becoming subservient to executive will. Since claims of administrative expertise and democratic legitimacy both support the extent of judicial deference, excessive restraint or abdication of scrutiny runs the risk of undermining constitutional guarantees. In order to protect the rule of law and ensure

that administrative discretion is subject to efficient, principled oversight even in the face of populist attacks, it is necessary to critically reexamine the proper boundaries of judicial review. Thus, the need to analyze and define the scope and boundary of judicial review becomes quintessential in undermining the overstepping functioning of administrative discretion and make it free from the excessive populist pressure which in expressed sense a threat to our rule of law and democratic resilience.

The concept of check and balance within the doctrine of separation of power maintains a balance of power structure among the three pillars of any democratic setup which are judiciary, executive and legislature. The wave of populism or the majority mandate rule often challenges the accountability and transparency features of separation of power.

RESEARCH QUESTIONS:

Appropriate research questions can be outlined based on the analysis of the topic "Judicial Review of Administrative Discretion in the Era of Populism: Safeguarding Checks and Balances." In the context of constitutional checks and balances, these inquiries seek to investigate the relationship among populism, administrative discretion, and judicial review::

1. How does populism influence the judicial review of administrative discretion in modern democratic governance?
2. What challenges do courts face in maintaining judicial independence and effective oversight of administrative discretion under populist regimes?
3. Comparative analysis of the extent of judicial review that prevent arbitrary exercises of administrative power and uphold the rule of law during populist governance?
4. How can the traditional separation of powers doctrine be adapted to better safeguard checks and balances in the context of administrative discretion influenced by populism?

HYPOTHESIS:

1. Judicial review acts as a critical safeguard that prevents the arbitrary exercise of administrative power under populist regimes, thereby protecting democratic principle and the rule of law.

RESEARCH METHODOLOGY:

The study of "Judicial Review of Administrative Discretion in the Era of Populism: Safeguarding Checks and Balances" is best approached by using a qualitative, doctrinal, and socio-legal research methodology. This entails a thorough examination of the fundamentals of administrative and constitutional law, a critical assessment of court rulings, and an investigation into how populism affects the operation of administrative discretion and judicial review. Examining legal texts, case law, academic discussions, and theoretical frameworks pertaining to judicial independence, the separation of powers, and checks and balances are common components of the methodology. Along with normative analysis to assess the legitimacy and efficacy of judicial interventions under populist governance, a comparative approach may also be used to comprehend how various jurisdictions have responded to populist pressures on judicial review.

II. Conceptual Framework

Meaning, nature, and scope of administrative discretion -

In Law, discretion is the power or right of a judge, public official, or other entrusted authorities to make decisions based on their own judgement and conscience, within the boundaries of established legal framework and governance structure. The discretion in layman term subsists the feature of flexibility, in a sense that when there is no determined rules or procedure to be followed but it should not be arbitrary in nature means the absence of fairness, justness and reasonableness in it. Administrative law unlike the constitutional law describes various organs of government in motion rather at rest. The day to day functioning and decision making work of an administration exemplifies the working of administrative body and its occupied discretionary orders.[3]

" Discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections."

~ Sir Edward Coke, Rooke's Case (1598).

The transition from the theory of "Laissez Faire" to "Welfare State" have increased the government action and intervention thus made the topic of administrative discretion relevance and important. The administrative authorities have now vast discretionary say and in general exercise power at the subjective satisfaction of the administration without any such imposing conditions. On its original position administrative body entrusted with the executive functions and responsibility however the delegation of legislative function and the power of interpretation through its tribunals makes it fit for all kinds of other democratic institutional operations. In short the concentration of all powers in the hand of administration legislative, executive and judicial.[4]

Discretionary powers conferred on the administration are of different kinds. Administrative discretion refers to the different types of decision making power that has been given to government officials, this is usually formed by statute or regulation which in turn allows

[3] *I.P. Massey, Administrative Law 3 (9th ed., Eastern Book Company 2016).*

[4] *Administrative Law's Role in Welfare State | PDF | Administrative Law | Social Justice*, SCRIBD, https://www.scribd.com/document/789102019/How-Administrative-Law-Contributes-to-the-Functioning-of-a-Welfare-State-in-Ensuring-Social-Justice (last visited May 17, 2026) (on file with author).

them a certain degree of flexibility with how they can apply policies within their department on their decisions. The primary types of discretion are unlimited or ordinary, where officials have the freedom to select one of several equally acceptable solutions and can be altered between as many times as deemed necessary; limited or extraordinary where decisions accepted by law based on vague concepts but offering some choice among alternatives; and finally chained or quasi- discretion which confines choices defined in legal texts but still provides a margin of interpretation. And, more pragmatically, administrative discretion may also be alive and well in the day-to-day implementation of areas as licensing/permitting, policy interpretation, and enforcement priority setting that make unavoidable the tailoring of administrative activity for different and changing sets of circumstances. Such varieties serve to promote effective government, though they also need to be kept in check so as not to slide into arbitrary and oppressive rule.

The scope of administrative discretion is not unfettered and the extent of such discretion is not unlimited. Legal frameworks place fixed constraints upon administrative discretion in order to avoid arbitrary or unfair decision-making. These are imposed via statute, through the courts, and by rules of procedural fairness, making decisions legal, reasonable, and compliant with the purpose of the enabling statute. Mechanisms such as judicial review further offer checks and balances, ensuring transparency, accountability, and the protection of individuals' rights without compromising agencies the operational flexibility needed to carry out their mandates and adjust to evolving public needs.

Secretary of State for Education & Science v. Tameside Metropolitan Borough Council, [1977] AC 1014 (HL), Lord Diplock said:

"The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

Administrative discretion's scope is both functionally wide—to enable responsive government—and simultaneously subject to structured legal and judicial control to prevent arbitrariness and uphold the rule of law. The interplay between flexibility and accountability defines its operational boundaries within administrative law.

Judicial review: concept, constitutional basis, and historical evolution -

Judicial review is a basic mechanism in the administrative law to provide accountability, legality, and safeguarding of constitutional rights. The theory, constitutional foundation, and historical development of judicial review are discussed elaborately in the accompanying text, along with significant pertinent cases rendered by Indian courts.

Navigating the etymology of this word we can describe Judicial review as the process whereby courts scrutinize acts and decisions of government or administrative authorities to see that they conform to law, natural justice principles, and the Constitution. Its ambit involves scrutinizing whether an authority maintains legality, rationality, procedural propriety, and proportionality in its acts. Unlike appeals, judicial review focuses on the fairness and legality of the decision-making process rather than the administrative decision's merits. Courts only intervene when decisions are irrational, unlawful, arbitrary, or violate fundamental rights.[5]

Articles 32[6] and 226 provide the primary constitutional foundation for the Indian judiciary's review of public laws. While Article 226[7] grants High Courts even more extensive authority to issue writs "for any other purpose" other than fundamental rights, Article 32 grants the Supreme Court the authority to enforce fundamental rights through appropriate writs. This is the cornerstone of the public law review of administrative action practice, protecting constitutionalism and preventing the misuse of governmental power.

“Judicial Review” may be defined as a “Court’s power to review the actions taken by the administrative body and termed it unconstitutional and ultra virus when those actions exceed the boundary of constitutionality. Therefore, it is an instrument in the hand of judiciary to maintain the harmony in the order of deliverance and the execution of policies.

The underlying objective of judicial review is to make sure that the authority or the body entrusted with the power to regulate and administer policy must not abuse it and the individual should receive fair and free treatment at all costs. In the landmark case of *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (India), the honorable Supreme court of India

[5] IJRPR, Judicial Review Article, https://ijrpr.com/uploads/V5ISSUE4/IJRPR25123.pdf (last visited May 17, 2026) (on file with author).

[6] INDIA CONST. art. 32.

[7] INDIA CONST. art. 226.

held the independency of judiciary and acknowledge the power of judicial review as vested and trusted in the hands of judiciary as one of the quintessential components of it in ensuring the constitutionality and validity of any legislation or policy.[8]

In another landmark case of *Tata Cellular v. Union of India*, (1994) 6 SCC 651 (India), the supreme court stated: "The *judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its own merits. These restraints bear the hallmarks of judicial control over administrative action."*

The idea of Judicial review was borrowed from the American constitution which has given legislative power in the hand of congress, executive power in the hand of the President and the judicial power in the hand of the supreme court of America and the courts subordinate to it which has the power to judiciously decide and can set aside any law which is not as per the constitutional mandate of the land. It was in the case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Where the doctrine of judicial review got established as a procedural norm of filtration where the dirt of ill willed laws or portions of it get erased out. In the year 1803, the court, led by Chief Justice John Marshall, ruled that the judiciary has the power to invalidate laws that are in conflict of the constitution thus thereby asserted the supremacy of the constitution. In India we adopt this mechanism of Judicial review as a part and parcel of our basic structure principle which cannot be taken or altered in any way.[9]

Relationship between discretion and rule of law -

The concept of rule of law is integral to our holy constitution of India. The basic description of this concept says that the all entity whether private/public/co-operative institution or body are subject of law and it is the law which governs the actions of individual or institution and no individual or institution has a supremacy over it. The rule of law ensures that a law should be clear, transparent, uniform and fair in all sense and manner.

Legal Scholar such as Edward Coke were among the first who made a significant contribution in championing the discourse pertaining to supremacy of common law over crown which ushered a leading pathway of other eminent legal scholars such as Sir A.V

[8] Devansh Tyagi, *Judicial Review Cases in India*.
[9] Britannica, *Marbury v. Madison | Background, Summary & Significance*, https://www.britannica.com/event/Marbury-v-Madison (last visited May 17, 2026) (on file with author).

Dicey to further elaborate and precisely defined this concept and coined three basic elements or pillars which articulates this very concept of rule of law such as Supremacy of law, Equality before the law and predominance of legal spirit.[10]

In the landmark case of *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1 (India) honourable supreme court highlighted the importance of rule of law and termed it "A Golden Thread" which runs through every provision of the constitution therefore it is indeed a part and parcel of the basic structure doctrine. Later apex court in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India) substantiated the test of reasonableness in length which says that a law must pass through this test in order to be fair, accountable and transparent. *Quod Principi Placuit Legis Habet Vigorem* (the sovereign's will has the force of law) this maxim applies with a condition that a sovereign will has the force of law and that law must be fair and not arbitrary in any given situation.

In the realm of administrative law the concept of administrative discretion and rule of law is interwoven closely in balancing out the accountability. On one hand administrative discretion emphasise on the action oriented task of the administration and on the other hand the rule of law demands that all those carried task or actions are subject to established law as no one is supreme above the law. In short rule of law is a framework within which an administrative discretion should be applied and carried with.

Rule of law doesn't eliminate administrative discretion but requires that the discretion must be exercised with the established legal norms and procedure. In democratic state and welfare state kind of model like we have in India requires equilibrium in order to maintain the legitimacy in governance and safeguarding freedom and honour of its citizens.[11]

The abuse or misuse of power can be abstain and preventable through the rule of law which marks as a cornerstone in safeguarding Individual freedom and dignity.

Conclusion

The above stated are essential complementary cornerstones to the operation of a modern democratic welfare state, bound within the discipline of the Rule of Law. The transition from the laissez-faire regime to that of the welfare state, as a direct consequence, has seen the administrative arm absorb in itself legislative, executive and judicial powers making the

[10] *Id.*
[11] St. Soldier Law College, *Rule of Law in Administrative Actions – A Critical Legal Analysis*, https://stsoldierlawcollege.in/Blog-Details/Rule-of-law-in-administrative-actions---a-critical-legal-analysis (last visited May 17, 2026) (on file with author).

requirement of a strict legal check all the more important. While administrative discretion can take its form of being unbridled, limited or quasi it cannot transform itself into arbitrary administration. As stated by Lord Diplock, 'the administrator when required to use his discretion must come to a reasoned choice between all relevant alternatives.' The judicial review based on Article 32 & 226 of the constitution remains the main instrument in the hands of the Judiciary for checking the administrative action and ensuring that the same is legal, rational, procedurally fair and constitutionally correct, as laid down in the classic cases of Minerva Mills v. Union of India & Tata Cellular v. Union of India. On the other hand, the Rule of Law, whose twin pillars are the supremacy of law and equality before law and its inherent predominance of the spirit of law as explained by Dicey, does not do away with the necessity of discretion, but restricts the arbitrary use of discretion and ensures, as was held in Maneka Gandhi v. Union of India, that administrative action withstand the scrutiny of its fairness, reasonability and translucency so as to guarantee the liberty and dignity of each and every citizen of India.

III. Populism and Administrative Discretion

Defining populism as a political phenomenon -

As per the given meaning in the oxford dictionary - the word populism means a movement or a political approach that strives to appeal to ordinary people who feels that their concerns are disregarded by established elite groups.

The word described within the context of a political phenomenon or movement because of its emphasis in the role and interest of the "Common people" or the "General Will" of the society in tussle with the corrupt and anti-welfare elite power lobby. The aspirations of the populist approach are always to out- throw the self-serving elite group. The populism as a political phenomenon can project a caution signal projecting as a clarion call for revolution. The struggle starts with setting out a popular narrative and make it workable through assembling majority against the powerful self-centric setup of elitist. The populism can manifest in different form or configuration as there can be a democratic populism which seeks to bring change and empower ordinary citizens through the direct participation and on the other side it can also take the guise of an authoritative populism where the power often concentrates in the hand of one individual who projects himself as a messiah or the charismatic leader who can steer the wheel of change to empower the people's will, often bypassing the principle of check and balance.

The semblance of political configuration which populism entails make it abrupt force to make a potential wholistic change that shapes future recourse of governance model, election procedure, policy formulations, implementations and its execution.[12]

Populist governance styles and their influence on administrative decision-making -

Once the outcry for change came to power, they outcast every existing set up and try in every possible way to impose stipulations which best suited their interest and political motives. They have their own multilayered kind of modus operandi, and I would zealously explain it by taking the reference of the seminal work of *Steven Levitsky and Daniel Ziblatt* book titled How *democracies die?* (2018) They meticulously argued that the consolidation of power by the populist regime happens just like a sport game: as first they capture referee, limit the scope of check and balance by appointing their loyalists and sidelining the opposition star

[12] National Resilience Studies, School of Strategic and Global Studies, University of Indonesia et al., *Populism and the Erosion of Democratic Checks and Balances: A Systematic Literature Review across Regions*, 7 IJMRA (2024), https://www.ijmra.in/v7i10/18.php (last visited May 17, 2026) (on file with author).

players. The overtures of their power displacement and later power accumulations start with altering the very fundamental pillars of democracy like infringement of election operations, stifling civil society, censoring journalists etc.

Professor Jhumpa Mukherjee (Department of political Science, St. Xavier's College, Kolkata, India) made an intensive effort in pointing out the populism, public administration and democratic backsliding: The Indian Experience and the comparative analysis in other south Asian countries such as Bangladesh etc.

The populist style of governance significantly influences the administrative decision-making process and often restructure it to their suitability and convenience so that the influence and intervention of political leadership could be at the maximum tone and level. Under populist regime the disruption of the political motivated will overshadowed the practical and pragmatic ideas of the well learned bureaucracy. They tend to channelize the system according to their whim and fancies and take their loyalist and seek patronage in their favor. There is no or very little scope of dissent or disagreement by the public officials as they are only allowed to execute orders and make it implementable at any cost, we can call it as a chained bureaucracy where a bureaucracy operates just like a stamp having no place for expressing, ideas, planning, suggestions or advice.[13]

The administrative autonomy always seen as a matter of obstacle rather an opportunity as the public administrative norms such as transparency, pluralism and accountability conceived as hurdles in imposing their populist will.

The use of administrative discretion under the shades of arbitrary exercise of power becomes prevalent surpassing the institutional frameworks and procedural constraints. One common line of practice can be seen in across the populist model following countries is the policy sabotaging by ignoring regulatory mechanism and often ignoring expert advice.

Risks of arbitrariness and erosion of institutional safeguards under populist regimes -

The arbitrariness of administration has a safe harbor in the populist kind of governance because of the centralization of power in the hand of executive organ. The populist leaders once come on the seat of power make the disability of right which persists equally and lawfully in the hands of other two branches which is legislative and judiciary. The erosion of institutional safeguards starts commencing through the weakening of legislative and judicial

[13] Jhumpa Mukherjee, *Populism, Public Administration and Democratic Backsliding: The Indian Experience*, Policy Studies (2025) (advance online publication).

institutions that are supposed to do check and balance. ‘The democracy lives its life through the breathing of parliament’ which means that it is the parliament which reflects the general will of the people through their representatives by undermining the role of a parliament by curtailing debates, discussion and consensus over bills or proposed amendments, it is exactly strangulating the voice of the people.[14] The threat to democratic system and the institutional functioning is not limited to this extent only and it overreach to stifle the voice of minority group, various interest groups by curtailing their basic civil rights and liberties. Democracy survives through the voice of dissent and criticism. The apparent risk of arbitrariness in the populist regime makes these practices nonchalant and non-permissible to practice. The audacious arbitrary power matrix subverts the nature of separation of power where the accountability maintains through the surveillance of other organs or the pillars of the government.

Impact of Populism on Judicial Review

Tensions between populist executive power and judicial independence -

The tug of war initiates when leaders or governments relying on populist rhetoric and mass support attempt to expand the horizon of executive authority in a way that challenge or undermine the independence of judicial role and capacity and its independent check on the arbitrariness of the administration. It becomes a hallmark of populist government to deliberately undermining the judicial independence, which is essential for enforcing the rule of law and maintaining checks and make administration accountable for their act. The tension rise to the pick and slacken the progress of democracy when the role of interpreting the laws which fairly resides in the area of judiciary sabotaged by the executive making the role of judicial review vulnerable and recant.[15] In gist, tension exists when populist leaders centralize authority within the executive, sideline the judiciary, and frame oversight or dissent as obstructionist, leading to a weakened system of checks and balances and threatening the judiciary's role as an independent guardian of constitutional values.

Case studies of courts confronting populist-driven discretion

[14] *The Future of Multilateralism Between Multipolarity and Populists in Power - ECPS*, https://www.populismstudies.org/the-future-of-multilateralism-between-multipolarity-and-populists-in-power/ (last visited May 17, 2026) (on file with author).

[15] *Lord Hodge, Preserving Judicial Independence in an Age of Populism, Address at the North Strathclyde Sheriffdom Conference, Paisley https://supremecourt.uk/uploads/speech_181123_9ce4b9f447.pdf (Nov. 23, 2018) (last visited May 17, 2026)* (on file with author).

Courts in different places have had to deal with circumstances where populist ideas affect the decisions of the executive or legislative branches. This goes against the basic ideas of judicial independence and the Constitution principles. Here are focused case studies exemplifying how courts have grappled with populist-driven discretion, each illuminating the tension between populist mandates and the rule of law.

South Africa: The Harris Cases (1952–1956) -

During the apartheid era, after the Appellate Division invalidated a statute aimed at circumventing constitutional entrenchment clauses (Harris I), the government responded by attempting to pack both the legislature and the judiciary, eventually achieving its objective by increasing the size of the Senate and appointing favorable judges. This episode exposes how populist or authoritarian regimes can react to judicial resistance by manipulating institutional structures, undercutting the courts' ability to constrain populist executive action.[16]

India: Trial Courts and Punitive Populism -

In one recent instance, a Gujarati trial court accelerated the imposition of the death penalty in a well-known criminal case. Bypassing the structural discretion established by the Supreme Court in Bachan Singh (1980), the judge's rhetoric and the pace of the proceedings demonstrated performative justice impacted by public opinion. This illustrates how difficult it is for lower courts to maintain constitutional standards in the face of social outcry, particularly when new legislation puts retribution ahead of rational justice.

China: Courts and Authoritarian Populism -

Also described as responsive courts, the judiciary in China demonstrate undisguised responsiveness to populism, and, in the process, violate principles of the rule of law. The literature, even in authoritarian systems, recognizes the influence of public protests and petitions to judicial decisions, as well as the emergence of systems where the law is used and applied as an abstraction to popular principles of justice.[17] The case of China provides sufficient evidence to show the extent to which populism and control on the public undermine public policy. Alongside all the other authoritarian systems, the courts survive functioning to the, extent where they are allowed to operate.

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[16] *Harris and Others v. Minister of the Interior and Another.*, *19 Int'l L. Rep. 35 (1957).*

[17] *Populist Authoritarianism in China: National and Global Perspectives - ECPS*, https://www.populismstudies.org/populist-authoritarianism-in-china-national-and-global-perspectives/ (last visited May 17, 2026) (on file with author).

Safeguarding Checks and Balances

Importance of separation of power in a populist climate -

Separation of powers assumes heightened importance within populist climates where majoritarian pressures as well as authority centralization may threaten constitutional checks and balances. It stresses the doctrine builds more than just theory it also practically protects against concentrated power plus eroded judicial independence specifically when large political waves fight usual standards.

Separating powers benchmarks legal with political legitimacy in constitutional democracies, regardless of how various jurisdictions specifically implement it. This doctrine is a bulwark against overreach now that populist leaders or movements can try to take charge. Dividing of powers between both the legislative and executive and the judiciary shields the rule of law from either impulsive or partisan policymaking. Populist waves dominating parliaments or executives pose a risk for this division.

The function of the judiciary becomes critical especially within a populist environment in which it can review and can curb, when it is necessary, excesses that are executive or legislative. The article identifies that courts routinely find separation of powers difficult during legal proceedings as they judge obligations plus enforce obligations. Populist governments can attempt to sideline any legal scrutiny, and then courts can interpret norms. Courts apply also constitutional and international norms ensuring human rights, and they prevent subversion of procedural governance for immediate political gain.[18]

Populist politics will likely accentuate the 'will of the people,' perhaps at the expense of settled legal guarantees of minorities and basic rights. Separation of powers in the system makes the judiciary powerful enough to investigate executive action and legislative policy in terms of whether popular mandates ever interfere with constitutional guarantees of freedoms and rights. For example, in some of the landmark climate cases that have been covered, courts applied obligations on the state to safeguard life and the environment even where enforcing them was politically unpopular illustrating the importance of strong judicial autonomy when populist opinion tests entrenched legal principles.

[18] National Resilience Studies, School of Strategic and Global Studies, University of Indonesia et al., *Populism and the Erosion of Democratic Checks and Balances: A Systematic Literature Review across Regions*, 07 IJMRA (2024), https://www.ijmra.in/v7i10/18.php (on file with author).

Role of courts in reasserting constitutional boundaries

The function of courts in reinforcing constitutional limits during populism is most important but delicate. Courts must enforce constitutional tenets, such as the separation of powers, by playing the role of an impartial judge that restraints executive and legislative abuses. Against the threat posed by populism to voice itself as doing the voice of the monolithic will of the people, constitutional democracy is safeguarded by courts under the interpretation of the constitution that safeguards minority rights, rule of law, and institutional checks and balances.

Populist governments also try to discredit courts by court-packing, constitutional amendment, or public demonization in order to dilute judicial autonomy and provide a rationale for their power concentration. In the face of such oppositions, courts can hold firm by being independent, relying on people's support, and adhering to constitutional checks. They protect people from democratic institution mutilations by holding populist leaders accountable for conduct that contravenes constitutional conventions or goes beyond their prerogatives.[19]

Courts also intervene constructively to forestall threats to constitutional order by using tools like judicial restraint and institutional discussion to slow down democratic decay. Their legitimacy partially rests on balancing deference to majority rule with respecting constitutional boundaries in an attempt to shield democracy from populist majoritarian exploitation.

In short, courts reaffirm constitutional limits on populist abuses by guaranteeing judicial independence, upholding the separation of powers, and as guardians of constitutional democracy against political pressures to entrench power and duck institutional safeguards.

Courts and Constitutional Constraints -

- Courts apply constitutional constraints by interpreting law within the parameters of the separation of powers, thereby preventing one branch from encroaching on the other.
- They claim that calls to "representing the people" made by populists do not amount to untrammelled executive power, jeopardizing minority rights and democratic norms.

Judicial Restraint and Protecting Democracy -

[19] Ratnesh Kumar Pandey & Dr Preeti Dubey, *The Role of the Supreme Court in Protecting and Interpreting the Constitution of India*.

- Courts can withstand by maintaining independence, bolstered by public trust and support from civil society.
- There are good instances where courts have resisted populist pressure, respecting constitutionalism even under hostile political environments (e.g., Colombia, UK, South Africa)

Balancing Popular Sovereignty and Constitutionalism-

- Courts balance the dilemma of being respectful of democratic choice versus enacting judicially enforced constitutional constraints to avert the erosion of democratic institutions.
- They endeavour to safeguard democracy by acting pre-emptively, using doctrines of judicial restraint to temper possible democratic backsliding.

Conclusion -

Separation of powers can be defended as a cornerstone of constitutionalism, particularly necessary when majority-based populist politics creates overwhelming pressure that, by its very nature, threatens both democracy and the rule of law by demanding that power be both centralized within the executive, and that the courts allow those in charge to dictate outcomes based on appeals to the popular will. Leaders in such circumstances have used the guise of popular demands to promote overwhelming executive power and attacks on judicial independence, making the courts the only truly viable counterforce to this assault on constitutional checks and balances, the rights of minorities, and due process of law. This defense comes about not only from reviewing executive or legislative acts to declare them unconstitutional, but even more essentially, through adjudicating and enforcing both domestic constitutional standards and relevant international law to reject majority demands which undermine existing legal arrangements and protections. Though populist leaders attempt to strip courts of independence through means like packing, constitutional change and public delegitimization, courts can continue to vindicate their own power and authority by protecting institutional independence, securing public legitimacy, and adhering strictly to legal norms (as was observed in Colombia, the UK and South Africa); ultimately, the strength of constitutional democracy is dependent on the courts ability to balance respect for democratic majority decision-making with confinement to constitutionally imposed limits in

the defense against populist overreach and constitutional degradation.

IV. Comparative Perspectives

Experiences from several democracies: -

Judicial review in the era of populism hampered by the unreasonable arbitrary exercise of the administration. The comparative perspective and the judicious comparative analysis among the mentioned countries shades light on the ongoing disruption in the functioning of the administration and how does it affect the exercise of judicial role in countering those challenges. In this part I have broached this module to delve into the similar trend that is going on or happened in these countries namely -

INDIA

India the world's largest democratic country has witnessed such instances of majoritarian rules which made a stable and stale situation in the history of democratic governance. In the era of Indira Gandhi led congress government the undemocratic, unconstitutional imposition of emergency 25th June 1975 to 21st March 1977 made a distinct impression of the populist era where the unruly arbitrary power of the administration was prevalent. The scope of judicial review was constrained within the wall of urgency of the situation and on the ground of national threat. The mass sterilization program for the population control exemplified the abuse and misuse of power by the administration. The number of parliamentary sittings in the emergency period was marked only with mere symbolic presence, the oppositions were sent to jail, there was a mass censorship on media. In the very first and successively the second Modi government which began from the year 2014-19 and 2019-24 have seen a drastic decline in the number of sittings of the parliament, the passing of bills in haste and the decline in the scrutiny, deliberation and discussion by the various committees of the parliament.[20] These instances do hint towards the kind of repercussions caused the majoritarian government where there is the clear derailment of check and balance the cornerstone principle for accountability and transparency.

HUNGARY

[20] *ResearchGate*, https://www.researchgate.net/publication/236772036_Populism_in_India/link/596a7b480f7e9b8091946727/download?_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19 (last visited May 17, 2026) (on file with author).

The kind of oppression the populist regime can have on the independency of judiciary can also be traced in the Viktor Orban's government in Hungary. Since assuming the power in the year 2010, Orban strategically weakened the democracy and slacken the independency of judiciary, thus manoeuvring the democratic administration into an "illiberal democracy''. Arregui Acosta (2023) in his seminal work highlighted the central tactics involved in the Orban's regime which eroded the judicial independency and media freedom. Orban's strategy primarily started with a climacteric move on making constitutional amendments that helps in consolidating executive power and make it more centralized these amendments restricted the judicial impartiality in financial matters and introduces such laws which transcended the boundary of judiciary.[21] Further, the government intervention got to be involved in judicial appointments which severely impacted the independency of judiciary and override the courts power.

TURKEY

Alike pattern of misappropriate tactics emerged in Turkey under the leadership of Tayyip Erdogan, where efforts to centralize power in one hand led to frail of parliamentary and judicial independency. The referendum came with an intent of establishing the more centralised power through the transition from a parliamentary to an executive presidential system held on April 16,2017, made a significant change and completely destabilized the parliamentary influence from the date of its official effect came on June 24, 2018. The second attack of populist culture happened with judiciary where the replacement of the existing judges with the loyalist made the judiciary a tool in the arm of executives. By subverting the medial freedom, suppressing the voice of opposition and dissenters, exerted control over the narrative, and limited public debate. These measures collectively usher the way towards the authoritarian political system.[22]

BRAZIL

[21] Gábor Szabó, Populism in Hungary: A Study of the Fidesz-KDNP Government of Hungary in the Period Between 2010 and 2019, (Master's Thesis, Aalborg University 2019).
[22] Antonino Castaldo, Populism and Competitive Authoritarianism in Turkey, 16 S.E. EUR. & BLACK SEA STUD. 1, (2018).

In Brazil Mr. Bolsonaro the far-right wing party leader emerged victorious in the October, 2018 general election and became the 38th President of Brazil. His initial election rhetorics and political gimmick later posed a direct threat on the long-established democratic norm of the country. Mr. Jair Bolsonaro's presidency serves as a case of how populist leadership can threaten democratic institutions, although the kind of approach his administration took was marked by less systematic approach as comparatively adopted by Turkey and Hungry. Bolsonaro's led government made an open threat attempt on legislative and judiciary, portraying both these pillars check and balance feature as an impediment in the policy execution and implementation totally projecting it in a bad light. This narrative set a negative narrative of these institutions degrading public trust in it. He openly disregarded judicial oversight thus made every possible attempt to succumb the judicial activism process and raised public questioning of courts order. Moreover, during his tenure his style of governance encouraged military involvement in politics raised concerns about the erosion of civilian oversight and the potential shift toward authoritarian thus mobilized narratives which suited well to his art of governance. The illustrations can be traced in his administration's policy for environmental issues and the suppression and disregard of indigenous rights.[23] While, less systematized and institutionalized framework of Bolsonaro's administration actions significantly threatened the democratic check and balance principle, mirroring the common tactics adopted by other above-mentioned countries of this module.

Lessons for balancing administrative flexibility and constitutionalism

Tipping the scale between administrative flexibility and constitutionalism, especially at a time of populist politics, requires discerning appreciation of administrative discretion. While administrative discretion, on the one hand, contributes vitally to good governance through the means of exercising flexibility and adaptability to evolving, eclectic needs, it is essential to give administrators the leeway to respond innovatively to issues in response to which legislatures cannot pre-empt at all and thus represents an effective mechanism of fine-tuning public service delivery. Yet discretion that goes unchecked can produce arbitrariness and abuse, especially where there are populist regimes that are prone to circumvent institutional restraints in the service of personalistic power. Populists tend to circumvent the restraints of the rule of law because they seek to concentrate and personalize power in the

[23] Santiago Meneses, *Right-Wing Populism in Brazil: A Story of Crises and Dissatisfaction* (2023), https://hdl.handle.net/1887/3422256 (on file with author).

service of the "will of the people," which can erode legal impartiality, minority rights, and institutional accountability.

The learning process of maintaining constitutional balance is the requirement to institute strong institutions of accountability, transparency, and judicial oversight within the administrative process. While administrative flexibility allows for active policymaking and policy implementation, such powers should always be within the bounds of requisite rights and rule of law.[24] Judicial review, proportionality tests, and principles such as legitimate expectation act as a check upon discretion's abuse and confirm that measures do not fly from law and constitutional precepts. In the specific context of populism waves, it is all the more imperative that administrative law uphold participatory government and does not permit institutional checks to be unravelled, ensuring thus both administrative efficacy and the requisite grounding principles of constitutional democracy.

Conclusion

I. All these case studies concerning India, Hungary, Turkey, and Brazil, on the whole, present us with a predictable, systematic trend. The trend is clear: under populist regimes, the fundamental bases of democracy judicial independence, legislative oversight and institutional accountability – are gradually being dismantled. Either through unconstitutional proclamation of emergency, as occurred under India's prime minister Indira Gandhi in 1975; through cleverly conceived constitutional changes, as Orban had implemented in Hungary; through dismantling of parliamentary dominance, as witnessed in Turkey under Erdogan, or through no less damaging yet informal disregard of democratic institutions, as exemplified by Bolsonaro's administration in Brazil, the theme always remained: consolidation of the executive in his/her person, and deliberate abandonment of any kind of checks and balances. The studies on the four countries teach us a lesson that the wide executive discretion that the government is free to exercise is essential for good administration and policy adaptability; yet it must never stray from its constitutional constraints, rule of law, and

[24] Soo Chan Ahn, *Legitimacy, Flexibility and Administrative Law*, MAURER THESES AND DISSERTATIONS 94 (2021), https://www.repository.law.indiana.edu/etd/94 (on file with author).

judicial supervision. Devices like judicial review, tests of proportionality and legitimate expectation are essential for preventing the arbitrary consequences of discretion; but for their functioning, the very institutional basis of democratic governance is critical-impartial, active, participatory operation of the courts.

V. Conclusion and Suggestions

Reassessment of checks and balances in the era of populism -

The doctrine of checks and balances, long regarded as the cornerstone of constitutional governance, faces renewed scrutiny in the era of populism. Populist movements often emphasize majoritarian mandates and direct appeals to “the people,” which can lead to impatience with institutional restraints. Legislatures, courts, and regulatory bodies that exist to act as counterweights to executive power are increasingly portrayed as obstacles rather than as essential guardians of democratic stability. This shift raises the need to reassess how the balance between popular will and institutional limits can be preserved without undermining accountability or democratic participation.

A nuanced re-evaluation of checks and balances today calls for both attention to the strengths and weaknesses of constitutional design in the face of populist pressures. Effective judicial review, independent watchdog institutions, and Congressional oversight on one hand continue to be needed to avoid slide into authoritarianism. Excessively stringent or oppressive checks on the other hand threaten to inflate populist myths that institutions are elitist or out-of-touch with the popular mood. The issue thus is how to regain balance in these mechanisms so that they remain in command of abuse of authority but not insensitivity to democratic hopes, so that constitutional government's promise remains even in tempestuous politics.

Judicial review as a constitutional shield against arbitrary discretion

Judicial review is a constitutional protective device for preventing the application of untrammelled discretion by ensuring the exercise of power by public authorities within parameters of reason and law. Based on the principle of rule of law, it prevents administrative and executive arms from exercising power in ways incompatible with citizen rights or in contravention of constitutional restraints. By the mechanism of judicial review, the said decisions, which are legally unjustifiable, excessive, or prompted by mala fides, can be overruled, thus enhancing accountability and transparency.

Moreover, judicial review embodies the constitutional ethos of checks and balances, protecting citizens from governmental excesses while preserving the supremacy of the Constitution. By assessing whether administrative actions adhere to principles such as fairness, equality, and reasonableness, the judiciary upholds democratic governance and prevents the concentration of unchecked power. It transforms discretion into a tool of responsible governance rather than one of arbitrary control, preserving public trust in institutions. In doing so, judicial review sustains the delicate balance between authority and liberty, ensuring that state power remains a means of serving the people rather than dominating them.

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