



RISE OF POPULISM – SOCIO-LEGAL ANALYSIS ON HOW IT IS INEVITABLY THREATENING THE RULE OF LAW AND FUNDAMENTALS OF THE DEMOCRACY

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ABSTRACT

The resurgence of the concept of Populism has widely put a lot of institutions of the countries under pressure. The paper concentrates on the emergence of Populism and how it has drastically affected the discretionary decisions and policy & agenda-setting of the governmental organs. The author highlights the effect of Populism in different countries and how it will have an adverse effect on the rule of law and analysis of Penal Populism in India. Also, the author will assess how it will affect the independence of the judiciary.

INTRODUCTION

The Former CJI Ranjan Gogoi said the rise of Populism presents a challenge of independence of courts and asked the judiciary to stand up against the Populist forces to protect the constitutional ethos. It is for us to recollect that such situations across the world have heaped tremendous pressure on judicial organs, and it is no surprise that in some jurisdictions, the judiciary too has succumbed to Populist forces.

As Populist governments tend to display authoritarian traits, it is critical to limit the

erosion of democratic institutions. In particular, governments should adhere more thoroughly to the existing standards of judiciary independence, as it is necessary for maintaining democracy.

POPULISM

There are a lot of marked differences where the concept of Populism is to be feared or applauded. Populism is a dynamic concept. According to Mudde & Rovira Kaltwasser Populism is termed as, *A thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, “the pure people” versus “the corrupt elite,” and which argues that politics should be an expression of the volonté générale (general will) of the people¹.*

The definition of Populism used for the report is as follows: Populism is nothing but the unified ‘nation’ against corrupt ‘elites’ and external enemies, and it claims for a charismatic leader the power to speak the will of the nation.

It is therefore fundamentally illiberal, rejects diversity of identity and opinion within society and discards basic principles of modern constitutional thinking and checks on the decisions of the executive.

EFFECT OF POPULISM

Populism arises from the ‘broken promises’ of democracy. ‘The people’ can never truly rule precisely because of heterogeneity and conflicts of value and interest and some voices always prevail neglecting the other voices. Populism in an illiberal democracy

¹ Populism: A Very Short Introduction
<https://global.oup.com/academic/product/Populism-a-very-short-introduction-9780190234874>



finds a harmonious equilibrium between majority rule and minority rights. This equilibrium is almost impossible. It will have a drastic effect on the rule of law and governance in the country. Moreover, it illuminates its tendency towards authoritarianism and against the principles of democracy.

While Populists are not against constitutions as such, but a Populist leader can indeed colonize the state like Hitler and the legal system by enacting a 'Populist constitution'. If there is a rise in Populist forces, the real voices of dissent and the oppressed will not be heard. The sole reason for the emergence of Populism is to hear the voices of the dissent which will not be heard since the majoritarian voices will be much louder. The voice of the Populist forces is an illiberal democratic response.

POPULISM AND RULE OF LAW

A powerful Populist, who holds elected office, may be able to have a decisive impact on a country's political agenda and policy terms. Probably the most spectacular example here is Donald Trump's power to set an isolationist agenda through trade & foreign policy, in the name of 'Making America Great Again'. Not to mention shaping of immigration policy and practice indecisive and human rights threatening ways. There are two further potential and diffuse impacts of what we might call partial Populism on the rule of law are also worthy of consideration. These are, first, the capacity of Populism to affect the exercise of *discretionary powers* and, second, the upshot of what I will call '*convention-trashing*'.² It

was first coined by Nicolas Lacey in her research analysis on this concept. The effect of discretionary decisions is elaborately discussed further.

The concept of convention trashing is nothing but the internalization of the normative ideals associated with the rule of law by those who exercise power. Recent examples include Donald Trump's flouting of the long-established conventions about conflicts of interest and nepotism, by failing effectively to separate himself from his business interests & his incontinent invective on Twitter. Moreover his decision to move a large part of his family into the White House in positions of very significant executive power. In India, governance has been widely influenced by Populist regimes. The present party in power, the BJP is highly criticized for its political mobilization on the basis of religion. The interference of religious leaders in administrative decisions has been a threat to the secularism of the country. Another example is the Indian Congress party, where the party structure verges on nepotism, retaining power within the Gandhi family tree. These are some of the features of convention trashing in Populism.

PENAL POPULISM

'Penal Populism' or 'overcriminalization' is truly a product of Populism. Legal debates have been slower and do not address the seriousness to focus on Populism as a potential threat to the rule of law's integrity. The political system has rendered the law-making process highly responsive to Populist considerations, whether through resort to mechanisms such as initiatives and referenda

² <http://www.lse.ac.uk/International-Inequalities/Assets/Documents/Working-Papers/III->

Working-Paper-28-Lacey-Populism-and-the-Rule-of-Law.pdf



or simply through politicians' openness to popular concerns in their shaping and conduct of the legislative agenda.

In simple terms, Penal Populism is the process where the political parties which are in power compete with each other to be tougher on crime in order to get the popular support of the people. The increase in the punishment for major crimes has proven to be no deterrent. The policies introduced by the Populist Party in power are mainly concerned for the electoral advantage of the party which takes precedence over the Penal effectiveness of the policy.

We all know for a fact being responsive to the public demand by the political party is just a way how democracy works, but the real problem arises when the political party works on the policy from the opinions and demands of the lesser informed public who ignore the logic of society and later consequences. The emotional reaction to the crimes which force the lawmakers to introduce policies neglects the effectiveness of the policy but gives an electoral advantage. The political party in power will have its excess concern towards the attractiveness of the policy where it neglects the evidence of the effects in the criminal justice system. The political party in power will use this as a tool to make a simplistic assumption on public opinion based on inappropriate methods. It is because people feel that crimes are committed. After all, the existing punishments are not harsh enough. The truth is harsh punishments do not necessarily act as a deterrent factor.

PENAL POPULISM IN INDIA

For instance, let's see how Penal Populism has had an impact on increasing the punishments on crimes in India. Every time there is a public outcry due to the increase in the number of sexual offenses, the government pacifies the same by imposing more stringent punishments for such offenses. The government responded to the Kathua rape case which was brutal where an 8 year old girl was raped by passing an ordinance which later became an Act³. The act provides stringent punishment which includes death Penalty for those who are convicted of raping girls below 12 years. This was an ordinance introduced to convince the public outcry that the government has done something for the cause. My opinion is, there is, of course, some deterrence after increasing the punishment but the later consequences have not been considered in the present case. It does not necessarily deter the rape of minors. The problem here is, the deterrence effect does not take into consideration the possibility of conviction. It is important to emphasize on the fact that the conviction rate against women has hit an all-time low in 2016 which is 18.9% and this gravely undermined the deterrent effect which harsher punishments supposedly create⁴. If the punishment is harsher, chances are that the victim will not report the crime for various reasons. 'Crime in India: 2015' indicates that 94.8% of the accused under Section 4 (penetrative sexual assault) and Section 6 (aggravated penetrative sexual assault) of the Protection of Children from Sexual Offences Act (POCSO Act), 2012 were

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<https://economictimes.indiatimes.com/news/politics-and-nation/president-gives-assent-to-the-criminal-law-amendment-act/articleshow/65374343.cms?from=mdr>

⁴ *Crimes in India 2016*, National Crime Records Bureau, Ministry of Home Affairs, Government of India



‘known accused’⁵. It is obvious that most of the victims will not report the crime since the death Penalty will apprehend pressure on the victim since the accused is already known to the person. Moreover, there should be a stringent justice system which is not succumbed by corruption.

One of the reasons why there are a lot of underreported cases for rape is Penal Populism. The due process of law has been already stacked up by delay and when there are crimes reported on the death Penalty, there can be a huge delay on the justice served. The 262nd report of the Law Commission of India has observed that capital punishment does not act as a deterrent.

*“After many years of research and debate among statisticians, practitioners, and theorists, a worldwide consensus has now emerged that there is no evidence to suggest that the death penalty has a deterrent effect over and above its alternative — life imprisonment.”*⁶

The problem here is the increase in punishment has made people jump to the conclusion that the crime will be in control. But we know for a fact that there always been an increase in rape cases in India excluding the unreported cases. **The stringent punishment has shadowed the problems ailing to the criminal justice system where the restorative and rehabilitative aspects of justice are not taken into consideration.**

Another example here is the famous Nirbhaya case. We all know for a fact how the public responded to the situation. There

were hunger strikes and a huge protest to treat one of the accused who is a juvenile as an adult. Without any delay, the government amended the Juvenile Justice Act to show its concern and made a provision to treat juveniles of the age 16-18 as adults depending upon the heinous of the crimes⁷. The government did this to satisfy the public’s outrage and feared a huge loss in their upcoming elections. The author is here to explain how the Penal Populism has taken place in this situation. What the accused did was grotesque in nature and they deserved to be punished but the problem does not end after the amendment. The stringent punishment just shadows the real problem in this situation.

Harsh punishments do not mean that juvenile crime rates have gone down. According to the 'Crime in India-2016' released by the National Crime Records Bureau, the juveniles in conflict with the law in 2015 were 33,433. After the juvenile justice amendment, the juveniles in conflict with the law were 35,849 in 2016. It is clear that an increase in punishment has not worked as deterrence. It is just for ensuring the electoral support and not for preventing the crime in general. Populism can be a huge threat to democracy.

EMERGENCE OF POPULISM

Populism through different forms and different degrees began to shape the political decisions of many established democracies. *Populism cannot be divided as left and right precisely. it does not have an ideology. It projects depending on the political movements.* These changes have overturned

⁵ *Crimes in India 2015*, National Crime Records Bureau, Ministry of Home Affairs, Government of India

⁶ <https://www.thehindu.com/opinion/op-ed/should-those-who-rape-minors-get-the-death-Penalty/article23686547.ece>

⁷ <http://cara.nic.in/PDF/JJ%20act%202015.pdf>



the conventional by keeping social movements aside, Populism from the mid-20th Century has been primarily a phenomenon of countries with presidential political systems and radical inequalities. It was always the Populist regimes in the past where they fought against major inhuman activities like Sati in India, Slavery and Caste oppression. It was more of liberal Populist forces that lean towards the left ideology back in the days. It was against the majoritarian forces. But the post-millennial society has been more of a right-leaning Populism. The majoritarian forces are against the resistance. But since the Populism concept is dynamic, the concept has emerged for retaining the power by the politicians where their policy impacts, decision making are influenced by the Populist forces.

The concept of Populism emerged at the time when the political process no longer represents the normal citizens when disparities of the wealth and poverty have increased drastically, when irresponsible hubris goes unchecked by the government and the corporate world when criminal wars of aggression undermine our integrity, when the environmental cost for economic development threatens the planet itself, Populist forces helped to bring the revolution. Left Populism or progressive Populism is said to hold the potential to address crises in a manner that secures the democratic project by deepening the legitimacy of democracies and upholding civic, political, and economic rights alongside material egalitarianism. Mostly the left Populist forces take stance open to immigration and refugees and one that is adversarial to the power and privilege

of financial capital, the drivers of pollution, and natural systems destruction. But now, Populism has found its negative impact on the globe. Populism, particularly in postmillennial politics, typically refers to right Populism, which is characterized by emotionally charged political appeals through neo-nationalism, masculinism, xenophobia, sexism, racism, ethnic golden ageism, a disregard for liberal democratic norms, and so forth. But the concept of Populism cannot be divided as left and right precisely. It does not have an ideology. It projects depending on the political movements. Political Propaganda of Populists is aimed at voters who don't feel represented in the established political system. According to Hannah Arendt, these are voters who are ignored and labeled as apolitical by the other established political parties. They are voters without strong political views, providing a perfect target for propaganda.⁸

For instance, Adolf Hitler is considered to be one of the greatest Populist leaders during that political movement. He was able to influence the Germans to consider the Jews to be outsiders and deserved to be punished. Nazi Germany wasn't there from the beginning, it was an evolution. It was the liberated dynamic of a mass movement, which drove the Weimar Republic into the Third Reich. The ideology of the Populist regimes mostly is influenced by hate towards one community, more of racist discourse, stigmatization of Muslims or Jews as terrorists. The justification of the Populist forces is mostly by spreading fear and chaos towards the masses.

⁸ <https://www.eyes-on-europe.eu/Populism-through-the-eyes-of-hannah-arendt-now-and-then/>



"Every man a king" That was the slogan of Huey Pierce Long Jr., the Louisiana governor and senator of the 1930s who was arguably the most flamboyant Populist in American history. The country boy called himself The Kingfish and was a sworn enemy of oligarchs and corporate. In the depths of the Depression, Long's "Share Our Wealth" plan called for the federal government to confiscate the fortunes of anyone with more than \$8 million in wealth to provide a \$5,000 annual income and health care for all American families. As governor, Long built thousands of miles of roads and improved education but was also notoriously corrupt and dictatorial. Franklin Roosevelt called him one of the most dangerous men in America, with good reason: The Kingfish was widely considered a viable dark-horse candidate to defeat FDR in 1936. But he was assassinated by the relative of a political foe. He was a great example of a populist leader.⁹

In the last few years, even in countries in which its position had been largely seen as secure, things have begun to change as a result of some spectacular instances of the capacity of Populist politics to put the rule of law under pressure.

British immigration policy since 2010 has been hugely shaped by Populist anti-immigration sentiment. The threat to some (particularly Conservative) parliamentary seats from UKIP, alongside the longstanding anti-EU sentiment of a small core in the Tory Party, helped to shoehorn a range of Populist policies onto the government's agenda, as well as influencing the tone of political

discourse, and engendering a pervasive distrust in transnational and international governance which is a natural concomitant of nationalist resurgence¹⁰. Generally, the Populists do not have direct control of the government but these political Populist movements will have their significant presence within the government.

Narendra Modi, the Prime minister of India is the best example who rises through Populist regimes. His Populism consists certainly in his jingoism as the aftermath of Pulwama (A retaliation on terrorist groups in Pakistan) testifies, but also on his uncanny ability to impress people by working on issues that can fetch maximum publicity dividends.

Another nature of Populism in India is Hindu nationalist, which uses religion as a tool to mobilize and unite a large population of the country. The Indian Muslims are considered as foreign even after all these years by the Populist force. Populism in India that presents itself in the form of right-wing Hindu nationalism threatens not only minority groups ideologically opposed to Hinduism but also anything that runs counter to the traditional "Hinduness" of the nation. Even though India shares different ethnic, linguistic, language & cultural differences what unites the different parts of the people is Hinduism. After Indian independence, the constitution of India has followed the secular principle yet it has been riddled by the Populist forces to date. For Hindu nationalists to define Hindutva, or "Hinduness," as the basis for nationalism and thus recent Populist movements in India, the first step needed was to redefine what counts as religion.

⁹ <https://theweek.com/articles/579018/brief-history-Populism>

¹⁰ <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1257&context=teachlearnfacpub>



INTERVENTION OF POPULISM IN INDIAN JUDICIARY

Judicial independence is a vital democratic institution. According to the World Bank measure of judicial independence, Poland, Hungary, Italy, and Venezuela all experienced noteworthy reductions in judicial independence owing to specific acts pushed by their Populist governments¹¹. Populism would affect the discretionary powers of the judges. It is interesting to consider whether the election of judges which prevails in many Indian jurisdictions implies vulnerability to Populist influence via electoral pressures. Moreover, Judicialization is the growing involvement of judges in assessing the executive's prerogatives and performance and the reliance on courts for addressing core public policy questions and political controversies. So the political party in power will have huge pressure on the Judiciary in their decisions of the legislation. The judges have found it difficult and have been susceptible to the Populist Party in power since they can interfere in the career prospects of the judges through transfers, promotions, and appointments.

The judiciary in India is a separate and independent body that excludes itself from the executive branch with the doctrine of separation of powers. However, the integrity of the judiciary has come under question in recent years; four of India's most senior Supreme Court judges have warned that democracy is under threat because of the way the court is being run¹². It is to be noted that the judicialization of politics started from the

case *Kesavanandha Bharthi vs Union of India* where the doctrine of basic structure was observed. If the governmental organs introduce legislation that is affecting the basic structure of the constitution, then it is void. The Court dramatically expanded its role in the realm of rights and governance, asserting the power to invalidate constitutional amendments under the basic structure doctrine, control judicial appointments, and govern in the areas of environmental policy, monitoring and investigating government corruption, and promoting electoral transparency and accountability. But the integrity of the judiciary has come to question since the independent institution has also succumbed to the Populist forces.

According to a study by Rubén Poblete-Cazeneuve, he has analyzed if the Member of Legislative Assemblies (MLA) in India has an unfair advantage in the criminal trails. If the MLA belongs to the ruling party, the cases have 17% chance that the case gets disposed of without a conviction in contrast to the MLAs belonging to the opposition party where it takes a lot of time to get the cases resolved¹³. So it is clear that the Populist party influences the independence of the judiciary through threats and political intimidation.

One former judge of the Supreme Court, Justice Markandey Katju, claimed in 2015 that 50 percent of the higher judiciary, which consists of the Supreme Court and high court judges were corrupt, and criticized the trend

¹¹ https://jsis.washington.edu/wordpress/wp-content/uploads/2018/04/Task-Force_C_2018_Pekkanen_robert.pdf

¹² <https://www.bbc.com/news/world-asia-india-42660391>

¹³ <http://www.ridge.uy/wp-content/uploads/2019/05/Political-Power-and-judiciary-v9.pdf>



of judges and their relatives practicing in the same court.¹⁴

The interference of Populism in the judiciary increases usurpation and tyranny by the Populist who is holding power. Also, it might be the case that legal actors are affecting legal proceedings without any political influence. This would be the case if there are political ideologies (party loyalty) involved in their actions. It is widely recognized that judges enjoy a range of discretionary powers and considerable interpretive latitude. They are also, to state the obvious, human beings who are subject to the usual range of pressures, albeit that their institutional role and their professional training and culture equip them, ideally, with some very particular capacities for independent judgment.

RECOMMENDATIONS

Populism is a frightening practice, as it gains its power through democratic means, yet strips the values of democracy away as it becomes entrenched in a nation.

- The reason behind the increase of Populism is the *structure of societies*. **The less educated and more orthodox the people be, chances are the Populism foster deeply within the society.** The first step is Education. People should learn to not follow the herd and formulate their own opinions. They should know that the Populist leaders always peddle the dreams of the people and which of course ends with disaster. They are the opportunists that seriously care nothing about us and just create propaganda for the electoral advantage.
- People should be aware of how the Populist forces spread their agenda through biological

levels. Generally, humans are easily manipulated if it's related to them emotionally. It is fascinating to know how the Russian Populist forces target human dopamine, serotonin, adrenaline, testosterone, and oxytocin to influence the people.

- The electorate is satisfied if the government formulates stringent laws that increase Penal Populism. People should take into account that the increase in punishments will not eradicate crime rates. The administration must be definite and uniform in its work by eradicating Penal Populism. It shifts the focus of the government since they concentrate on making amusing policies to please the electorate rather than preventing the crimes.

The country should work on having strong central bureaucracies. Countries like Germany, England, and Canada have successfully blocked their Populist practices interfering in the bureaucracy of their country.

- Corruption is a huge threat to the working of a democracy. If a law provides tough punishment to the accused, it would be immaterial if he could find his way out of the conviction through bribes and political connection which is, of course, used magnificently in India.
- The next step is to legislate against the social media personalities who allow their extreme right-wing Populism to run rampant which causes more and more hate crimes, propaganda, false hopes, and the cult of personality, polarization, racism, and radicalization. Regulation on this propaganda promoted through social media must be in control since the Populist parties have always been able to sell their hate through IT cells.

¹⁴ <https://www.hindustantimes.com/punjab/50-of-higher-judiciary-corrupt-says-ex-sc-judge->

markandey-katju/story-Hfu8Ru8o9YfoGOjloboytN.html



CONCLUSION

The concept of Populism came out of nowhere; it is thrived off of the cracks from the minds of the Indian society. Evidently, the rise of Populism has been a huge threat for the country in various fields thus affecting the policy-making decisions & secular attitudes of the country. Populists exploit underlying faults within a society to convey their fundamentally illiberal message and consolidate their own power which will ultimately affect the fundamentals of democracy.

The rise in Populism has been a huge trouble for all institutions in all countries. Regarding the independence of the judiciary in the context of India, the basic structure doctrine power has always been exercised with judicial restraint with changing political and social circumstances. The judicial restraint not only a fear of backlash from the executives in the party in power but also the court's limited capacity to adjudicate the matters pertaining to policies of the parties. Moreover, it is a fear of public image and backlash for the judicial executives. Thus let us hope for our country to get more educated and not get influenced by the Populist regimes. People should be able to formulate their own opinion regardless of the propaganda spread by them and let time decide the future of our country with strong elements of democracy.
