

Judicial Independence under Populist Pressure: A Socio-Legal Review of Democratic Backsliding in the Twenty-First Century

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Abstract

Judicial independence is widely treated as a load-bearing pillar of constitutional democracy, yet in the last two decades this pillar has come under sustained pressure from elected populist governments across very different regions of the world. This review paper examines how populist actors in Hungary, Poland, India, Israel, Turkey, and the United States have used ordinary legal instruments, rather than open constitutional violation, to weaken courts from within. Drawing on the socio-legal literature on autocratic legalism, constitutional capture, and democratic backsliding, the paper argues that the erosion of judicial independence today is a slow, cumulative, and largely lawful process rather than a sudden coup. It proceeds through court-packing, jurisdiction-stripping, budgetary pressure, disciplinary control over judges, and a public rhetoric that frames courts as unelected obstacles to the popular will. The paper offers a comparative thematic analysis of these mechanisms, evaluates why existing constitutional safeguards have often failed to stop them, and closes with policy recommendations aimed at strengthening structural and social resilience against future backsliding. The analysis is doctrinal and comparative, based on secondary academic literature, case law, and policy reports, and is intended as a contribution to socio-legal and comparative constitutional scholarship.

Keywords: judicial independence; democratic backsliding; autocratic legalism; constitutional capture; populism; comparative constitutional law; rule of law

1. Introduction

For much of the second half of the twentieth century, the dominant threat to constitutional democracy was thought to come from tanks, coups, and states of emergency declared by military rulers. Courts were shut down, constitutions were suspended, and opposition leaders were imprisoned overnight. This picture no longer describes how most democracies die. As Levitsky and Ziblatt (2018) have argued, modern democratic collapse is far more likely to occur gradually, through the actions of elected leaders who use the very institutions of democracy to hollow it out from within. Judicial independence sits at the centre of this newer

and quieter crisis, because courts are usually the last domestic institution capable of checking an elected executive that wishes to concentrate power.

This review paper is concerned with a specific and current puzzle in socio-legal and comparative constitutional scholarship: why has judicial independence proved so vulnerable to populist governments, even in states with long-standing constitutional traditions, written bills of rights, and formally independent judiciaries? The paper treats this as a socio-legal problem rather than a purely doctrinal one, because the erosion of judicial independence cannot be understood only by reading constitutional text. It must also be understood through the political sociology of how legal rules are used, reinterpreted, and selectively enforced by actors who command electoral majorities.

The relevance of this inquiry is immediate. Since 2010, courts and constitutional tribunals have been restructured or placed under significant executive influence in Hungary, Poland, Turkey, India, Israel, El Salvador, and, to a debated extent, the United States. In several of these states, the changes were introduced through ordinary legislative majorities and were defended publicly as necessary reforms to make courts more accountable, efficient, or representative. This is precisely what makes the phenomenon difficult to address through conventional legal remedies: the changes wear the clothing of legality even while their cumulative effect is to disable judicial review of executive action.

This paper reviews the existing scholarship on this phenomenon, develops a thematic framework for understanding the mechanisms of judicial capture, applies that framework to a comparative set of jurisdictions, and critically evaluates the reasons why constitutional safeguards designed to protect judicial independence have so often failed. It closes with a set of policy-oriented recommendations directed at legislators, judicial councils, civil society, and international bodies concerned with the rule of law.

The significance of this inquiry extends beyond any single jurisdiction. Judicial independence is frequently treated in undergraduate and even postgraduate legal education as a settled institutional fact, guaranteed once a constitution provides for security of tenure and a formal separation of powers. The comparative experience of the last fifteen years challenges this assumption directly, showing that formal guarantees are necessary but not sufficient, and that judicial independence must instead be understood as an ongoing socio-political accomplishment that can be strengthened or weakened by the conduct of elected governments, the vigilance of civil society, and the resilience of legal professional culture. This paper accordingly situates itself within the broader socio-legal turn in comparative constitutional scholarship, which insists on studying law not merely as written text but as a set of practices embedded in, and shaped by, political society.

2. Methodology

This paper adopts a doctrinal and comparative review methodology, characteristic of socio-legal scholarship rather than empirical fieldwork. It draws on secondary academic sources,

including peer-reviewed journal articles, monographs, constitutional court judgments, and reports published by rule-of-law monitoring bodies such as the Venice Commission and the World Justice Project. The review is thematic rather than exhaustive: it selects jurisdictions that are widely discussed in the comparative constitutional law literature because they illustrate distinct mechanisms of judicial capture, rather than attempting a complete global survey.

The analysis follows three stages. First, it develops a conceptual vocabulary for describing the phenomenon, drawing on terms established in the literature such as autocratic legalism, constitutional hardball, and abusive constitutionalism. Second, it applies this vocabulary to identify recurring mechanisms of judicial capture across jurisdictions, organised thematically rather than country by country, so that common patterns become visible. Third, it critically evaluates the structural and political reasons why formal legal safeguards, including constitutional courts, judicial councils, and international monitoring mechanisms, have often proved insufficient to prevent backsliding. This methodology is appropriate for a review paper of this kind because the central research question is conceptual and comparative, concerned with patterns of legal reasoning and institutional design rather than with quantifiable outcomes.

3. Conceptual Framework: Judicial Independence and Democratic Backsliding

Judicial independence is conventionally understood to have two dimensions. Institutional independence refers to the structural protections that insulate the judiciary as a body from the other branches of government, including secure tenure, protected salaries, and judicial control over internal administration. Individual independence refers to the freedom of a single judge to decide a case according to law and conscience, without fear of removal, demotion, or retaliation. Both dimensions are necessary for courts to perform their constitutional function of checking the exercise of public power.

Democratic backsliding, a term now well established in comparative political science and public law, describes the incremental decay of democratic institutions by legal and quasi-legal means, typically initiated by an incumbent government that retains popular support. Bermeo (2016) distinguishes this pattern from classic coups and election-day fraud, describing it instead as a process of executive aggrandizement in which elected leaders gradually weaken checks on their power through legal and administrative channels that are difficult to challenge individually, even though their cumulative effect is severe.

Kim Lane Scheppele's concept of autocratic legalism captures the specific legal technique through which this aggrandizement occurs. Scheppele (2018) argues that contemporary autocrats rarely need to break the law to capture the state, because they can instead rewrite the law itself, using formally valid constitutional amendments and ordinary statutes to redesign institutions in their favour. The result is a state that continues to look legal from the outside, since courts still sit, elections still occur, and constitutions are still cited, while the substance of constitutional constraint has been hollowed out.

Related concepts sharpen this picture further. Mark Tushnet's idea of constitutional hardball describes the use of tactics that are technically permitted by existing rules but that violate the unwritten norms of restraint on which constitutional systems depend, such as court-packing or refusing to hold confirmation hearings for judicial nominees. David Landau's concept of abusive constitutionalism describes the use of formal constitutional amendment procedures themselves, rather than ordinary legislation, to entrench a ruling party's power and disable future opposition. Ozan Varol's related notion of stealth authoritarianism highlights how governments increasingly rely on seemingly neutral legal instruments, such as defamation law, tax law, or electoral administration, to suppress dissent while maintaining a democratic facade. Taken together, this vocabulary allows socio-legal scholars to describe a phenomenon that formal constitutional doctrine, focused narrowly on the text of the constitution, often struggles to name.

4. Literature Review

The scholarly literature on judicial independence and democratic backsliding has grown rapidly since approximately 2010, largely in response to developments in Hungary and Poland. Ginsburg and Huq (2018), in their influential study of constitutional erosion in the United States, identify three components of a functioning constitutional democracy that are especially at risk during backsliding: free and fair elections, rights of political speech and association, and the rule of law understood as constraint on the executive through independent courts. Their central claim, relevant to this review, is that the third component, judicial constraint, is often the first to be targeted precisely because it is the most immediate obstacle to executive action, while its erosion is the least visible to ordinary voters.

Sadurski (2019) provides a detailed account of the Polish case, describing how the ruling Law and Justice party, after winning parliamentary elections in 2015, moved within months to alter the composition and procedures of the Constitutional Tribunal, appoint loyal judges to a newly created disciplinary chamber, and lower the retirement age for sitting Supreme Court judges in a manner that forced the early departure of judges perceived as independent. Sadurski's account is significant for this review because it demonstrates how each individual reform could be defended as a technical administrative matter, such as retirement age harmonisation, while the cumulative effect was a substantial change in judicial composition favourable to the government.

Bugaric and Ginsburg (2016) extend this analysis to the wider postcommunist region, arguing that courts in new democracies are structurally more vulnerable to this kind of pressure because judicial independence norms in these states are comparatively young, informal conventions of restraint are weak, and constitutional courts often lack a deep reservoir of public legitimacy built over generations. This observation is important because it suggests that vulnerability to judicial capture is not evenly distributed across democracies, but is instead correlated with the historical depth of judicial institutions and the strength of surrounding civil society.

Beyond Europe, scholars have documented comparable dynamics in Turkey following the 2016 attempted coup, when emergency powers were used to dismiss thousands of judges and prosecutors under accusations of disloyalty, and in India, where scholars such as Khaitan (2020) have described an accumulation of executive-friendly judicial appointments, a widely discussed reluctance of the higher judiciary to hear politically sensitive cases promptly, and controversy over the opaque collegium system of judicial appointment. In Israel, the proposed judicial overhaul of 2023, which sought to curtail the Supreme Court's power to strike down legislation on grounds of reasonableness and to give the governing coalition greater control over judicial appointments, produced one of the largest sustained protest movements in the country's history and has been extensively analysed as a paradigm case of attempted constitutional capture by parliamentary majority.

In the United States, debate continues over whether developments such as the blocking of a Supreme Court nomination in 2016, the expansion of the federal judiciary through rapid appointments, and periodic proposals to alter the size of the Supreme Court amount to backsliding in the same sense as the European and Israeli cases, or whether they remain within the bounds of ordinary constitutional hardball. Ginsburg and Huq (2018) treat the American case with more caution than the Hungarian or Polish ones, suggesting that federalism, a strong independent legal profession, and a long tradition of judicial review provide the United States with greater structural resilience, even though the same warning signs are present in weaker form. This body of literature collectively establishes that judicial capture is a global and cross-regional phenomenon, that it proceeds through recognisable legal mechanisms rather than extra-legal violence, and that its success depends heavily on the pre-existing strength of judicial and civil society institutions in each state.

4.1 Theoretical Debate: Is Judicial Review Counter-Majoritarian or Democracy-Reinforcing?

Before turning to the mechanisms of capture, it is useful to confront a theoretical objection that populist governments repeatedly invoke, namely that strong judicial review is itself in tension with democratic self-government. This objection has a long pedigree in constitutional theory, most famously associated with Bickel's account of the counter-majoritarian difficulty, which asks why unelected judges should be permitted to override statutes passed by elected representatives. If judicial review is inherently anti-democratic, then measures that weaken it might be defended as a restoration of majority rule rather than an attack on democracy.

Socio-legal scholars have offered two main responses to this objection, both relevant to evaluating the populist case for judicial reform. The first response, associated with democracy-reinforcing theories of judicial review, argues that courts serve democracy rather than obstruct it when they protect the political process itself, including free speech, electoral fairness, and the rights of political minorities to organise and compete for power. On this view, a court that strikes down a gerrymandered electoral map or protects opposition parties from selective prosecution is not overriding democracy but preserving the conditions under which democratic competition remains meaningful. The second response emphasises that judicial review in most

contemporary democracies is not absolute, since legislatures typically retain the power to amend constitutions, override certain rulings through specified procedures, or revise ordinary statutes found unconstitutional on narrower grounds, meaning that judicial review operates as a dialogue with the legislature rather than a permanent veto.

This theoretical debate matters for the present review because it shows that the populist critique of courts, while drawing on a genuine and old tension in constitutional theory, is often deployed selectively. Reforms are rarely framed by their proponents as a considered rebalancing of the relationship between courts and legislatures; instead, they are typically introduced only after a court has ruled against the government, and are frequently accompanied by simultaneous changes to appointment procedures that entrench the reforming party's own influence over future judicial composition. This selective and self-serving pattern is one of the clearest empirical markers separating legitimate debate about the proper scope of judicial review from an attempt at capture, and it recurs across the case studies examined in this paper.

5. Thematic Analysis: Mechanisms of Judicial Capture

5.1 Court-Packing and Manipulation of Appointment Procedures

The most direct mechanism of judicial capture is control over who becomes a judge. Court-packing, in its classic sense, refers to increasing the number of seats on a court and filling the new seats with loyalists, a tactic historically associated with Franklin Roosevelt's failed 1937 proposal in the United States but revived in more successful form in Hungary and Poland. In Hungary, the ruling Fidesz party, after securing a two-thirds parliamentary supermajority in 2010, used its constitution-amending power to restructure the Constitutional Court, expand its bench, and lower the mandatory retirement age for ordinary judges, thereby creating vacancies that could be filled with government-aligned appointees. In Poland, a similar effect was achieved through disputes over the validity of prior judicial appointments and through the creation of a new disciplinary chamber empowered to sanction judges.

What unites these examples is that the formal appointment procedure set out in the constitution was rarely violated outright. Instead, the composition of the appointing body itself, whether a judicial council, a parliamentary committee, or the retirement threshold determining vacancy, was altered first, so that the subsequent appointments, though procedurally regular, produced a court that was substantively aligned with the governing party. This illustrates a recurring insight in the literature: judicial capture rarely requires breaking a rule, because it is often sufficient to change who controls the rule.

5.2 Jurisdiction-Stripping and Procedural Obstruction

A second mechanism operates not on who sits on the bench, but on what the bench is permitted to decide. Jurisdiction-stripping refers to legislative or constitutional amendments that remove specific categories of executive action from judicial review altogether. Hungary's post-2011 constitutional changes, for instance, limited the Constitutional Court's power to review

budgetary and taxation legislation, a category of law directly relevant to government policy. Similar techniques include shortening the time limits within which a constitutional challenge must be filed, restricting who has legal standing to bring a case, or requiring cases to be heard first by newly created lower tribunals staffed by government appointees before reaching an independent court.

Procedural obstruction achieves a related effect without formal jurisdiction-stripping. Delaying the scheduling of politically sensitive cases, assigning cases to particular benches through opaque allocation systems, or requiring larger and slower quorum requirements for constitutionally significant matters can effectively insulate government action from timely judicial scrutiny, even where the court in principle retains jurisdiction. Socio-legal scholars examining the Indian judiciary have pointed to delay itself as a form of de facto immunity, since a case that is not decided until years after the contested executive action has taken full effect provides only a symbolic remedy.

5.3 Disciplinary and Administrative Control over Sitting Judges

A third mechanism targets not appointment or jurisdiction, but the ongoing security of tenure of judges already in office. Disciplinary chambers, judicial conduct commissions, and administrative bodies controlling judicial salaries, housing, or case assignment can be repurposed as instruments of quiet intimidation. Poland's disciplinary chamber, established in 2017 and later found by the Court of Justice of the European Union to be incompatible with the requirement of judicial independence under European Union law, was used to investigate and sanction judges who had referred questions to European courts or who had publicly criticised the government's judicial reforms.

This mechanism is socio-legally significant because its effect operates primarily through anticipated consequence rather than actual punishment. A judge need not be dismissed to be influenced; the mere existence of a body capable of investigating, transferring, or financially disadvantaging judges who rule against the government can produce a chilling effect on judicial decision-making that is difficult to prove in any individual case, yet cumulatively reshapes the pattern of judicial outcomes across the system.

5.4 Delegitimizing Rhetoric and the Populist Framing of Courts

Alongside these formal legal mechanisms, populist governments have relied heavily on public rhetoric that frames courts as unelected, unaccountable, and out of touch with the will of the people. This rhetorical strategy performs a specific socio-legal function: it prepares public opinion to accept subsequent institutional changes as necessary corrections rather than as attacks on judicial independence. Leaders in Hungary, Poland, Turkey, and the United States have at various points described unfavourable judicial rulings as the product of an entrenched elite, a deep state, or activist judges pursuing a partisan agenda, rather than as the ordinary exercise of legal reasoning.

This rhetoric draws on a genuine and long-standing tension within constitutional theory, namely the counter-majoritarian difficulty first named by Alexander Bickel, which asks how unelected judges can legitimately override the decisions of elected legislatures. Populist leaders exploit this theoretical tension for strategic purposes, presenting court rulings that limit executive power not as legitimate constitutional constraint but as an illegitimate override of popular sovereignty. The socio-legal danger is that this framing, if it becomes widely accepted, erodes the diffuse public support that courts depend on for compliance with their rulings, since courts possess no independent enforcement power of their own and rely instead on a general societal expectation that judicial decisions will be obeyed.

5.5 Comparative Snapshots

The following comparative snapshots illustrate how these four mechanisms have combined differently across jurisdictions, producing distinct but related patterns of judicial capture.

Hungary: Following its 2010 supermajority, the governing party amended the constitution itself, expanded and repopulated the Constitutional Court, curtailed its jurisdiction over fiscal matters, and lowered the judicial retirement age to accelerate turnover. Scholars widely treat Hungary as the paradigm case of autocratic legalism, precisely because nearly every step was accomplished through formally valid constitutional amendment.

Poland: Beginning in 2015, the government disputed the validity of prior judicial appointments to the Constitutional Tribunal, created a disciplinary chamber to sanction non-compliant judges, and altered the retirement age of Supreme Court judges. The European Court of Justice and the European Commission repeatedly found these measures incompatible with judicial independence guarantees, producing a prolonged rule-of-law dispute within the European Union.

Turkey: After the attempted coup of July 2016, the government dismissed a very large number of judges and prosecutors under state-of-emergency decrees, restructured the body responsible for judicial appointments, and expanded executive influence over judicial careers, using the language of national security to justify measures that scholars describe as disproportionate to any demonstrated threat.

India: Scholars have highlighted the continuing opacity of the judicial collegium system, delays in confirming judicial appointments recommended by the collegium, and what several commentators describe as a pattern of institutional caution in politically sensitive cases involving preventive detention, electoral bonds, and constitutional status disputes, raising socio-legal questions about the informal pressures shaping judicial behaviour even absent formal court-packing.

Israel: The 2023 judicial overhaul proposals sought to limit the Supreme Court's reasonableness doctrine, grant the governing coalition effective control over judicial appointments, and permit the Knesset to override certain court rulings by simple majority. The scale of public mobilisation against these proposals, and their eventual partial suspension,

illustrates how civil society resistance can operate as a counterweight to attempted judicial capture.

United States: Debates continue over whether the blocking of a Supreme Court confirmation in 2016, rapid appellate court appointments, and recurring proposals to expand the size of the Supreme Court amount to constitutional hardball within tolerable limits or an early-stage form of the same backsliding observed elsewhere. Most comparative scholars regard federal structure, a robust legal profession, and long-standing norms of judicial deference as providing greater, though not unlimited, resilience.

Read together, these six snapshots suggest a rough typology of judicial capture strategies. Hungary and Poland represent concentrated capture, in which a single dominant party used a constitutional or near-constitutional majority to restructure the judiciary comprehensively within a short period. Turkey represents crisis-driven capture, in which an external shock, the attempted coup, was used to justify an emergency-powers restructuring far broader than the triggering event itself required. India represents diffuse capture, in which no single dramatic reform is easily identified, but a pattern of appointment delay, institutional caution, and opaque procedure produces a comparable cumulative effect over a longer period. Israel represents contested capture, in which an attempted comprehensive overhaul was met with sufficiently strong and sustained civil society mobilisation to force at least partial reversal, illustrating that capture is not inevitable even once seriously attempted. The United States represents incipient or disputed capture, in which the individual measures observed remain within a zone of reasonable disagreement among scholars as to whether they constitute backsliding at all. This typology suggests that the outcome of an attempted judicial capture depends heavily on the size of the incumbent's parliamentary majority, the presence or absence of a triggering national crisis, the depth of pre-existing judicial legitimacy, and the strength of organised civil society resistance.

5.6 Empirical Indicators of Decline

Beyond qualitative case description, cross-national empirical indices provide a further, complementary source of evidence for the trends discussed above. The Varieties of Democracy project and the World Justice Project's Rule of Law Index have both tracked measurable declines in judicial constraint on the executive in several of the jurisdictions discussed in this review over the past decade, alongside parallel declines in indicators of civil liberties and media freedom. While such indices necessarily rely on expert coding and carry the methodological limitations common to all cross-national measurement, their broad convergence with the qualitative case-study literature strengthens confidence that the patterns described here reflect a genuine and measurable global trend rather than the selective focus of a small number of legal scholars.

It is equally notable that these indices show considerable variation in the speed of decline. Hungary's scores on judicial constraint indicators fell sharply within a small number of years after 2010, consistent with the concentrated constitutional amendment process described

earlier, whereas India's trajectory in comparable indices has been described by researchers as a slower, more gradual softening rather than a sharp drop, consistent with the more diffuse and informal pressures discussed in this review. This variation is itself analytically important, since it suggests that judicial capture is not a single event but a continuum, and that early, gradual decline may be harder for domestic and international observers to recognise and respond to than a sudden and dramatic constitutional rupture.

6. Critical Discussion: Why Legal Safeguards Have Failed

A central puzzle for socio-legal scholarship is why constitutional safeguards explicitly designed to protect judicial independence, including security of tenure, judicial councils, and constitutional courts themselves, have so often failed to prevent capture. Four explanations recur across the literature and merit critical examination.

First, most constitutional safeguards were designed to prevent sudden, dramatic violations, such as the outright dismissal of judges by decree, rather than gradual, cumulative changes achieved through ordinary legislative or constitutional amendment procedures. A constitution that requires only a parliamentary supermajority, rather than a more demanding process involving referenda or extended multi-term ratification, provides comparatively little protection against a government that wins a single decisive election with enough seats to amend the constitution at will. Hungary's case demonstrates this vulnerability starkly, since its 2011 constitution was itself the product of ordinary constitutional amendment procedure.

Second, courts asked to review threats to their own independence face an acute legitimacy dilemma. When a constitutional court strikes down legislation that curtails its own powers, it is easily accused of self-interest, weakening the persuasive force of its ruling in the eyes of the public even where the ruling is legally sound. This dilemma is compounded when the composition of the court has already been partially altered by the time the challenge is heard, since a captured or partially captured court may simply decline to rule against the measures that produced its own membership.

Third, international and supranational mechanisms, while capable of naming violations, often lack timely enforcement power. The European Union's rule-of-law mechanisms against Hungary and Poland, including infringement proceedings and the conditionality mechanism tying funding to rule-of-law compliance, have produced results, but critics note that the process has been slow relative to the speed of domestic institutional change, allowing new appointments and structures to become entrenched facts on the ground well before any external remedy takes effect. This creates an asymmetry between the speed of legal capture and the speed of legal correction.

Fourth, and perhaps most importantly from a socio-legal perspective, formal constitutional design cannot substitute for the informal norms of restraint that historically underpinned judicial independence in mature democracies. Levitsky and Ziblatt (2018) emphasise two such norms: mutual toleration, the acceptance of political opponents as legitimate rivals rather than

existential enemies, and institutional forbearance, the self-restraint of not using every legally available power to its maximum extent. Where these norms weaken, formal rules alone provide only limited protection, because a sufficiently determined government can usually find some legally permissible route to the same outcome. This suggests that judicial independence is ultimately a socio-political achievement sustained by political culture, professional solidarity within the legal community, and public expectation, and not merely a legal guarantee written into a constitutional text.

A fifth and closely related explanation concerns the role of the media and civil society as external monitors of judicial capture. Where independent media investigate and publicise court-packing or disciplinary proceedings against judges, the political cost of capture rises, since voters who might otherwise be indifferent to procedural detail can be alerted to substantive threats to their rights. However, populist governments have frequently pursued media capture in parallel with judicial capture, through concentration of ownership, advertising pressure, or defamation litigation against critical outlets, thereby weakening the very mechanism that might otherwise mobilise public resistance. This parallel pattern indicates that judicial independence cannot be analysed in isolation from the wider health of the public sphere, since courts and the press function as mutually reinforcing checks on executive power, and the capture of one often facilitates the capture of the other.

7. Socio-Political Implications

The erosion of judicial independence has consequences that extend well beyond the judiciary itself. Where courts can no longer reliably check executive action, other democratic guarantees, including electoral fairness, freedom of the press, and protection of minority rights, become correspondingly harder to enforce, since courts are frequently the forum in which disputes over these guarantees are ultimately resolved. Ginsburg and Huq (2018) describe this as a mutually reinforcing decline, in which weakened courts make it easier to restrict media freedom or gerrymander electoral boundaries, which in turn makes it harder to remove the government responsible for weakening the courts in the first place, producing a self-sustaining cycle that is difficult to reverse through ordinary electoral politics alone.

There is also a significant public trust dimension. Comparative survey research summarised in rule-of-law reports suggests that public confidence in judicial institutions in states experiencing backsliding tends to polarise along partisan lines, with supporters of the governing party expressing increased confidence in a reshaped judiciary, while opposition-aligned citizens express declining trust. This polarization is itself corrosive, because judicial legitimacy has traditionally depended on courts being perceived as standing above ordinary partisan competition. Once judicial trust becomes another partisan marker, compliance with unfavourable rulings can no longer be assumed, further weakening the practical authority of courts regardless of their formal powers.

8. Policy Recommendations

Drawing on the mechanisms and failures identified above, this review proposes the following structural and social measures to strengthen resilience against judicial capture.

- Entrench judicial appointment and disciplinary procedures behind super-majoritarian or cross-party approval requirements, so that a single election victory cannot unilaterally reshape the composition or oversight of the judiciary.
- Require staggered, fixed judicial terms for constitutional court judges, reducing the ability of any single government to replace an entire bench within one electoral cycle.
- Establish independent, professionally led judicial councils with transparent, published criteria for appointment, promotion, and discipline, reducing the discretionary space available for politically motivated action.
- Strengthen the speed and enforceability of international and regional rule-of-law mechanisms, so that remedial action can outpace the entrenchment of captured institutions rather than lagging years behind it.
- Support independent legal professional associations, bar councils, and legal academia as civil society counterweights capable of publicly defending judicial independence when it is threatened.
- Encourage judicial communication strategies, including clearer public reasoning in judgments, that help maintain public trust and counter delegitimizing political rhetoric without compromising judicial neutrality.

These recommendations are not a guarantee against backsliding, since a sufficiently determined government supported by a durable electoral majority can, in principle, eventually overcome most structural safeguards. Their purpose is instead to raise the political cost and slow the pace of capture, buying time for civil society, professional bodies, and international mechanisms to respond before institutional change becomes irreversible.

It is also important to note a limitation acknowledged across the literature reviewed here: structural design operates within, and not above, political context. A super-majoritarian appointment rule can itself be repealed by a sufficiently large majority, a staggered-term system can be circumvented by simultaneous retirement-age legislation, as Poland demonstrated, and an independent judicial council can be reconstituted through ordinary statute if its own composition is not separately entrenched. This is why the recommendations above are presented as a package rather than as individually sufficient measures, and why several scholars, including Ginsburg and Huq (2018), argue that no purely legal or institutional design can fully substitute for a healthy political culture of mutual toleration between governing and opposition parties. Constitutional design should therefore be understood as raising the difficulty and cost of capture, encouraging earlier detection, and creating space for political and civic mobilisation, rather than as an automatic guarantee that operates independently of the society in which it is embedded.

8.1 Limitations of This Review

As with any review paper of this kind, several limitations should be acknowledged. First, the analysis relies on secondary academic literature and publicly available reports rather than original empirical fieldwork, primary judicial statistics, or interviews with judges and court officials, and its conclusions should be read as a synthesis of existing scholarship rather than as new primary evidence. Second, the selection of jurisdictions, while chosen to represent distinct mechanisms and regions, is not exhaustive, and comparable dynamics reported in other states, including Israel prior to 2023, Sri Lanka, Venezuela, El Salvador, and several sub-Saharan African democracies, are not examined in comparable depth here and would repay dedicated attention in future work.

Third, the pace of political and legal change in this area is rapid, and any review risks becoming quickly dated; developments in Israel's judicial overhaul debate, the ongoing rule-of-law dispute between Poland and the European Union, and shifts in the composition of national courts elsewhere continue to evolve after the period surveyed in this paper. Finally, terms such as autocratic legalism and constitutional hardball, while analytically useful, are contested, and some scholars caution against applying a single vocabulary uniformly across very different legal and political traditions, since the same formal mechanism, such as a change in judicial retirement age, may carry a different socio-legal significance depending on the surrounding constitutional history and political culture of the state in question. These limitations do not undermine the central comparative claims advanced in this review, but they do counsel appropriate caution in extending its conclusions automatically to jurisdictions or periods not directly examined.

9. Conclusion

This review has examined judicial independence as a socio-legal problem situated at the centre of contemporary democratic backsliding. It has shown that the erosion of judicial independence in Hungary, Poland, Turkey, India, Israel, and the United States, despite significant differences of context, follows recognisable and comparable mechanisms, including court-packing, jurisdiction-stripping, disciplinary control, and delegitimizing public rhetoric. It has argued, following the literature on autocratic legalism and constitutional hardball, that this erosion proceeds primarily through formally lawful means, which makes it considerably harder to resist through conventional legal remedies than a classic authoritarian coup.

The critical discussion has shown that existing constitutional safeguards, including judicial councils, constitutional courts, and international rule-of-law mechanisms, have frequently proved too slow or too narrowly designed to prevent capture, and that the ultimate protection of judicial independence depends as much on informal political norms of mutual toleration and institutional forbearance as on formal constitutional text. This suggests an important reorientation for future socio-legal research and policy: the defence of judicial independence cannot be pursued through constitutional design alone but must also address the political culture, professional solidarity, and public trust that sustain courts as genuinely independent

institutions. Future scholarship would benefit from closer comparative attention to cases of successful resistance to judicial capture, including Israel's 2023 mobilisation, in order to identify the social and institutional conditions under which democratic backsliding can be halted or reversed before it becomes entrenched.

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