

In India and Israel, a Common Threat to Judicial Independence – and to Democracy

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Both India and Israel are celebrating their 75th birthdays, amid strikingly similar conflicts about the balance of power between courts and government, fueled by an acute dissonance between each country's religious and secular populations

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On March 26th, when Israel was upended by a national strike, Nageswara Rao, a former judge on India's Supreme Court was in Jerusalem speaking at an emergency conference .on threats to judicial independence

He used the moment to speak out in support of those marching and protesting across Israel against the government's planned judicial overhaul which, if successful would neuter Israel's Supreme Court and grant more power to the government, which prompted .the strike

The "appointment of judges is an essential ingredient for independence of judiciary," he .told those attending the conference sponsored by the Israel Democracy Institute

This year, both India and Israel are celebrating the milestone of 75 years of
.independence

Both are multiparty parliamentary democracies that boast individual rights, a free press,
and active civil society. Both have populations that span multiple faiths, cultures and
modern as well as conservative outlooks. The secular-religious divide in both nations is
.acute

There are some fundamental differences between the two countries' legal systems. India,
unlike Israel, has a constitution, and it defines itself as a secular, socialist democratic
.republic

There's a striking similarity to the debates, issues and emotions surrounding what the role
.of the judiciary should be and who the judges are – and who they should be

Looking back, western ideas of neo-liberalization of the economy transformed both
nations into free-market economies even as they remained socialist-planned economies
.until the late 1980s

Their founding leaders, David Ben-Gurion of Israel and Jawaharlal Nehru of India
respectively, were secular, rational and liberal minds who were deeply influenced by the
.Western modernity

They both thought religion and cultural traditions could and would be reformed through
.rational and legal tools for the sake of modern state-building

But they both erred in underestimating the level of religiosity among some segments of
their society. Although the more traditional religious communities were in the minority
during their lifetimes, today those populations have ballooned, and they now enjoy more
political clout and popular support for their nationalist and religious values than ever
.before

.As in Israel, the question of how judges are appointed has become a major issue in India

In India, what is known as a collegium system exists, in which judges appoint other
judges with limited government power over the process. At best, the government can only
.delay the appointment of a given judge

Currently, in Israel judges are appointed by a committee that includes equal
representation for politicians, sitting judges and lawyers. While there is widespread
support for reforming the committee system, there is disagreement over how it should be
done. The government of Benjamin Netanyahu's proposal would give itself total control
.over all judicial appointments

In striking similarity to the arguments for the judicial overhaul in Israel, Indian
governments did have a direct role in the appointment of judges before 1993, but the
Supreme Court decided unilaterally that from then on, judges would be chosen
.independently and not be appointed by the executive

Indian politics went through a major social and cultural transformation following the period during the 1970s and 1980s when the lower castes and other less educated and marginalized sectors of society were labeled “Other Backward Classes.” In recent years .they have tried to gain stature and power in the political space

There’s a backlash by some, including from these formerly marginalized groups, against the Indian judiciary, much of it under the hegemony of upper castes, not unlike the disproportionate number of Ashkenazi Jews (Jews of European descent who, historically .have held more prominent roles in the Israeli establishment) in Israel’s Supreme Court

Although the lower castes are a majority within the Hindu population, they are vastly under-represented among Indian judges, not unlike the relative lack of representation of Jews of North African and Middle Eastern descent among judges in Israel

Modi’s government passed a bill back in 2014 that would have seen a national judicial .appointments commission share the power with the judiciary in appointing judges

.But the Supreme Court of India rejected this law

Many government officials, including Jagdeep Dhankar, the vice president of India, and a Modi appointee, have criticized them, saying the dismissal of the law that had been passed by parliament was anti-democratic. He claims the Supreme Court has “undone .the power of the people

This issue of judicial activism is another major issue for governments in India, as it is in Israel. In Israel there has been pushback to the perception promoted by the Netanyahu government that the Supreme Court has been overly liberal and interventionist in its .interpretation of the law

Kiran Rijju, the recently ousted law minister in India, has been vocal against what he sees as judicial overreach in his country

Does the judiciary run the country or the elected government? If the judiciary gets into“ the domain of the executive, they are venturing into a sphere where they are not supposed to. We are a democracy, and our sovereignty lies with the people of India. .People elect their representatives who run the country,” he said

One contentious example in India is the legality of homosexuality. Although it was a crime on the books (a hold-over from British rule when it was passed in 1861), it had mostly .been a forgotten law

India’s Supreme Court decriminalized homosexuality in 2018. Most governments had previously ignored this issue out of fear it could stoke a backlash from the majority of .Hindus, as well as the Muslim minority that tends to be socially conservative

Currently, an ongoing case related to same-sex marriage is before the Indian Supreme Court and has brought the issue back into the fore. For conservative Hindus and Muslims, the concept of same-sex marriage is an affront to their conservative values, and

.dismissed as an “urban elitist concept” by some government officials

Modi’s government has requested the court dismiss this hearing and let this matter be decided in the parliament, where elected leaders could consider whether it is socially .acceptable by the majority of lawmakers

But the court has refused to drop the matter, and appears to be giving some degree of recognition to same-sex marriage. The public, however seems more supportive. According to some surveys, almost 50 percent of Indians would support same-sex .marriage, with support even higher in urban areas

The case serves a reminder of how deeply divided the people are when it comes to the role of religion in public matters and how those issues intersect with the highest courts in .the land. Again, echoes of Israel

People of traditional cultures find it difficult to accept top-down laws which do not confirm to their ideas of morality. That’s why the more liberal-minded courts are bound to clash .with them again and again

The sight of tens of thousands of Israelis filling the streets for 20 weeks straight now in mass protests, firmly standing against tampering with the independence of Israel’s courts in the name of protecting democracy is a true inspiration for the people of India and the .broader region, where such peoples’ movements are extremely rare

As an educator, I believe that critical-minded, open learning reveals to the younger generation that education does not only expand one’s horizons but reveals that it is free and fair societies which do better than undemocratic ones. For that reason the judiciary must remain independent and a key check and balance if democracy is going to be .safeguarded

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