



"JUDICIAL POWER AND DEMOCRATIC BACKSLIDING: A COMPARATIVE STUDY OF INDIA AND USA"

Harshita Mishra

LLM(Masters in Law) : GUJARAT NATIONAL LAW UNIVERSITY, GANDHINAGAR, GUJARAT, INDIA

Abstract: In the early 21st century, the global spread of democracy has shifted toward a "democratic recession," where more nations are becoming autocratic than free. This paper examines the phenomenon of democratic backsliding a subtle process where elected leaders use legal tools to slowly dismantle checks and balances from within. The research aims to identify the specific legal mechanisms and institutional weaknesses that allow this erosion to happen, moving beyond a theoretical discussion to analyses real-world threats to liberal governance.

Using a comparative legal and statistical approach, the study investigates the "confrontational" model of executive pressure in the United States and the "accommodationist" model in India. The research further analyses electoral integrity through a detailed case study of India's 2019 general election, applying statistical tests to identify potential irregularities.

The findings reveal that while the U.S. judiciary faced direct rhetorical attacks on its legitimacy, the Indian judiciary is vulnerable to a more silent form of capture through the lure of post-retirement government appointments. Additionally, the electoral analysis suggests patterns of disproportionate wins in close races and targeted voter disenfranchisement, particularly among minority groups. The paper concludes that protecting democracy requires more than just good constitutional design; it demands active reforms, such as mandatory cooling-off periods for judges and clearer limits on executive power, to patch the institutional gaps exploited by modern autocrats.

Keywords- governance, executive, judiciary, democracy, accommodationist

I.INTRODUCTION

1.1. Background: A New Perspective of Democratic Decay

The early 21st century has been defined by a powerful and unsettling political shift that can be said as global retreat of liberal democracy. This phenomenon is widely known as a "democratic recession," marks a significant shift from the Post-Cold War narrative of democratic expansion.¹ For the first time in over two decades, the world now contains more autocratic nations than democracies, a clear indicator of a systemic shift in the international political landscape. This period of regression, which some scholars have termed the "Third wave of autocratization," appears to have gained momentum around 2010 and continues to reshape politics across the globe. Reports from monitoring organizations like the Varieties of Democracy (V-Dem) Project and Freedom House quantitatively substantiate this decline, noting a steady increase in authoritarian practices and a corresponding erosion of democratic norms and institutions. This global pattern of democratic decay provides the urgent and critical context for the present study, framing the analysis not as a theoretical exercise in constitutional law but as a direct response to a contemporary crisis challenging the foundations of liberal governance worldwide.² However, the past two decades have profoundly challenged this optimism.³ A growing number of nations, including established and consolidated democracies, are experiencing a steady and concerning erosion of democratic institutions, norms, and practices.⁴ Freedom House reported in 2025 that global freedom had declined for 19 consecutive years,⁵ while the V-Dem Institute noted that for the first time since 2001, democracies are no longer in the global majority.⁶

This contemporary trend, widely termed democratic backsliding, departs significantly from the 20th-century models of authoritarian transitions, which were often characterized by violent coups and overt suspension of constitutions.⁷ Today's democratic decay is a far subtler and more insidious process. It is typically driven not by generals in tanks, but by duly elected

¹ Larry Diamond, 'The State of Democracy in the World' (2015) 26(1) Journal of Democracy 141.

² Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991).

³ Larry Diamond and Marc F Plattner (eds), *Democracy in Decline?* (Johns Hopkins University Press 2015).

⁴ Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) Journal of Democracy 5.

⁵ Freedom House, *Freedom in the World 2025: The Uphill Battle to Safeguard Rights* (Freedom House 2025).

⁶ V-Dem Institute, 'Democracy Report 2024: Democracy Winning and Losing at the Ballot' (University of Gothenburg 2024)

⁷ Ozan O Varol, 'Stealth Authoritarianism' (2015) 100 Iowa Law Review 1673.

leaders who use the very instruments of governance to gradually dismantle democratic checks and balances from within.⁸ Each step might not seem dangerous by itself. For example, a government might pass a new law to limit the press. It could change rules to make courts less powerful. Or it might create a new rule that makes elections unfair. Taken alone, these actions may seem minor. But together, they cause a major shift away from democracy.⁹ This legalistic erosion makes it difficult for both domestic and international observers to identify a single moment of rupture, allowing democratic decay to proceed until it is often too late to reverse.¹⁰

The central problem this paper addresses is the urgent need to understand the precise legal and institutional mechanisms through which contemporary democratic backsliding operates. While the general trend is widely acknowledged, a deeper, comparative analysis is required to identify the specific vulnerabilities within democratic systems that autocrats exploit.¹¹ Established democracies like the United States and India, long considered resilient, have shown alarming signs of stress, demonstrating that no system is immune.¹² The challenge lies in recognizing that threats can manifest in vastly different forms from open, rhetorical attacks on institutions in one context to subtle, incentive-based co-optation in another. By failing to grasp these diverse strategies, democratic societies risk being unable to diagnose the illness until the institutional damage is severe.¹³ This paper, therefore, seeks to create a more granular and comparative understanding of the tools of democratic erosion and the corresponding points of institutional fragility.

1.2. Research Questions and Objectives

This research is guided by the following core questions:

1. What are the primary legal and institutional mechanisms through which democratic backsliding manifests in contemporary democracies?
2. How do national and international courts respond to democratic erosion, and what are the limits of their effectiveness?
3. What are the key institutional vulnerabilities that facilitate democratic backsliding, comparing the "confrontational" model in the United States with the "accommodationist" model in India?
4. How is electoral integrity compromised as a part of democratic backsliding, with a specific focus on the evidence from India's 2019 general election?
5. What constitutional and institutional reforms could effectively counter the incremental erosion of democracy?

To answer these questions, the paper pursues the following objectives:

1. To synthesize and analyse the concept of democratic backsliding as a process of incremental institutional decay.
2. To examine the role of constitutional amendments, judicial capture, and executive aggrandizement in facilitating this decay.
3. To conduct a comparative analysis of the threats to judicial independence in the United States and India.
4. To critically evaluate evidence of electoral manipulation as a tool for democratic backsliding.
5. To propose and evaluate potential legal and institutional safeguards to bolster democratic resilience.

⁸ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown 2018).

⁹ Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545.

¹⁰ Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 47-50.

¹¹ David Landau, 'Presidential Term Limits and the Rule of Law: The Case of Colombia' (2013) 61(1) American Journal of Comparative Law 157.

¹² See generally, Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 18(1) International Journal of Constitutional Law 154.

¹³ Ginsburg and Huq (n 10) 7.

II. HOW DEMOCRACIES WEAKEN

2.1. Defining the Phenomenon

Understanding contemporary threats to democracy requires a fundamental shift in perspective. The classic image of democratic collapse involves a sudden, often violent, rupture a military coup or an executive seizure of absolute power.¹⁴ However, the modern form of backsliding is far more subtle. Scholars Tom Ginsburg and Aziz Huq characterize this process as a form of erosion, where a series of incremental changes, each seemingly minor and often legally executed, cumulatively hollow out democratic substance while leaving its formal shell intact.¹⁵

This process is typically driven by elected incumbents who leverage their democratic mandate to undermine the very system that brought them to power.¹⁶ Because they operate through legal channels and avoid a single, dramatic break with the constitutional order, their actions are harder to challenge.¹⁷ This slow decay is arguably more dangerous than a coup because it is less likely to trigger widespread domestic resistance or international condemnation.¹⁸ The public may not recognize the threat until the core functions of democracy such as free and fair elections, an independent judiciary, and a free press have been irrevocably compromised.¹⁹ This incrementalism is the defining feature of 21st-century democratic backsliding, seen in countries ranging from Hungary and Poland to Venezuela and Turkey.²⁰

2.2. The Steps to Gaining Total Power

Comparative research reveals a consistent pattern of strategies employed by leaders intent on dismantling democratic checks. Some scholars have used five-part toolkit commonly used to engineer democratic regression.²¹

2.2.1. Constitutional Amendment as a Political Weapon

One of the most powerful tools for would-be autocrats is the constitutional amendment process itself. Rather than suspending the constitution, they amend it to concentrate power and remove constraints. A classic example is the removal or extension of executive term limits, a tactic seen across the globe.²² By framing these changes as the will of the people, leaders can achieve autocratic ends through seemingly democratic means. This "abusive constitutionalism" uses the language and procedures of constitutional law to subvert its liberal-democratic purpose.²³

2.2.2. How Power Becomes Unchecked

A central objective of backsliding leaders is the elimination of institutional checks on their power. The judiciary is a primary target. This can involve "court-packing" (filling courts with loyalists), lowering the retirement age of judges to force out incumbents (as seen in Poland), intimidating judges through public attacks, or creating parallel judicial bodies that bypass the established courts.²⁴ Similarly, legislatures may be weakened by changing electoral rules to ensure a permanent majority for the ruling party or by stripping them of their oversight powers.²⁵

2.2.3. Politicizing the Executive

Would-be autocrats seek to centralize and politicize executive power, purging the meritocratic state bureaucracy and replacing it with loyalists. Independent accountability institutions, often called "fourth branch" or "guarantor" institutions (such as electoral commissions, anti-corruption agencies, and human rights ombudsmen), are either captured or starved of resources.²⁶ By ensuring that the entire state apparatus is loyal to the leader rather than to the constitution or the public, the executive can act with impunity.

2.2.4. Degrading the Public Sphere

A vibrant and independent public sphere is essential for a healthy democracy. Backsliding leaders work to degrade it by intimidating or capturing the media, harassing civil society organizations, and promoting polarization and disinformation.²⁷ By controlling the flow of information and discrediting critical voices, they prevent the formation of a coordinated opposition and ensure that their narrative dominates public discourse.

¹⁴ Nancy Bermeo, 'Coups and the Causes of Democratization' (2011) 44(1) Comparative Politics 1.

¹⁵ Ginsburg and Huq (n 10) 4.

¹⁶ Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell Law Review 391.

¹⁷ Scheppele (n 9) 548.

¹⁸ Bermeo (n 4) 15.

¹⁹ Levitsky and Ziblatt (n 8) 7-10.

²⁰ See Gábor Halmai, 'The Rise of Illiberal Constitutionalism in East-Central Europe' (2022) 28(2) European Public Law 337.

²¹ Ginsburg and Huq (n 10) ch 4.

²² David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189.

²³ *ibid* 192.

²⁴ See Laurent Pech and Kim Lane Scheppele, 'Illiberalism and the Rule of Law in Poland and Hungary' (2017) 21(2) European Constitutional Law Review 165.

²⁵ Samuel Issacharoff, 'Fragile Democracies' (2007) 120 Harvard Law Review 1405.

²⁶ Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633.

²⁷ Ginsburg and Huq (n 10) 4.

2.2.5. Undermining Political Competition

The ultimate goal is to eliminate meaningful political competition, entrenching the ruling party in power indefinitely. This is achieved through direct attacks on political opponents (using trumped-up legal charges, for example) or, more subtly, by rigging the electoral machinery. This can involve gerrymandering electoral districts, manipulating voter registration lists, or compromising the independence of the election commission.²⁸ As will be explored in Chapter 3, this manipulation of the electoral process represents one of the most direct and effective ways to subvert democracy.

THE JUDICIARY ON TRIAL

No institution is more central to the battle over democratic backsliding than the judiciary. Courts are designed to be the ultimate guardians of the constitutional order, tasked with upholding the rule of law and protecting individual rights against executive and majoritarian overreach.²⁹ It is therefore no surprise that they are often the first institution to be targeted by would-be autocrats and a key front line in the defence of democracy.³⁰ This chapter explores the multifaceted role of courts in the era of democratic backsliding, examining how they are attacked and captured, and comparing the distinct vulnerabilities of the judiciaries in the United States and India.

3.1. The Assault on Domestic Courts: Capture and Complicity

The assault on domestic courts is a hallmark of democratic erosion. Leaders pursuing an anti-democratic agenda cannot tolerate an independent judiciary that might obstruct their plans.³¹ The strategies of attack are numerous and often sophisticated. They include Court-Packing, Jurisdiction-Stripping, Judicial Purges and Intimidation.³²

- **Court-Packing:** Appointing a wave of loyalist judges to shift the court's ideological balance.
- **Jurisdiction-Stripping:** Passing laws that remove the courts' authority to hear cases in sensitive areas, such as national security or election law.
- **Judicial Purges:** Forcing judges into early retirement or removing them through politicized impeachment proceedings.
- **Intimidation:** Launching public, rhetorical attacks against judges who issue unfavorable rulings, accusing them of being politically motivated or even traitors. This tactic aims to undermine public trust in the judiciary and pressure judges into submission.

In some cases, courts become complicit in the backsliding project. Rosalind Dixon and David Landau have developed the concept of "abusive judicial review," where courts use the power of judicial review not to defend democracy, but to undermine it.³³ For instance, a captured constitutional court might uphold a law that cancels presidential term limits or restricts voting rights, lending a veneer of legal legitimacy to an anti-democratic act. This highlights a crucial point: judicial review is a tool, and like any tool, it can be used for both constructive and destructive purposes.

3.2. Comparative Vulnerabilities: The United States vs. India

While the threat to judicial independence is global, the specific vulnerabilities exploited by executive power vary significantly depending on a country's constitutional design and political culture. The cases of the United States and India provide a stark comparative illustration of two different models of judicial pressure.

3.2.1. The U.S. Model

The threat to judicial independence in the United States, particularly during the Trump administration (2017-2021, 2025-Present), has been characterized by direct, confrontational antagonism from the executive branch. This approach did not rely on formal constitutional changes but on a systematic effort to erode the judiciary's legitimacy and test the boundaries of its power.³⁴

The primary tactic was rhetorical delegitimization. President Trump frequently launched public attacks on judges and judicial decisions that went against his administration's policies.³⁵ By labelling judges as "so-called judges" or accusing them of being partisan actors, he sought to reframe the judiciary in the public mind as a political obstacle rather than a neutral arbiter of law.³⁶ This strategy aimed to sever the public's trust in the courts, thereby weakening their most crucial asset: their perceived legitimacy.

²⁸ Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Harvard University Press 2018).

²⁹ Alexander Hamilton, 'The Federalist No. 78' in *The Federalist Papers* (1788).

³⁰ David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts, Constitutionalism, and Popular Will' in Maurice Adams and others (eds), *Judging Europe's Judges* (Hart Publishing 2017).

³¹ Levitsky and Ziblatt (n 8) ch 5.

³² Ginsburg and Huq (n 10) 127-135.

³³ Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2019) 86 University of Chicago Law Review 301.

³⁴ Jack Goldsmith, 'Will Trump's Assaults on the Rule of Law Outlast His Presidency?' (2018) 132 Harvard Law Review 258.

³⁵ See, for example, Donald J Trump, Twitter Post (5 February 2017, 3:32 PM) <https://twitter.com/realdonaldtrump/status/828342188158750720> (referring to a judge as a "so-called judge").

³⁶ Stephen M Griffin, 'The Executive's Pardon Power and the Problem of Constitutional Subversion' (2019) 58(2) Washburn Law Journal 327.

This rhetoric was coupled with procedural circumvention, where the administration used executive actions to systematically test constitutional boundaries, effectively daring the courts to respond.³⁷ The series of travel ban executive orders, the attempt to end birthright citizenship by decree, and efforts to freeze congressionally appropriated funds were not just policy initiatives; they were probes designed to discover the outer limits of executive authority. This two-pronged strategy challenging judicial authority procedurally while attacking its legitimacy rhetorically represents a sophisticated assault on the separation of powers. While lower federal courts showed significant resilience by frequently blocking these actions, the experience revealed vulnerabilities, particularly in the enforcement of judicial orders against a determined executive and the inherent delays of the litigation process.³⁸

3.2.2. The Indian Model

In contrast to the confrontational model in the U.S., the primary threat to judicial independence in India is a more subtle, accommodationist mechanism operating through institutional incentives. This threat revolves around the common practice of appointing retired Supreme Court and High Court judges to prestigious and lucrative government positions after they leave the bench.³⁹

Unlike U.S. federal judges who hold lifetime appointments, Indian judges face a mandatory retirement age (65 for the Supreme Court). This creates a post-judicial career phase where the government becomes a significant potential employer, offering positions such as state governors, members of parliament, and heads of various commissions and tribunals. This practice creates a potential conflict of interest: a judge approaching retirement might be hesitant to rule against the government in a major case if they know a desirable post-retirement appointment depends on that same government's goodwill.⁴⁰ Studies have found a statistical correlation where judges who author judgments favourable to the government have a higher probability of receiving post-retirement appointments.⁴¹ Other analyses suggest the government's win rate in cases increases when the deciding bench includes judges nearing retirement. While correlation is not causation, these patterns create a powerful perception of impropriety that can be just as damaging to public trust as direct attacks.

High-profile cases have amplified these concerns. **The appointment of former Chief Justice Ranjan Gogoi to the upper house of Parliament just months after his retirement following his oversight of key verdicts favourable to the government, including the contentious Ayodhya case was widely criticized by the legal community as a threat to the perceived integrity of the judiciary.**⁴² This system of incentivization represents a subtle but powerful form of judicial capture that, instead of attacking the judiciary, co-opts it through the allure of future rewards.⁴³

3.3. International Courts

Given the pressures on domestic courts, some have looked to international courts as a potential backstop against democratic backsliding. Liberal internationalist theory suggests that democracies can use international legal commitments to "lock in" their domestic democratic arrangements, with international courts serving as external enforcers.

Tom Ginsburg's analysis of several regional courts reveals a mixed record. The European Court of Human Rights (ECHR) was designed in part as a defence of democracy and has played a role in defining democratic norms across Europe. However, it faces immense challenges in enforcing its decisions, struggling with a massive case backlog and a lack of "teeth" to compel compliance from defiant states. Similarly, the European Union's own mechanisms for disciplining member states, such as Article 7, have proven slow and politically difficult to implement, as seen in the cases of Hungary and Poland.

The Inter-American Court of Human Rights has been active in defending judicial independence but has struggled to stem systemic democratic decay in countries like Venezuela. Perhaps counterintuitively, Ginsburg argues that the African Court on Human and Peoples' Rights has shown the most promise, taking an expansive view of its remedial powers to order structural and even constitutional changes in member states to protect democratic processes.

Overall, while international courts can provide a valuable forum for challenging anti-democratic actions, their effectiveness is severely limited by political constraints and a fundamental lack of enforcement power. They are better at inducing up-front commitments from aspiring democracies than at enforcing those commitments on the back end when a country begins to slide.

THE BALLOT BOX: - A Case Study of India's 2019 Election

While the capture of institutions like the judiciary represents a critical front in democratic backsliding, an even more direct path to entrenchment is the manipulation of the electoral process itself. Free and fair elections are the cornerstone of any democracy.⁴⁴ When the integrity of the ballot box is compromised, the very foundation of democratic legitimacy crumbles. Sabyasachi Das's research paper, "Democratic Backsliding in the World's Largest Democracy," presents a granular, data-driven analysis of potential

³⁷ Daphna Renan, 'The President's Two Bodies' (2018) 118 Columbia Law Review 1119.

³⁸ *Washington v Trump*, 847 F.3d 1151 (9th Cir. 2017).

³⁹ Law Commission of India, *Ethics in Governance* (14th Report, 1958) (recommending against post-retirement government employment for judges).

⁴⁰ Arghya Sengupta, *Independence and Accountability of the Indian Higher Judiciary* (Cambridge University Press 2019) 210-215.

⁴¹ Madhav S Aney, Shubhankar Dam and Giovanni Ko, 'The Court and the Government: An Empirical Analysis of the Supreme Court of India's Election Year Jurisprudence' (2017) 13(1) Journal of Empirical Legal Studies 76.

⁴² See, for example, 'Ex-CJI Gogoi's Rajya Sabha nomination raises questions of judicial independence' *The Hindu* (New Delhi, 17 March 2020).

⁴³ Chintan Chandrachud, *The Cases that India Forgot* (Juggernaut 2019) (discussing judicial deference to the executive).

⁴⁴ Article 21(3), Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

electoral irregularities in India's 2019 general election, offering a stark case study of how this crucial democratic process can be threatened.⁴⁵

4.1. Analysing Skewed Election Results in 2019

In a normal, fair election, it is expected that in very closely contested races, a party would win roughly half and lose roughly half of them the outcome is effectively random. A statistical tool known as the McCrary test checks for this by examining the density of a party's win margin. A smooth distribution around the zero-margin point (a close race) is expected.⁴⁶ A sudden jump in the density just on the winning side of zero suggests that something is systematically tilting close races in that party's favour.

It was found that for India's 2019 general election, the incumbent Bhartiya Janata Party (BJP) exhibits a large, statistically significant discontinuous jump in its win margin density. In simple terms, the BJP won a disproportionately high number of very close elections.⁴⁷ This pattern was not observed for the BJP or the other major national party (Indian National Congress) in previous general elections, nor was it found in state assembly elections held around the same time. Furthermore, this irregularity was statistically significant in states ruled by the BJP at the time of the election, but not in states ruled by other parties. This failure of the McCrary test is rare in robust democracies and suggests the incumbent party may have been able to exercise "precise control" over election outcomes in tight races.⁴⁸

4.2. Mechanisms of Manipulation

The key question arising from this anomaly is whether it was the result of superior campaigning or outright electoral manipulation. Das systematically tests both hypotheses and finds the evidence is more consistent with manipulation.⁴⁹ He identifies two primary channels through which this may have occurred: registration manipulation and turnout manipulation.

4.1.1. Registration Manipulation

One of the subtlest ways to rig an election is to control who gets to vote. This can be done through the targeted deletion of names from the official electoral rolls, a practice sometimes referred to as voter purging. Das investigates this by examining the growth rate of the electorate in parliamentary constituencies (PCs) between the 2014 and 2019 elections.

The analysis reveals a startling pattern PCs that the BJP barely won in 2019 had a statistically significant lower rate of electorate growth compared to PCs that it barely lost.⁵⁰ This finding is consistent with the strategic deletion of voter names in key constituencies to flip the outcome in the incumbent's favour. The effect was even more pronounced in constituencies with a higher share of Muslim voters, a group that largely does not support the BJP.⁵¹ This suggests that the registration manipulation may have been a targeted effort to disenfranchise a specific minority community.

4.1.2. Data Discrepancies and Pliable Observers

Manipulation can also occur at the voting and counting stages. Das uncovers two concerning pieces of evidence in this regard. First, he analyses a significant discrepancy in the official Electronic Voting Machine (EVM) turnout data released by the Election Commission of India (ECI). The ECI released two different "final" sets of turnout figures that did not match, later removing the initial data from its website without a full explanation. Das finds that the likelihood of a "large" discrepancy between these two datasets was disproportionately higher in the constituencies that the BJP barely won.⁵² While not direct proof of fraud, this correlation suggests that constituencies with anomalous results also had irregularities in their official data reporting.

Second, the analysis points to potential weaknesses in election monitoring. The ECI assigns counting observers to oversee the vote-counting process. Das finds that in closely contested races, there was a discontinuous increase in the assignment of observers from the State Civil Service (SCS) cadre, who are appointed by state governments and are thus potentially more politically pliable than federally appointed Indian Administrative Service (IAS) officers. The presence of these potentially pliable observers was, in turn, correlated with larger turnout data discrepancies in the constituencies that the BJP won.⁵³ This suggests that the monitoring process may have been strategically weakened in key constituencies, facilitating local manipulation.

4.2. A Pattern of Discrimination: The Targeting of Minority Voters

Manipulation disproportionately affected India's largest minority group, Muslims. As noted, the electorate growth was slowest in high-Muslim-share PCs that the BJP won. Further analysis of polling-station-level data reveals another telling pattern. Typically, the BJP's vote share is negatively correlated with the Muslim electorate share in an area. However, in the PCs the BJP barely won,

⁴⁵ Sabyasachi Das, 'Democratic Backsliding in the World's Largest Democracy' (Ashoka University, Working Paper, July 2023).

⁴⁶ Justin McCrary, 'Manipulation of the running variable in the regression discontinuity design: A density test' (2008) 142(4) Journal of Econometrics 698.

⁴⁷ Das (n 45) 3.

⁴⁸ *ibid* 4.

⁴⁹ *ibid* 15.

⁵⁰ *ibid* 18.

⁵¹ *ibid* 21.

⁵² *ibid* 25.

⁵³ *ibid* 31.

this negative relationship was significantly weaker.⁵⁴ In these "suspicious" constituencies, a high Muslim population did not predict a lower likelihood of an extremely high BJP vote share, contrary to all normal voting patterns. This result strongly supports the hypothesis that the BJP's "excess" wins in close races came not from winning over more voters, but from the suppression of votes in minority-dominated areas.

CONSTITUTIONAL REMEDIES AND DEMOCRATIC RESILIENCE

The rise of democratic backsliding has spurred an urgent search for effective constitutional and institutional countermeasures. If the threat is a slow erosion from within, then the defence must also be built into the institutional fabric of the state. This chapter explores potential remedies, drawing on comparative constitutional scholarship concerning tools for holding leaders accountable and proposals for systemic reform.

5.1. Holding Leaders Accountable: Impeachment and Disqualification

When elected leaders act to subvert democracy, two powerful constitutional tools for holding them accountable are impeachment and disqualification. In their analysis, Huq and Ginsburg explore the design and application of these mechanisms across the globe.⁵⁵ Impeachment, the process of removing a head of state from office, is often conceived of as a response to individual criminality or malfeasance what Huq and Ginsburg call the "bad actor" model. However, their comparative analysis reveals that it often functions more broadly as a "Political reset" mechanism. In many presidential systems, which are notoriously rigid, impeachment is used to resolve a paralyzing political crisis when a leader has lost public support and the ability to govern, even in the absence of clear criminality.⁵⁶ Contrary to fears that this could be destabilizing, the evidence suggests that impeachment, whether successful or not, does not on average reduce the quality of democracy in the countries where it is used. Instead, it can serve as a crucial safety valve to prevent deeper democratic collapse.

Disqualification refers to mechanisms that exclude specific individuals or groups from holding public office, either temporarily or permanently. This tool presents a fundamental tension between democratic self-realization and self-destruction: the power to exclude can be used to protect democracy from its enemies, but it can also be abused to entrench incumbents by fencing out legitimate opposition.⁵⁷ Comparative experience shows four main types of disqualification:⁵⁸

1. Backward-Looking Group Rules (Lustration): Used in post-authoritarian transitions to bar officials from the previous regime from public office.
2. Forward-Looking Group Rules (Militant Democracy): Banning anti-democratic political parties, a practice common in many European countries but prohibited in the U.S. under First Amendment jurisprudence.
3. Backward-Looking Individual Rules: This includes impeachment for past acts.
4. Forward-Looking Individual Rules: The most common form is executive term limits, which prevent an individual from entrenching themselves in office.

The international experience suggests that these tools, particularly when temporary, can play a role in democratic defense without permanently excluding political actors who may have an enduring public support.

5.2. Suggestions

Beyond these reactive tools, preventing backsliding requires proactive institutional reform. The comparative analysis of the U.S. and India illuminates specific vulnerabilities that demand targeted solutions.

In the United States, the challenge of executive confrontation points to a need for:⁵⁹

- Legislative Clarification of Executive Power: Congress should pass laws that more clearly define the boundaries of executive authority, particularly regarding emergency powers and the control of appropriated funds, to reduce ambiguity that a president can exploit.
- Depoliticizing the Judiciary: Reforms aimed at reducing the intense politicization of the judicial appointment process could bolster the court's perceived legitimacy. Proposals include fixed terms for Supreme Court justices or the use of bipartisan appointment commissions.
- Enhanced Enforcement Mechanisms: Developing stronger mechanisms for enforcing judicial orders against a resistant executive is critical to ensuring the judiciary's power is not merely symbolic.
- In India, the threat of accommodationist incentivization calls for a different set of reforms:
- Mandatory "Cooling-Off" Periods: A mandatory period (e.g., three years) before retired judges can accept any government appointment would sever the immediate link between their rulings and potential future rewards.⁶⁰

⁵⁴ *ibid* 22.

⁵⁵ Aziz Z Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78.

⁵⁶ *ibid* 110.

⁵⁷ Mark A Graber, 'Militant Democracy and the Democratic Dilemma' (2013) 64(2) Northern Ireland Legal Quarterly 143.

⁵⁸ Huq and Ginsburg (n 55) 120-130; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) American Political Science Review 417.

⁵⁹ See Presidential Commission on the Supreme Court of the United States, *Final Report* (December 2021).

⁶⁰ Arun Jaitley, 'The Indian Judiciary: The Challenges Ahead' (2012) (Speech delivered at the Silver Jubilee celebrations of the High Court of Delhi) (arguing for a cooling-off period).

- **Independent Oversight of Appointments:** An independent, transparent commission should be established to regulate all post-retirement government appointments for judges, using clear and objective criteria.⁶¹
- **Enhanced Financial Security:** Improving the financial security of retired judges would reduce their dependence on post-retirement government positions, thereby lessening the incentive for pre-retirement accommodation.
- These context-specific reforms underscore a broader principle: safeguarding democracy requires a constant process of institutional adaptation and renewal to counter the evolving strategies of those who would undermine it from within.

CONCLUSION

The evidence synthesized in this paper paints a sobering picture of the state of global democracy. The midnight coup is no longer the main concern; rather, elected leaders' slow and systematic destruction of democratic institutions is. This process of democratic backsliding is slow, multifaceted, and dangerously effective because it preserves the outward facade of democracy while corroding its internal mechanisms. The fight for democracy in the 21st century is therefore a fight to defend it from within. This research has highlighted the two most critical battlegrounds in this fight: the courts and the ballot box. Our comparative analysis of the United States and India reveals that while the threat to judicial independence is universal among backsliding states, the methods of attack are tailored to specific institutional weaknesses. The U.S. model of confrontational delegitimization exploits political polarization and tests the limits of unwritten constitutional norms. The Indian model of accommodationist incentivization, by contrast, exploits the structural feature of mandatory judicial retirement to create subtle conflicts of interest. Both strategies, though different in form, lead to the same perilous outcome- a weakened judiciary less capable of acting as a check on executive power.

Simultaneously, the detailed case study of India's 2019 general election demonstrates how the electoral process itself can be subverted. The statistical evidence of disproportionate wins for the incumbent in close races, coupled with indications of targeted voter disenfranchisement and weak monitoring, serves as a stark warning. When citizens can no longer trust the integrity of their vote, the most fundamental link between the government and the governed is broken.

Yet, this analysis is not merely a diagnosis of decay; it is also a call to action. Constitutional tools like impeachment and disqualification, when properly designed, can serve as vital defences against anti-democratic leaders. More importantly, proactive institutional reforms such as mandatory cooling-off periods for judges in India and clearer legislative constraints on executive power in the U.S. can patch the very vulnerabilities that would-be autocrats seek to exploit.

Ultimately, the resilience of any democracy depends not just on the elegance of its constitutional design but on the sustained vigilance of its citizens, civil society, and institutional actors. The slow erosion of democracy can only be countered by a constant and determined effort to reinforce its foundations. Recognizing the subtle, varied, and often legalistic nature of the threat is the essential first step in the ongoing project of democratic self-preservation.

REFERENCE

Legislation

- Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

Books

- Applebaum A, *Twilight of Democracy: The Seductive Lure of Authoritarianism* (Doubleday 2020)
- Chandrachud C, *The Cases that India Forgot* (Juggernaut 2019)
- Diamond L and Plattner MF (eds), *Democracy in Decline?* (Johns Hopkins University Press 2015)
- Ginsburg T and Huq AZ, *How to Save a Constitutional Democracy* (University of Chicago Press 2018)
- Huntington SP, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991)
- Levitsky S and Ziblatt D, *How Democracies Die* (Crown 2018)
- Mounk Y, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Harvard University Press 2018)
- Sengupta A, *Independence and Accountability of the Indian Higher Judiciary* (Cambridge University Press 2019)

Journal Articles

- Ackerman B, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633
- Aney MS, Dam S and Ko G, 'The Court and the Government: An Empirical Analysis of the Supreme Court of India's Election Year Jurisprudence' (2017) 13(1) Journal of Empirical Legal Studies 76
- Bermeo N, 'Coups and the Causes of Democratization' (2011) 44(1) Comparative Politics 1
- Bermeo N, 'On Democratic Backsliding' (2016) 27(1) Journal of Democracy 5
- Diamond L, 'The State of Democracy in the World' (2015) 26(1) Journal of Democracy 141
- Dixon R and Landau D, 'Tiered Constitutional Design' (2019) 86 University of Chicago Law Review 301
- Goldsmith J, 'Will Trump's Assaults on the Rule of Law Outlast His Presidency?' (2018) 132 Harvard Law Review 258

Reports and Working Papers

- Das S, 'Democratic Backsliding in the World's Largest Democracy' (Ashoka University, Working Paper, July 2023)
- Freedom House, *Freedom in the World 2025*: (Freedom House 2025)

⁶¹ Nick Robinson, 'The Indian Supreme Court and Post-Retirement Employment' (2014) 2(1) Jindal Global Law Review 94.

- Ginsburg T, 'Constitutional Endurance' (2007) 1(2) University of Chicago Law School, John M Olin Law & Economics Working Paper 1
- Law Commission of India, *Ethics in Governance* (14th Report, 1958)
- Presidential Commission on the Supreme Court of the United States, *Final Report* (December 2021)
- V-Dem Institute, 'Democracy Report 2024: Democracy Winning and Losing at the Ballot' (University of Gothenburg 2024)

Other Sources

- 'Ex-CJI Gogoi's Rajya Sabha nomination raises questions of judicial independence' *The Hindu* (New Delhi, 17 March 2020)
- Hamilton A, 'The Federalist No. 78' in *The Federalist Papers* (1788)
- Jaitley A, 'The Indian Judiciary: The Challenges Ahead' (Speech delivered at the Silver Jubilee celebrations of the High Court of Delhi, 2012)
- Trump DJ, Twitter Post (5 February 2017, 3:32 PM)
<https://twitter.com/realdonaldtrump/status/828342188158750720>

