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# CONSTITUTIONAL COURTS AND DEMOCRATIC BACKSLIDING: A COMPARATIVE STUDY OF INDIA AND JAPAN

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## ABSTRACT

The growing phenomenon of democratic backsliding has emerged as one of the most significant constitutional challenges of the twenty-first century. Across established and emerging democracies, concerns have arisen regarding the gradual weakening of institutional checks and balances, concentration of executive authority, erosion of civil liberties, and declining accountability mechanisms. In this context, constitutional courts occupy a pivotal position as guardians of constitutionalism, entrusted with the responsibility of preserving democratic values and restraining the misuse of public power. This article undertakes a comparative examination of the role of constitutional adjudication in addressing democratic backsliding in India and Japan, two Asian democracies that have adopted distinct constitutional traditions and judicial approaches.

The study investigates how the constitutional frameworks and judicial institutions of these countries have responded to pressures that may threaten democratic governance. India presents a model of robust judicial review, where the Supreme Court has developed innovative constitutional doctrines, most notably the Basic Structure Doctrine, to protect the foundational principles of the Constitution from majoritarian encroachment. Conversely, Japan's constitutional system is characterised by a more restrained judicial culture, with the Supreme Court exercising its power of constitutional review cautiously and often deferring to legislative and executive judgment. By analysing constitutional provisions, landmark judicial decisions, and contemporary democratic challenges, this article evaluates the extent to which courts can function as effective safeguards against democratic erosion.

The research adopts a doctrinal and comparative methodology, drawing upon constitutional texts, judicial precedents, and scholarly literature to assess the strengths and limitations of judicial intervention in preserving democratic order. The comparative analysis demonstrates that the effectiveness of

constitutional courts is shaped not only by formal constitutional powers but also by institutional legitimacy, political context, judicial independence, and public confidence in the rule of law. The article argues that while courts alone cannot prevent democratic decline, they remain indispensable constitutional actors capable of reinforcing democratic resilience when supported by strong legal and institutional foundations. The study contributes to contemporary scholarship on comparative constitutional law by highlighting the diverse ways in which constitutional courts in Asia respond to the challenges posed by democratic backsliding and constitutional governance in an evolving political landscape.

**Keywords:** Democratic Backsliding; Constitutional Courts; Judicial Review; Constitutionalism; India; Japan; Rule of Law; Basic Structure Doctrine; Judicial Independence; Comparative Constitutional Law.

## **Introduction**

The preservation of democratic governance has become an increasingly complex challenge in the contemporary constitutional landscape. While traditional threats to democracy were often associated with military coups and abrupt regime changes, modern democracies are more commonly confronted with a gradual process of institutional erosion known as democratic backsliding. Democratic backsliding refers to the incremental weakening of democratic institutions, constitutional safeguards, civil liberties, and mechanisms of accountability by governments that have acquired power through democratic means. This phenomenon has attracted significant scholarly attention because it poses a threat not only to democratic governance but also to the rule of law and constitutionalism that underpin modern constitutional states.

Constitutional courts occupy a central position in addressing the challenges posed by democratic backsliding. As guardians of constitutional values, these institutions are entrusted with the responsibility of reviewing governmental actions, protecting fundamental rights, and maintaining the balance of power among state organs. Judicial review serves as an essential mechanism through which constitutional courts can prevent the concentration of power and ensure that governmental authority remains subject to constitutional limitations. However, the effectiveness of constitutional courts in resisting democratic erosion varies considerably across jurisdictions, depending on constitutional design, judicial independence, political culture, and institutional legitimacy.

India and Japan provide a compelling comparative framework for examining the relationship between constitutional adjudication and democratic resilience. Both countries are among Asia's most influential constitutional democracies, yet they differ significantly in their judicial traditions and approaches to constitutional review. India has developed one of the world's most activist constitutional judiciaries, with the Supreme Court exercising extensive powers of judicial review and formulating transformative doctrines such as the Basic Structure Doctrine to protect the Constitution's core democratic principles. Through landmark decisions, the Indian judiciary has frequently intervened to preserve constitutional governance and safeguard fundamental rights against executive and legislative excesses. In contrast, Japan represents a model of judicial restraint. Although the Constitution of Japan formally empowers the Supreme Court to exercise judicial review, the Court has historically adopted a cautious approach, often demonstrating deference to the political branches of government. This distinctive judicial culture raises important questions regarding the capacity of constitutional courts to act as effective checks on governmental power and to respond to potential democratic challenges within different constitutional settings.

Despite the growing body of scholarship on democratic backsliding and constitutionalism, limited comparative attention has been devoted to understanding how Asian constitutional courts respond to democratic erosion. Existing studies frequently focus on European and North American jurisdictions, leaving a significant gap in comparative constitutional scholarship concerning Asia. By comparing India's assertive model of constitutional review with Japan's restrained judicial approach, this article seeks to contribute to a more nuanced understanding of the role of courts in preserving democratic governance. The article adopts a doctrinal and comparative research methodology based on constitutional texts, judicial precedents, and academic literature. It examines the constitutional foundations of judicial review in both jurisdictions, analyses landmark judicial decisions relating to democratic governance and constitutional accountability, and evaluates the institutional strengths and limitations of constitutional courts in confronting democratic backsliding.

The central argument advanced in this study is that constitutional courts remain indispensable guardians of democratic constitutionalism; however, their effectiveness depends not solely upon the formal powers conferred by constitutional texts but also upon broader factors such as judicial independence, institutional legitimacy, political culture, and public support for constitutional values. Through a comparative analysis of India and Japan, this article aims to

offer insights into the evolving role of constitutional courts in safeguarding democracy in an era marked by increasing pressures on constitutional governance.

## **II. Conceptual Framework: Understanding Democratic Backsliding and the Role of Constitutional Courts**

### **A. Understanding Democratic Backsliding**

The concept of democratic backsliding has emerged as a central concern within contemporary constitutional and political discourse. Unlike traditional democratic breakdowns, which often occur through abrupt military coups or revolutionary transformations, democratic backsliding generally manifests as a gradual and incremental process through which elected governments weaken democratic institutions from within. Such erosion frequently occurs through legally enacted measures that undermine constitutional safeguards while preserving the outward appearance of democratic governance.

Scholars have defined democratic backsliding as the state-led deterioration of political institutions, civil liberties, electoral integrity, and mechanisms of accountability that sustain constitutional democracy. The phenomenon commonly involves restrictions on freedom of expression, weakening of judicial independence, concentration of executive power, manipulation of electoral processes, and the marginalisation of political opposition. Because these measures are often implemented through formal legal mechanisms, they present unique challenges to constitutional systems designed to protect democratic governance.

The contemporary relevance of democratic backsliding can be observed across various regions of the world. Even established democracies have experienced tensions between majoritarian political mandates and constitutional limitations on governmental power. Consequently, constitutional scholars increasingly recognise that the endurance of democracy depends not only on electoral processes but also on the strength of constitutional institutions capable of restraining abuses of power.

### **B. Constitutionalism and Democratic Governance**

Constitutionalism constitutes the normative foundation upon which modern democratic systems operate. At its core, constitutionalism requires that governmental authority be exercised in accordance with constitutional principles rather than political expediency. It seeks

to ensure that public power remains limited, accountable, and subject to legal constraints. A constitutional democracy therefore extends beyond the principle of majority rule. While democratic elections provide legitimacy to governmental institutions, constitutionalism ensures that elected representatives cannot arbitrarily undermine fundamental rights, judicial independence, or institutional checks and balances. The protection of constitutional values such as equality, liberty, human dignity, and the rule of law remain essential to democratic governance.

The relationship between democracy and constitutionalism is inherently complementary yet occasionally contentious. Democratic governments may claim popular legitimacy for policies that conflict with constitutional protections, creating tensions between majoritarian preferences and constitutional limitations. In such circumstances, constitutional courts often serve as mediating institutions responsible for preserving the balance between democratic decision-making and constitutional fidelity.

### **C. Constitutional Courts as Guardians of Democracy**

Constitutional courts occupy a distinctive position within constitutional democracies. Their primary function is to interpret constitutional provisions, resolve disputes concerning governmental powers, and ensure compliance with constitutional norms. Through the exercise of judicial review, constitutional courts act as institutional safeguards against unconstitutional exercises of public authority. The role of constitutional courts extends beyond traditional dispute resolution. In contemporary democracies, courts increasingly perform a broader constitutional function by protecting minority rights, preserving institutional balance, and defending democratic processes. Judicial intervention becomes particularly significant during periods of democratic stress when executive or legislative actions threaten constitutional principles.

The effectiveness of constitutional courts in responding to democratic backsliding depends upon several factors. First, courts must possess sufficient constitutional authority to review governmental actions. Second, judicial independence must be protected from political interference. Third, courts require institutional legitimacy and public confidence to ensure compliance with their decisions. Finally, constitutional culture plays an important role in determining the extent to which judicial decisions are respected by political actors and society.

Nevertheless, constitutional courts are not without limitations. Excessive judicial intervention may generate concerns regarding judicial overreach and democratic legitimacy. Critics argue that unelected judges should exercise caution when reviewing policies adopted by democratically elected representatives. Accordingly, constitutional courts must continuously balance their responsibility to protect constitutional values against the need to respect democratic decision-making processes.

#### **D. Models of Judicial Review: Activism and Restraint**

Comparative constitutional scholarship identifies two broad approaches to judicial review: judicial activism and judicial restraint. Judicial activism refers to an approach in which courts actively interpret constitutional provisions to safeguard rights, develop constitutional principles, and review governmental actions. Activist courts often regard themselves as guardians of constitutional values and are willing to invalidate legislation or executive measures that conflict with constitutional norms. This model is frequently associated with transformative constitutionalism, where courts play an active role in shaping democratic development. Conversely, judicial restraint emphasises deference to the political branches of government. Courts adopting this approach generally intervene only when constitutional violations are clear and substantial. Judicial restraint is often justified on democratic grounds, reflecting the belief that elected institutions possess greater democratic legitimacy than judicial bodies in making public policy decisions.

Neither model is inherently superior. Judicial activism may strengthen constitutional protections but risks accusations of judicial supremacy, whereas judicial restraint may preserve democratic decision-making but potentially leave constitutional safeguards vulnerable during periods of democratic decline. The effectiveness of either approach largely depends upon the political and institutional context within which courts operate.

#### **E. Analytical Framework for the Comparative Study**

This article employs democratic backsliding as the principal analytical lens through which the constitutional experiences of India and Japan are examined. The comparison focuses on three interconnected dimensions. First, it analyses the constitutional foundations of judicial review in both jurisdictions and the extent of authority vested in their respective supreme courts. Second, it evaluates how courts have responded to constitutional challenges involving

executive power, democratic accountability, and the protection of fundamental rights. Third, it assesses the broader institutional factors—including judicial independence, political culture, and public legitimacy—that influence judicial effectiveness.

Through this framework, the study seeks to determine whether constitutional courts can effectively function as barriers against democratic erosion and whether differing judicial philosophies produce distinct outcomes in safeguarding constitutional democracy. The comparative examination of India and Japan offers valuable insights into the diverse ways constitutional courts contribute to democratic resilience within the Asian constitutional context.

### **III. Constitutional Foundations of Judicial Review in India and Japan**

#### **A. Judicial Review in Constitutional Democracies**

Judicial review is a fundamental feature of modern constitutional governance. It empowers courts to examine the constitutionality of legislative and executive actions and to invalidate measures that conflict with constitutional provisions. As an institutional mechanism, judicial review reinforces the supremacy of the constitution and prevents the arbitrary exercise of governmental power. In the context of democratic backsliding, judicial review serves as a critical safeguard by ensuring that political actors remain subject to constitutional limitations. The scope and intensity of judicial review vary across constitutional systems. Some jurisdictions grant courts extensive authority to interpret constitutional principles and strike down unconstitutional actions, while others adopt a more restrained approach that emphasises deference to elected institutions. India and Japan exemplify these contrasting models, making them particularly suitable for comparative analysis.

#### **B. Constitutional Foundations of Judicial Review in India**

India's constitutional framework establishes one of the most comprehensive systems of judicial review in the world. The Constitution of India, which came into force on 26 January 1950, reflects a commitment to constitutional supremacy, fundamental rights, separation of powers, and the rule of law. Although the Constitution does not explicitly use the term “judicial review,” several provisions collectively confer broad review powers upon the judiciary.

Articles 13, 32, 131, 136, 141, 142, and 226 constitute the principal constitutional foundations

of judicial review. Article 13 declares that laws inconsistent with fundamental rights shall be void to the extent of their inconsistency. Article 32 empowers individuals to directly approach the Supreme Court for the enforcement of fundamental rights, while Article 226 grants similar powers to High Courts. These provisions establish judicial review not merely as an institutional function but as a constitutional guarantee.

The Supreme Court of India has consistently expanded the scope of judicial review through constitutional interpretation. One of the most significant developments occurred in *Kesavananda Bharati v State of Kerala* (1973), where the Court articulated the Basic Structure Doctrine. According to this doctrine, Parliament's power to amend the Constitution under Article 368 is not unlimited; amendments that damage or destroy the Constitution's basic structure are unconstitutional. The Basic Structure Doctrine represents a unique constitutional innovation that has significantly strengthened India's capacity to resist democratic backsliding. By preventing constitutional amendments that undermine democracy, judicial independence, federalism, secularism, or the rule of law, the doctrine acts as a substantive constitutional safeguard against majoritarian excesses.

Subsequent decisions reinforced this position. In *Indira Nehru Gandhi v Raj Narain* (1975), the Supreme Court invalidated constitutional amendments that sought to immunise electoral disputes from judicial scrutiny. Similarly, in *Minerva Mills Ltd v Union of India* (1980), the Court reaffirmed that limited government and judicial review form part of the Constitution's basic structure. These judgments collectively transformed the judiciary into a central institution responsible for preserving constitutional democracy. As a result, India's constitutional system reflects a model of strong-form judicial review characterised by judicial activism, constitutional innovation, and an expansive understanding of judicial responsibility in safeguarding democratic governance.

### **C. Constitutional Foundations of Judicial Review in Japan**

Japan's constitutional framework presents a markedly different approach to judicial review. The Constitution of Japan, which entered into force in 1947 following the Second World War, established a democratic constitutional order founded upon popular sovereignty, fundamental rights, and parliamentary government. Article 81 of the Japanese Constitution expressly designates the Supreme Court as "the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act." On its face, this provision grants

Japanese courts substantial authority comparable to constitutional courts in other democratic systems.

Despite possessing formal constitutional authority, however, the Japanese Supreme Court has historically exercised judicial review with considerable restraint. Since the adoption of the Constitution, the Court has invalidated legislation on constitutional grounds only in a limited number of cases. Judicial intervention in politically sensitive matters has generally been cautious, reflecting a broader institutional culture that emphasises judicial modesty and respect for legislative judgment. Several factors contribute to this restrained approach. First, Japan's parliamentary system traditionally places significant trust in elected institutions to resolve political disputes. Second, the judiciary has historically avoided direct confrontations with the executive and legislative branches. Third, cultural and institutional norms encourage consensus-building rather than adversarial constitutional adjudication.

Notwithstanding this restraint, the Japanese judiciary continues to play an important constitutional role. Courts regularly interpret constitutional provisions concerning individual rights, administrative accountability, and governmental powers. Although the Supreme Court rarely strikes down legislation, the possibility of judicial review itself exerts a moderating influence on governmental action. Japan therefore represents a model of weak-form or restrained judicial review in which constitutional authority exists but is exercised sparingly. The Japanese experience demonstrates that the effectiveness of constitutional courts cannot be measured solely by the frequency of constitutional invalidation; rather, it must also be assessed through the broader constitutional culture within which judicial institutions operate.

#### **D. Comparative Analysis of Constitutional Foundations**

A comparison of India and Japan reveals significant differences in both constitutional design and judicial practice. India's constitutional framework has enabled the judiciary to assume an assertive role in protecting constitutional values and democratic institutions. Through doctrines such as the Basic Structure Doctrine and expansive interpretations of fundamental rights, Indian courts have developed a robust system of constitutional oversight. Japan, by contrast, illustrates a model in which constitutional review is formally available but institutionally restrained. While Japanese courts possess the authority to review governmental action, they generally defer to political branches unless constitutional violations are manifest and substantial.

These divergent approaches reflect broader differences in constitutional culture. India's judiciary has embraced a transformative vision of constitutionalism, viewing itself as an active guardian of democracy and rights. Japan's judiciary, on the other hand, has traditionally prioritised institutional stability, democratic deference, and judicial self-restraint. Nevertheless, both systems share a common objective: the preservation of constitutional governance and the maintenance of democratic legitimacy. The contrasting experiences of India and Japan provide valuable insights into how constitutional courts can respond to democratic challenges through different institutional strategies.

The constitutional foundations discussed in this section establish the framework for evaluating how courts in both jurisdictions have addressed concrete instances of democratic stress and constitutional conflict. The following section therefore examines landmark judicial decisions and their implications for democratic resilience and constitutional accountability.

#### **IV. Constitutional Courts and Democratic Backsliding in India: Judicial Responses, Landmark Cases, and Contemporary Challenges**

##### **A. Democratic Backsliding and the Indian Constitutional Context**

India is widely regarded as the world's largest democracy and possesses a constitutional framework designed to protect pluralism, federalism, fundamental rights, and the rule of law. Since the adoption of the Constitution in 1950, democratic governance has been supported by independent institutions, periodic elections, and an active judiciary. Nevertheless, concerns regarding democratic backsliding have periodically emerged, particularly when executive authority has expanded at the expense of institutional checks and balances. Democratic backsliding in the Indian context does not necessarily manifest through the abolition of democratic institutions. Rather, concerns often arise from the gradual concentration of power, restrictions on civil liberties, pressures on independent institutions, and tensions between majoritarian political mandates and constitutional safeguards. These developments place constitutional courts in a crucial position as guardians of constitutional democracy.

The Supreme Court of India has repeatedly been called upon to address constitutional controversies involving executive authority, electoral integrity, judicial independence, and the protection of fundamental rights. Through judicial review, the Court has attempted to ensure that democratic governance remains consistent with constitutional principles.

## **B. The Emergency Period and Judicial Lessons**

The most significant constitutional crisis in independent India occurred during the Emergency (1975–1977), proclaimed under Article 352 of the Constitution by Prime Minister Indira Gandhi. During this period, fundamental rights were suspended, political opponents were detained, press freedoms were restricted, and executive authority expanded significantly.

The Emergency exposed vulnerabilities within India's constitutional framework and highlighted the importance of judicial independence. The Supreme Court's decision in *ADM Jabalpur v Shivkant Shukla* (1976), commonly known as the Habeas Corpus Case, remains one of the most controversial judgments in Indian constitutional history. The majority held that citizens could not seek judicial remedies for unlawful detention during the Emergency when the enforcement of fundamental rights had been suspended.

The judgment attracted substantial criticism for failing to protect individual liberty during a period of constitutional crisis. Many scholars regard the decision as a judicial failure that demonstrated the dangers of excessive deference to executive authority. In later years, the Supreme Court effectively distanced itself from the reasoning adopted in *ADM Jabalpur*, acknowledging the central importance of constitutional rights and judicial oversight. The Emergency experience fundamentally shaped subsequent constitutional jurisprudence. It reinforced the judiciary's commitment to protecting democratic institutions and contributed to the development of a more assertive model of judicial review.

## **C. The Basic Structure Doctrine as a Shield Against Democratic Erosion**

One of the most significant judicial contributions to democratic resilience in India is the Basic Structure Doctrine established in *Kesavananda Bharati v State of Kerala* (1973). The doctrine limits Parliament's amending power by preventing constitutional amendments that destroy the Constitution's essential features. Although originally developed before the Emergency, the doctrine gained heightened importance as a safeguard against democratic backsliding. By ensuring that core constitutional principles remain beyond political manipulation, the doctrine protects democracy from majoritarian attempts to alter the constitutional order fundamentally.

The Supreme Court has identified several elements of the basic structure, including:

- Democracy;

- Rule of law;
- Judicial review;
- Separation of powers;
- Federalism;
- Secularism;
- Judicial independence;
- Protection of fundamental rights.

The doctrine represents a unique constitutional innovation because it allows courts to review even constitutional amendments. This provides an additional layer of protection against democratic erosion by ensuring that temporary political majorities cannot dismantle constitutional safeguards. From a comparative perspective, few constitutional systems provide courts with such extensive authority. Consequently, the Basic Structure Doctrine has become one of the strongest judicial mechanisms available for resisting democratic backsliding.

#### **D. Judicial Protection of Electoral Democracy**

Free and fair elections constitute the foundation of democratic governance. The Supreme Court has frequently intervened to preserve electoral integrity and ensure accountability within the democratic process.

In *Indira Nehru Gandhi v Raj Narain* (1975), the Court invalidated constitutional provisions designed to shield the Prime Minister's election from judicial scrutiny. The judgment reaffirmed that electoral fairness and judicial review form essential components of constitutional democracy. Similarly, judicial decisions concerning candidate disclosures, criminalisation of politics, and electoral transparency have strengthened democratic accountability. Through these interventions, the Court has sought to ensure that electoral processes remain consistent with constitutional values rather than merely procedural exercises. The judiciary's role in protecting electoral democracy illustrates how constitutional courts can contribute to democratic resilience by safeguarding the legitimacy of representative institutions.

### **E. Protection of Fundamental Rights and Civil Liberties**

The protection of fundamental rights constitutes another critical dimension of judicial resistance to democratic backsliding. Restrictions on civil liberties often represent an early indicator of democratic erosion. Consequently, constitutional courts play a vital role in preventing governmental encroachments upon individual freedoms. The Supreme Court has expanded constitutional protections through an evolving interpretation of Article 21, which guarantees the right to life and personal liberty. Judicial decisions have recognised a wide range of rights, including privacy, dignity, access to justice, and procedural fairness.

A landmark example is *Justice K.S. Puttaswamy (Retd.) v Union of India* (2017), where the Court unanimously recognised privacy as a fundamental constitutional right. The judgment reaffirmed constitutional limitations on state power and emphasised the importance of individual autonomy within a democratic society. Similarly, judicial interventions concerning freedom of speech, minority rights, and access to constitutional remedies demonstrate the Court's willingness to act as a guardian of constitutional liberties. Such decisions strengthen democratic resilience by ensuring that individual rights are not sacrificed in pursuit of political objectives.

### **F. Judicial Independence and Institutional Challenges**

While the Indian judiciary possesses extensive constitutional authority, its ability to resist democratic backsliding depends significantly upon judicial independence. Courts can effectively protect constitutional values only when they remain free from political interference.

The judiciary has developed various mechanisms to preserve institutional autonomy, including judicial review of governmental actions and the collegium system for judicial appointments. However, debates concerning judicial appointments, transparency, accountability, and institutional legitimacy continue to generate controversy. Critics argue that excessive judicial activism may blur the distinction between adjudication and policymaking. Others contend that a strong judiciary is essential in a constitutional democracy where political institutions may occasionally fail to uphold constitutional principles. This tension reflects the broader challenge of balancing democratic accountability with constitutional oversight.

Furthermore, delays in judicial proceedings, case backlogs, and unequal access to justice may

affect the judiciary's capacity to respond effectively to constitutional challenges. These institutional limitations highlight that judicial authority alone cannot guarantee democratic resilience.

### **G. Assessment of the Indian Experience**

The Indian experience demonstrates that constitutional courts can play a significant role in resisting democratic backsliding. Through doctrines such as the Basic Structure Doctrine, the protection of fundamental rights, and the preservation of electoral integrity, the Supreme Court has established itself as a central institution within India's constitutional democracy. At the same time, the effectiveness of judicial intervention remains dependent upon broader institutional and political conditions. Courts cannot single-handedly preserve democracy if constitutional values lose support among political actors or the public. Judicial decisions require institutional legitimacy and societal acceptance to achieve meaningful impact.

Nevertheless, India's constitutional jurisprudence provides an important example of how courts can act as guardians of democratic governance. The judiciary's willingness to review governmental actions, protect constitutional principles, and enforce fundamental rights has contributed significantly to democratic resilience. As concerns regarding democratic backsliding continue to emerge globally, the Indian experience offers valuable insights into the potential and limitations of constitutional courts in defending constitutional democracy. The next section examines the contrasting experience of Japan, where judicial restraint rather than judicial activism has traditionally characterised constitutional adjudication. This comparison provides an opportunity to evaluate whether differing judicial philosophies produce different outcomes in safeguarding democratic governance and constitutional accountability.

## **V. Constitutional Courts and Democratic Backsliding in Japan: Judicial Restraint, Constitutional Review, and Democratic Governance**

### **A. Democratic Governance and Constitutional Development in Japan**

Japan represents one of Asia's most stable constitutional democracies. Following the adoption of the Constitution of Japan in 1947, the country embraced a democratic political order founded upon popular sovereignty, respect for fundamental rights, pacifism, and parliamentary government. The post-war Constitution fundamentally transformed Japan's political and legal

system by replacing imperial sovereignty with constitutional democracy and establishing institutional safeguards designed to prevent authoritarian rule.

Unlike many jurisdictions that have experienced abrupt democratic breakdowns, Japan has generally maintained stable democratic institutions for several decades. Nevertheless, contemporary discussions concerning democratic backsliding remain relevant. Concerns relating to executive dominance, declining political competition, limitations on governmental accountability, and the concentration of political power have periodically generated debate among scholars and constitutional commentators. While these concerns may not be as pronounced as in some other democracies, they raise important questions regarding the capacity of constitutional institutions to preserve democratic governance over time.

Within this constitutional framework, the judiciary occupies a unique position. Although the Japanese Constitution formally grants courts extensive authority to review governmental action, the judiciary has historically exercised its powers with considerable caution. Consequently, Japan provides an important contrast to India's more activist model of constitutional adjudication.

## **B. Constitutional Basis of Judicial Review in Japan**

The authority of Japanese courts to conduct constitutional review derives primarily from Article 81 of the Constitution, which designates the Supreme Court as the court of last resort with the power to determine the constitutionality of laws, regulations, and official acts. In principle, this provision establishes a strong constitutional foundation for judicial review comparable to that found in many democratic systems. The Constitution further guarantees judicial independence through Articles 76 and 78, which protect judges from undue interference by political institutions. Together, these provisions seek to ensure that courts can perform their constitutional responsibilities impartially and independently.

Despite these formal powers, the Japanese Supreme Court has historically exercised judicial review sparingly. Since the Constitution entered into force, the Court has invalidated legislation on constitutional grounds only in a limited number of cases. This reluctance to strike down governmental action has led scholars to characterise Japan as a system of judicial restraint rather than judicial activism. The restrained nature of constitutional adjudication in Japan does not indicate a lack of constitutional authority. Rather, it reflects an institutional philosophy that

emphasises respect for democratic decision-making and deference to elected branches of government. This approach has significant implications for the judiciary's role in addressing democratic backsliding.

### **C. Judicial Restraint and Constitutional Adjudication**

Judicial restraint has become one of the defining characteristics of Japanese constitutional jurisprudence. Courts generally avoid intervention in politically sensitive matters unless constitutional violations are clear, direct, and unavoidable. This philosophy is rooted in the belief that policy decisions should primarily be resolved through democratic institutions rather than judicial intervention.

Several factors explain this tendency toward restraint. First, Japan's parliamentary system traditionally accords substantial authority to elected institutions. Second, cultural and institutional norms encourage consensus and stability, reducing incentives for confrontational judicial review. Third, the judiciary has historically sought to preserve its legitimacy by avoiding direct conflicts with the executive and legislative branches.

While judicial restraint promotes institutional stability, it also generates debate regarding the judiciary's ability to respond effectively to democratic challenges. Critics argue that excessive deference may limit the courts' capacity to act as meaningful constitutional safeguards when governmental actions threaten democratic principles. Supporters, however, contend that restraint respects democratic legitimacy and prevents courts from assuming an excessively political role.

The Japanese experience therefore illustrates the ongoing tension between constitutional oversight and democratic deference that characterises many constitutional democracies.

### **D. Landmark Constitutional Decisions and Democratic Accountability**

Although Japanese courts rarely invalidate legislation, several constitutional decisions have shaped the development of constitutional governance and democratic accountability. One recurring area of judicial review concerns electoral representation. The Supreme Court has considered numerous challenges relating to disparities in the value of votes between electoral districts. In several cases, the Court acknowledged that significant disparities in vote weight raised constitutional concerns regarding electoral equality. However, rather than immediately

invalidating electoral arrangements, the Court generally provided the legislature with opportunities to implement corrective measures.

These decisions demonstrate the Court's preference for cooperative constitutional dialogue rather than direct institutional confrontation. The judiciary recognises constitutional deficiencies while allowing political institutions to address them through legislative reform. The courts have also adjudicated cases involving freedom of expression, religious liberty, administrative authority, and individual rights. While these decisions have contributed to constitutional development, the judiciary has generally avoided expansive interpretations that would substantially alter the balance between governmental institutions. This pattern reflects a judicial philosophy that prioritises constitutional stability and gradual institutional evolution over transformative constitutional intervention.

### **E. Democratic Backsliding and Contemporary Constitutional Challenges**

Although Japan is not commonly regarded as a prominent example of democratic backsliding, certain developments have generated scholarly concern regarding the long-term health of democratic governance. These concerns include the concentration of executive authority, the dominance of a single political party for extended periods, limitations on parliamentary opposition, and debates concerning governmental transparency and accountability.

Some scholars argue that prolonged political dominance by governing parties may weaken democratic competition and reduce the effectiveness of institutional checks and balances. Others point to controversies surrounding national security legislation, state secrecy laws, and administrative discretion as areas where constitutional oversight remains important. In these circumstances, the judiciary's restrained approach raises important questions regarding its capacity to respond to potential democratic erosion. If democratic backsliding occurs gradually through formally legal mechanisms, courts may face increasing pressure to determine whether constitutional intervention is necessary to preserve democratic principles.

Unlike India, where courts have frequently employed constitutional doctrines to limit governmental authority, Japanese courts have generally preferred incremental and cautious responses. Whether this approach provides sufficient protection against democratic erosion remains an important subject of scholarly debate.

## **F. Strengths and Limitations of the Japanese Model**

The Japanese model of constitutional review offers several advantages. Judicial restraint promotes institutional stability, respects democratic decision-making, and reduces the risk of judicial overreach. By avoiding excessive involvement in political controversies, courts may preserve public confidence and maintain their legitimacy as neutral constitutional arbiters. Furthermore, constitutional governance does not depend exclusively upon judicial intervention. Democratic resilience can also be supported through political accountability, electoral competition, administrative transparency, and civic participation. From this perspective, the judiciary represents only one component of a broader constitutional framework.

However, the restrained model also presents limitations. Courts that are reluctant to challenge governmental authority may be less effective in responding to subtle forms of democratic backsliding. When constitutional violations emerge gradually through legislative or executive action, excessive judicial deference may weaken constitutional safeguards and reduce institutional accountability. Consequently, the Japanese experience highlights the potential risks associated with an overly cautious judiciary. While restraint may enhance democratic legitimacy under ordinary circumstances, periods of constitutional stress may require more active judicial engagement to protect constitutional values and democratic institutions.

## **G. Assessment of the Japanese Experience**

Japan's constitutional experience demonstrates that the existence of judicial review does not necessarily translate into frequent judicial intervention. Although the Supreme Court possesses substantial constitutional authority, it has traditionally exercised that authority with caution and restraint. This approach reflects broader institutional and cultural preferences for democratic deference, consensus-building, and political stability.

From the perspective of democratic backsliding, the Japanese model presents both strengths and challenges. Judicial restraint may preserve institutional legitimacy and democratic accountability, but it may also limit the judiciary's ability to act decisively when constitutional principles are threatened. The effectiveness of this model therefore depends significantly upon the continued strength of political institutions and broader constitutional culture. The comparison between India and Japan reveals two contrasting approaches to constitutional

adjudication. India demonstrates a model of active judicial engagement and robust constitutional oversight, whereas Japan illustrates a restrained and deferential approach to judicial review. These differences provide a valuable basis for assessing how constitutional courts contribute to democratic resilience under varying institutional conditions. The following chapter undertakes a direct comparative analysis of both jurisdictions to evaluate their respective strengths, limitations, and implications for the protection of constitutional democracy in the face of democratic backsliding.

## **VI. Comparative Analysis: Evaluating the Effectiveness of Constitutional Courts in Preventing Democratic Backsliding in India and Japan**

### **A. Introduction to the Comparative Analysis**

The experiences of India and Japan provide two distinct models of constitutional adjudication within democratic systems. Both countries possess written constitutions, independent judiciaries, and formal mechanisms of judicial review. Nevertheless, their constitutional courts have developed markedly different approaches to the exercise of constitutional authority. India has embraced a proactive and interventionist model of judicial review, whereas Japan has generally adopted a restrained and deferential approach.

This chapter compares the constitutional experiences of the two jurisdictions to evaluate how differing judicial philosophies influence the capacity of constitutional courts to resist democratic backsliding. The analysis focuses on five key dimensions: constitutional authority, judicial philosophy, protection of democratic institutions, safeguarding of fundamental rights, and institutional legitimacy.

### **B. Constitutional Authority and Judicial Powers**

One of the most significant differences between India and Japan lies in the practical exercise of constitutional authority. Although both constitutions formally empower courts to review governmental actions, the scope of judicial influence differs considerably.

In India, judicial review has evolved into a powerful constitutional instrument. Through expansive interpretations of constitutional provisions and the development of doctrines such as the Basic Structure Doctrine, the Supreme Court has established itself as a central guardian of constitutional democracy. The Court possesses the authority to invalidate legislation, executive

actions, and even constitutional amendments that violate fundamental constitutional principles. By contrast, the Japanese Supreme Court exercises its constitutional authority more cautiously. Although Article 81 grants broad review powers, the Court has historically been reluctant to invalidate legislation or challenge governmental policies directly. Judicial review remains available in theory, but its practical application is significantly more limited. This distinction suggests that formal constitutional powers alone do not determine judicial effectiveness. The willingness of courts to exercise those powers plays an equally important role in shaping constitutional outcomes.

### **C. Judicial Activism versus Judicial Restraint**

The contrast between judicial activism and judicial restraint constitutes a defining feature of the comparison. India's judiciary has frequently adopted an activist approach. Through public interest litigation, expansive rights-based jurisprudence, and innovative constitutional doctrines, the Supreme Court has actively shaped constitutional development. Judicial intervention has often been justified as necessary to preserve constitutional values, protect vulnerable groups, and prevent abuses of governmental authority. The Basic Structure Doctrine exemplifies this activist orientation. By limiting Parliament's power to amend the Constitution, the judiciary created an additional constitutional safeguard against democratic erosion. This doctrine enables courts to prevent even constitutionally enacted changes from undermining democracy, judicial independence, or the rule of law.

Japan, conversely, has traditionally favoured judicial restraint. Courts generally defer to legislative and executive judgment unless constitutional violations are clear and substantial. This approach reflects a commitment to democratic decision-making and institutional stability. Both approaches offer advantages and disadvantages. Judicial activism can strengthen constitutional protections but may invite criticism for interfering with democratic processes. Judicial restraint preserves democratic legitimacy but may reduce the judiciary's ability to respond effectively to emerging threats to constitutional governance.

### **D. Protection of Democratic Institutions**

The protection of democratic institutions represents a critical measure of judicial effectiveness in preventing democratic backsliding.

In India, courts have repeatedly intervened to safeguard electoral integrity, constitutional accountability, and institutional independence. Decisions relating to electoral fairness, judicial review, and constitutional amendments demonstrate the judiciary's willingness to protect democratic structures from political encroachment. The judiciary has frequently acted as a constitutional check when other institutions have appeared vulnerable to political pressure. The Emergency period remains a significant example. Although the judiciary initially struggled to resist executive excesses, subsequent constitutional jurisprudence reflected a renewed commitment to preventing similar democratic crises. The lessons of the Emergency contributed to a stronger judicial understanding of its constitutional responsibilities.

In Japan, democratic institutions have generally remained stable without substantial judicial intervention. Courts have contributed to constitutional governance through interpretation and oversight, but political institutions have largely retained primary responsibility for maintaining democratic accountability. As a result, the judiciary's role in protecting democratic institutions has been less visible but not entirely absent. The comparison indicates that India's judiciary functions as a more active institutional safeguard, whereas Japan relies more heavily on political and societal mechanisms to preserve democratic governance.

### **E. Protection of Fundamental Rights**

The protection of fundamental rights constitutes another important dimension of democratic resilience.

The Indian Supreme Court has developed one of the most expansive rights-based constitutional jurisprudences in the world. Through creative constitutional interpretation, the Court has recognised a wide range of rights relating to privacy, dignity, environmental protection, access to justice, and personal liberty. Judicial willingness to expand constitutional protections has strengthened safeguards against governmental overreach. Moreover, Public Interest Litigation has enhanced access to constitutional justice by allowing broader participation in constitutional adjudication. This innovation has enabled courts to address systemic violations affecting disadvantaged and marginalised communities.

Japanese courts have also protected constitutional rights, but generally through narrower and more cautious interpretations. The judiciary tends to avoid transformative constitutional rulings and often prefers incremental legal development. Consequently, constitutional rights protection

in Japan relies more heavily upon legislative and political processes than upon judicial innovation. While both systems recognise the importance of individual rights, India demonstrates a stronger judicial commitment to rights-based constitutionalism, particularly in circumstances involving potential democratic erosion.

### **F. Judicial Independence and Institutional Legitimacy**

Judicial independence is essential for constitutional courts seeking to resist democratic backsliding. Courts cannot effectively review governmental actions if they are subject to political influence or institutional pressure. India's constitutional framework provides significant protections for judicial independence, and the judiciary has consistently asserted its institutional autonomy. Nevertheless, debates concerning judicial appointments, transparency, accountability, and perceived judicial overreach continue to influence public discourse. The challenge for Indian courts lies in balancing constitutional activism with democratic legitimacy.

Japan's judiciary benefits from a reputation for professionalism, stability, and political neutrality. Judicial restraint has arguably contributed to institutional legitimacy by reducing perceptions of political involvement. However, excessive caution may also create concerns regarding the judiciary's willingness to defend constitutional principles during periods of democratic stress. The comparative experience suggests that judicial legitimacy depends not only upon independence but also upon public confidence in the judiciary's constitutional role. Courts must maintain a balance between constitutional vigilance and institutional credibility.

### **G. Comparative Assessment of Democratic Resilience**

The comparative analysis reveals that constitutional courts contribute to democratic resilience through different institutional pathways. India's model emphasises active judicial engagement, constitutional innovation, and robust enforcement of constitutional norms. This approach provides strong safeguards against democratic backsliding by enabling courts to intervene when constitutional principles are threatened. The judiciary functions as an independent constitutional actor capable of challenging governmental actions and preserving institutional accountability.

Japan's model emphasises democratic deference, institutional stability, and cautious

constitutional interpretation. Democratic resilience depends less upon judicial intervention and more upon the strength of political institutions, constitutional culture, and societal commitment to democratic values. Courts act as constitutional overseers but generally avoid becoming primary participants in political disputes. Neither model offers a universally applicable solution. The effectiveness of constitutional courts depends upon broader constitutional environments, political traditions, and societal expectations. Judicial activism may be necessary in contexts where democratic institutions face significant pressure, whereas judicial restraint may be appropriate where constitutional norms are deeply embedded within political culture.

## **H. Key Findings**

Several conclusions emerge from the comparative analysis:

1. Constitutional courts remain essential institutions for preserving democratic governance and constitutional accountability.
2. Formal constitutional powers are insufficient without judicial willingness to exercise them effectively.
3. Judicial independence and institutional legitimacy are critical prerequisites for successful constitutional oversight.
4. India's activist model provides stronger direct safeguards against democratic backsliding through doctrines such as the Basic Structure Doctrine and expansive rights jurisprudence.
5. Japan's restrained model prioritises democratic legitimacy and institutional stability but may offer fewer judicial tools for responding to gradual democratic erosion.
6. Democratic resilience ultimately depends upon the interaction between courts, political institutions, civil society, and constitutional culture rather than judicial intervention alone.

The comparative experiences of India and Japan demonstrate that constitutional courts can play a significant role in safeguarding democracy, but their effectiveness is shaped by the broader constitutional and political environments in which they operate. Understanding these

differences provides valuable insights into the evolving relationship between constitutional adjudication and democratic governance in contemporary constitutional democracies.

## **VII. Conclusion and Recommendations**

### **A. Conclusion**

The phenomenon of democratic backsliding has emerged as one of the most pressing challenges confronting constitutional democracies in the twenty-first century. Unlike traditional forms of authoritarian takeover, democratic backsliding often occurs gradually through legal and institutional mechanisms that weaken constitutional safeguards while maintaining the formal appearance of democratic governance. In this context, constitutional courts have assumed increasing importance as institutions responsible for protecting constitutionalism, preserving the rule of law, safeguarding fundamental rights, and maintaining democratic accountability.

This article examined the role of constitutional courts in addressing democratic backsliding through a comparative analysis of India and Japan. Although both countries are constitutional democracies with established systems of judicial review, their constitutional courts have developed significantly different approaches to the exercise of judicial power. India represents a model of active constitutional adjudication characterised by robust judicial review, constitutional innovation, and a willingness to intervene when democratic principles are threatened. Japan, by contrast, illustrates a model of judicial restraint in which constitutional review is exercised cautiously and with substantial deference to political institutions.

The analysis demonstrates that the Indian Supreme Court has played a particularly influential role in strengthening democratic resilience. Through landmark decisions and doctrines such as the Basic Structure Doctrine, the Court has created constitutional safeguards capable of preventing majoritarian attempts to undermine the essential features of the Constitution. Judicial interventions concerning electoral integrity, judicial independence, constitutional amendments, and fundamental rights have contributed significantly to the preservation of democratic governance. While debates concerning judicial activism and institutional accountability continue, the Indian experience illustrates how courts can function as effective barriers against democratic erosion.

The Japanese experience presents a contrasting perspective. Although the Japanese Supreme Court possesses formal constitutional authority to review governmental action, it has traditionally exercised that authority with restraint. Judicial deference to political institutions has contributed to constitutional stability and democratic legitimacy but has also generated concerns regarding the judiciary's capacity to respond decisively to potential threats to constitutional governance. The Japanese model demonstrates that democratic resilience may depend not only upon judicial intervention but also upon broader political culture, institutional trust, and societal commitment to constitutional values.

## **B. Recommendations**

Based on the findings of this study, several recommendations may be advanced to strengthen the role of constitutional courts in safeguarding democratic governance.

### **1. Strengthening Judicial Independence**

Judicial independence remains the most important prerequisite for effective constitutional review. Constitutional courts cannot act as meaningful checks on governmental power if judicial appointments, tenure, or decision-making processes are subject to political interference. Both established and emerging democracies should adopt institutional safeguards that protect courts from undue political influence while ensuring accountability and transparency.

### **2. Preserving Constitutional Limits on Majoritarian Power**

Democratic legitimacy must operate within constitutional boundaries. Governments elected through democratic processes should not be permitted to dismantle the constitutional foundations of democracy itself. Constitutional courts should therefore continue to enforce constitutional limitations designed to protect fundamental rights, separation of powers, judicial review, and the rule of law.

The Indian experience demonstrates the importance of substantive constitutional safeguards such as the Basic Structure Doctrine. While similar doctrines may not be appropriate in every jurisdiction, constitutional systems should incorporate mechanisms capable of preventing constitutional abuse by temporary political majorities.

### **3. Enhancing Access to Constitutional Justice**

Effective constitutional protection requires meaningful access to judicial remedies. Procedural barriers that prevent individuals and groups from seeking constitutional review may weaken democratic accountability. Judicial systems should therefore ensure that constitutional remedies remain accessible, affordable, and efficient. Innovations such as public interest litigation have expanded access to constitutional justice in India and may offer valuable lessons for other jurisdictions seeking to strengthen constitutional accountability.

### **4. Promoting Constitutional Culture and Public Awareness**

Constitutional courts operate most effectively within societies that value constitutional governance. Public understanding of constitutional principles, democratic institutions, and fundamental rights strengthens societal resistance to democratic backsliding. Governments, educational institutions, and civil society organisations should therefore promote constitutional literacy and civic engagement. A strong constitutional culture not only supports judicial legitimacy but also encourages voluntary compliance with constitutional norms by political actors and citizens alike.

### **5. Encouraging Institutional Dialogue**

The relationship between courts and political institutions should not be viewed solely in adversarial terms. Constitutional governance functions most effectively when courts, legislatures, and executive institutions engage in constructive constitutional dialogue. Judicial review should aim not merely to invalidate governmental actions but also to encourage constitutional compliance and democratic accountability. The Japanese model of cautious judicial engagement illustrates the potential value of institutional dialogue, although such dialogue must not compromise constitutional safeguards when fundamental principles are threatened.

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