CONSTITUTIONAL COURTS IN HYBRID REGIMES

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ABSTRACT

Constitutional Courts in Hybrid Regimes

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Democratic backsliding and the resurgence of authoritarianism have led to the prevalence of hybrid regimes in the twenty-first century. This ambiguous kind of authoritarian regime has complicated the traditional democracy-versus-pure-authoritarian-regime divide. Hybrid regime is the new game in town, but can constitutional courts promote democracy in these contexts? And if so, how? Cautiously optimistic about the potential of constitutional courts, the thesis argues that this is not an empty wish. Constitutional courts are not effective substitutions of the political process. Nevertheless, they have a modest but meaningful role to play in advancing democratic norms in a hybrid regime. The thesis provides a valuable examination of hybrid regimes and constitutional courts, and offers theories and tools that aim to guide democratically committed judges in hybrid regimes. These prescriptions are not limited to the adjudicative context, and cover what judges as social actors can and should do as well. While normative theoretical in substance, the thesis is informed by comparative insights and empirical studies, and draws heavily on a wide range of disciplines including law, political theory and science, sociology and psychology. The thesis hopes to illuminate and inspire judges who are operating in politically challenging environments.

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CHAPTER ONE

HYBRID REGIMES, CONSTITUTIONAL COURTS, AND DEMOCRATIC PRINCIPLES

1. Introduction

The thesis examines the role of constitutional courts in hybrid regimes. Specifically, it argues that constitutional courts have a democratic role to play in these regimes that are neither fully authoritarian nor democratic. By democratic role, I do not mean that a constitutional court is itself a democratic institution, or is capable of substituting for the political process. Instead, the central argument of the thesis is that constitutional courts can and should shore up democratic norms and resist authoritarianism in hybrid regimes. Ways in which this role can be performed sustainably will be explored. I will be using the terms "democratic role" and "democracy-enhancing role" interchangeably throughout the thesis.

This introductory chapter sets out the backdrop of the thesis by describing two global phenomena of relevance: the proliferation of hybrid regimes and the diffusion of court-centric constitutionalism. It will then be showed why a normative look at constitutional courts in hybrid regimes is an important topic and how this is a gap in the literature. Operating assumptions of the thesis will be specified, and two basic terms will be defined, including constitutional courts and democracy. The chapter concludes by offering a roadmap of the thesis.

2. Proliferation of Hybrid Regimes

The thesis is set against the backdrop of two intersecting phenomena. The first is the prevalence of hybrid regimes. A hybrid regime is a type of non-democratic regime that contains both democratic and authoritarian characteristics.[1] A hybrid regime seeks to appear as a functioning democracy, but with unfair elections and the undermining of democratic institutions, its core remains authoritarian. In contrast to the people in pure authoritarian regimes though, those in hybrid regimes enjoy some opportunities and freedom to participate in elections and other political channels.

Hybrid regimes have become one of the main regime-types in today's world, complicating the traditional democracy-versus-pure-authoritarian-regime dichotomy. Classifying countries into one of three statuses, Freedom House's 2020 report listed 32% of the countries as "Partly Free".[2] According to The Economist's Democracy Index in 2019, 22.2% of the countries are considered to be "Hybrid Regimes", and another 32.3% as "Flawed Democracies".[3] One study also finds that "three-quarters of authoritarian states [during the 2000s] permitted more than one party to participate in these elections".[4] However one defines a hybrid regime, it is undeniable that a substantial portion of the global population is living under this ambiguous regime-type.

Hybrid regimes are not new, but their growth is unprecedented.[5] There are several factors contributing to this phenomenon. The world's march to democracy has largely stopped after entering the twenty-first century. The third wave of democratization that began in the late 1970s has been taken over by a new wave of autocratization.[6] In the past

[1] A more thorough definition of a hybrid regime will be provided in Chapter Two.
[2] 'Freedom in the World' (Freedom House 2020), 6.
[3] The Economist, 'Democracy Index 2019: A year of democratic setbacks and popular protest' (2020), 3.
[4] Dawn Brancati, 'Democratic Authoritarianism: origins and effects' (2014) 17 *Annual Review of Political Science* 313, 314.
[5] Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (CUP 2002) 14.
[6] Anna Lührmann and Staffan I. Lindberg, 'A Third Wave of Autocratization Is Here: What Is New about It?' (2019) 26 *Democratization* 1095.

decade or so, democratic backsliding has been affecting states all around the world.[7] Much of the optimism with third wave democracies in the late twentieth century is shown to be misplaced. New democracies at the time such as Venezuela, Hungary and Poland have shown significant signs of decay, and some of the semi-democracies or semi-authoritarian regimes such as Hong Kong, Uganda and Singapore are still struggling with authoritarianism. With authoritarian powers including China and Russia on the rise, the basic norms of democracy are being challenged and displaced, further legitimizing autocratization trends. Even mature democracies like the United States have not been immune to corrosion.[8] Unlike regime changes in the past which were usually triggered by sudden events like coups, this new process of autocratization tends to be gradual and subtle.[9] As a result, we have seen an increasing number of regimes that are stuck in between democracy and pure authoritarianism. And refuting past assumptions, hybridization is not transitional. Hybrid regimes have proven to be very durable.[10]

A particularly interesting feature of this new wave of autocratization is that it tends to have a "legal façade". [11] Writings on "autocratic legalism" [12] and "abusive constitutionalism"[13] show how authoritarians today have discovered ways to concentrate political powers and undermine accountability through seemingly lawful means and by abusing democratic institutions. By adapting the language and form of constitutional democracy in their favor, [14] authoritarians have made contemporary degradation of the

[7] Tom Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9; Larry Diamond, 'Breaking Out of the Democratic Slump' (2020) 31 *Journal of Democracy* 36.
[8] Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018).
[9] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 *Journal of Democracy* 5.
[10] Leonardo Morlino, 'Are There Hybrid Regimes? Or Are They Just an Optical Illusion?' (2009) 1 *European Political Science Review* 273, 283-285.
[11] Lührmann and Lindberg (n 6), 1104.
[12] Kim Lane Scheppele, 'Autocratic legalism' (2018) 85 *The University of Chicago Law Review* 545.
[13] David Landau, 'Abusive Constitutionalism' (2013) 47 *Univeristy of California Davis Law Review* 189.
[14] See William J. Dobson, *The Dictator's Learning Curve: Inside the Global Battle for Democracy* (Random House 2012).

democratic process subtle. Detecting and guarding against corrosions that are dressed up legally is challenging for many who lack the necessary expertise. These circumstances accentuate the need for judicial institutions to protect and expand on the democratic half of a hybrid regime.

3. Court-centric Constitutionalism in Hybrid Regimes

This leads us to the other phenomenon – the diffusion of court-centric constitutionalism. Written almost twenty years ago, Ran Hirschl documented a trend at the time: juristocracy.[15] What he meant by juristocracy is the "transfer[] [of] an unprecedented amount of power from representative institutions to judiciaries."[16] Juristocracy remains a highly relevant topic today. Constitutional review is included in around 80% of the world's constitutions.[17] Hardly a day goes by without reading about a constitutional court somewhere in the world deciding on issues that are traditionally thought to be outside the legal realm. These issues are far from trivial, and oftentimes "mega-political" in nature,[18] or of fundamental importance to the very fabric of a polity. Indeed, there seems to be a tendency for constitutional scholars today to equate constitutionalism with constitutional review.

What is defying conventional understanding, however, is that court-centric constitutionalism is actually not limited to democracies. It used to be the consensus that courts in non-democracies were mere puppets and that judicialization of politics was

[15] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP 2009).
[16] Ibid 1.
[17] Tom Ginsburg and Mila Versteeg, 'Why do Countries Adopt Constitutional Review?' (2014) 30 *The Journal of Law, Economics, & Organization* 587, 587.
[18] Ran Hirschl, 'The Judicialization of Mega-politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93.

impossible outside democracies.[19] Evidence we have today shows that the picture is more nuanced that what was assumed: while constitutional courts in hybrid regimes are weaker and less autonomous than their democratic counterparts, case studies and large-N research both show that "judicializing authoritarian politics"[20] is happening all the time. More importantly, constitutional courts in non-democratic regimes, and especially hybrid regimes, have decided on *and* resisted authoritarianism in important cases.[21] Just as hybrid regimes fall in the middle of the political spectrum, studies find that constitutional courts in hybrid regimes enjoy a mid-range level of judicial independence if one accepts that judicial independence is a matter of degree.[22] Judicial powers can be developed outside democracies and constitutional courts in hybrid regimes can be moderately independent institutions.[23]

4. The Normative Turn (Informed by Empirical Analysis)

Putting the two phenomena described together, the thesis is the first attempt in taking a normative theoretical look at constitutional courts in hybrid regimes. Specifically, it seeks to present a democratic role of a constitutional court; highlight the practical challenges faced in realizing this role; and prescribe normative guidelines for constitutional courts in

[19] Tamir Moustafa, 'Law and Courts in Authoritarian Regimes' (2014) 10 *Annual Review of Law and Social Science* 281, 282. Even today, some still argue that it is basically impossible for a meaningful constitutional system to exist in an authoritarian regime. See e.g. Francesco Biagi, *Three Generations of European Constitutional Courts in Transition to Democracy* (CUP 2020) 25-6.
[20] Moustafa ibid.
[21] See e.g. Tom Ginsburg and Tamir Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008); Yasser Kureshi, 'When Judges Defy Dictators: An Audience-Based Framework to Explain the Emergence of Judicial Assertiveness against Authoritarian Regimes' (2021) 53 *Comparative Politics* 233; Eric C. Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (CUP, 2019); Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (CUP 2007).
[22] Brad Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy* (OUP 2019).
[23] Ibid 12.

hybrid regimes to meet the goals of furthering liberal democratic norms in a sustainable manner while maintaining judicial independence under an authoritarian climate.

Normative constitutional theory has been largely preoccupied by constitutional systems and constitutional courts of democratic systems. Despite the resurgence of authoritarian regimes, normative debates about the role of constitutional courts are largely centered around consolidated democracies, [24] new democracies undergoing consolidation,[25] and democracies that are resisting backsliding.[26] Little attention is given to authoritarian regimes by normative constitutional scholars. [27] On the other hand, political scientists and those who engage in empirical studies have begun to discover the intricacies of constitutional courts operating in hybrid regimes and pure authoritarian regimes. They shed light on the behavioral patterns and functions of these courts.[28] These studies tend to be devoid of normative content as their goals are descriptive and explanatory, or are only focused on institutional survival, [29] but they provide fertile

[24] See e.g. Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2005) 114 *Yale Law Journal* 1346; Aileen Kavanagh, 'Participation and Judicial Review: A reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2009); Jeff King, *Judging Social Rights* (CUP 2012); Rosalind Dixon, 'The Core Case for Weak-form Judicial Review' (2016) 38 *Cardozo Law Review* 2193.

[25] See e.g. Theunis Roux, *The Politics of Principle: The first South African constitutional court, 1995–2005* (CUP 2013); Samuel Issacharoff, *Fragile Democracies: Contested power in the era of constitutional courts* (CUP 2015); David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 *Boston College Law Review* 1501.

[26] See e.g. Sujit Choudhry, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment: A reply to Rosalind Dixon and David Landau' (2017) 15 *International Journal of Constitutional Law* 826; Aziz Z. Huq, 'Democratic Erosion and the Courts: Comparative perspectives' (2018) 93 *New York University Law Review Online* 21; Tom Ginsburg, 'The Jurisprudence of Anti-Erosion' (2018) *66 Drake Law Review* 9.

[27] Possible reasons for this gap will be suggested in Chapter Three.

[28] See e.g. Moustafa (n 21); Ip (n 21); Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (CUP, 2007); Gretchen Helmke, *Courts under Constraints: Judges, generals, and presidents in Argentina* (CUP, 2012); Alexei Trochev, *Judging Russia: the role of the constitutional court in Russian politics 1990–2006* (CUP, 2008).

[29] For example, it is assumed under Helmke's strategic defection model that judges in Argentina are seeking survival under institutionally unstable environments. Helmke (n 28) 144-145, 170. There are also works that are not necessarily regime-type specific but explores generally the techniques of institutional survival under harsher political climates. See e.g. Erin F. Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66 *Duke Law Review*, 1; Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wisconsin Law Review* 683.

grounds to fill the normative gap. Relying on normative constitutional theory and the empirical insights of comparative judicial political studies, this thesis sits at the juncture of the two fields, with a leaning towards the normative half of the discussion.

There are two operating assumptions in the thesis. The first is, as previously mentioned, the fact that a moderately independent constitutional court is a realistic possibility for a hybrid regime. More will be said about the socio-political foundation of this phenomenon in Chapter Three. The very fact that there is space for constitutional courts to challenge the regime forms the motivation of this research. It would be rather meaningless to talk about how judges should play a democratic role in pure authoritarian regimes when judicial institutions there are struggling to even survive without major political interferences. Equally, judicial autonomy and judicial power[30] mean little if it is unclear how judges should assert their authority. For example, judges of an autonomous court can use the power for their own personal gain, or such powers can be wielded recklessly so as to push the court to its own demise. The possibility of judicial autonomy opens the space for much-needed normative discussion in a hybrid regime context.

Another operating assumption relates to the constitutions of hybrid regimes. Given the illiberal and anti-democratic practices observed in non-democratic regimes, it is tempting to conclude that constitutions there are mere "shams"[31] and nothing more than parchment paper. It is perhaps no surprise that most authoritarian constitutions promise more than they can actually deliver.[32] However, what determines a state's constitutional performance is not only the formal elements of a constitution.[33] Whether effective

[30] The idea of judicial power will be further elaborated in Chapter Five.
[31] David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863.
[32] Ibid 919.
[33] State is used in a sociological instead of legal sense. State, as a legal concept, is a system recognized under international law. Here, state is understood as a complex social group – with citizens, bound together by rules (i.e. the constitution) within a territory, interacting with the state, institutions and one another; a state must be capable of claiming authority over its citizens. For instance, Hong Kong, as a Chinese Special Administrative Region, is not a state under international law, but it is a state sociologically as the

constitutional enforcement mechanisms exist or not is another crucial part of the equation.[34] The effectiveness of a constitutional court – one of the most important constitutional actors within a constitutional order – is also determinative of a state's constitutional health. Importantly, a constitutional court's effectiveness is partly reliant on the formal design of a constitution. The constitution, to some extent, determines the latitude possessed by courts. A constitutional court derives legitimacy from the constitution, and provisions relating to constitutional jurisdiction and human rights for example supply crucial ammunition for constitutional courts to assert its authority. A constitution that eliminates any meaningful space for constitutional review would render any normative discussion in this area futile.

Fortunately, constitutions in hybrid regimes do tend to provide the raw materials for constitutional courts to potentially play a meaningful role. As noted just now, a vast majority of the constitutions in the world explicitly provide for constitutional courts. Most constitutional courts enjoy expressed constitutional authority to decide on constitutional matters. Large-N research also finds that constitutions in non-democratic regimes formally resemble those in democracies.[35] For example, both kinds of constitutions contain similar number and kinds of rights, provisions that define the state as a democracy, and safeguards that give effect to judicial independence. The reason for this partial resemblance stems from hybrid regimes' attempts to ride on the reputational gains of pretending to be

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Hong Kong government exerts control and asserts legitimacy over its citizens within the territory of Hong Kong. See N.W. Barber, *The Constitutional State* (OUP 2010) Chapter 2.

[34] See James Melton, 'Do Constitutional Rights Matter? The relationship between de jure and de facto human rights protection' (2013) available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.375.9784&rep=rep1&type=pdf>, last visited 14 November 2021.

[35] David S. Law and Mila Versteeg, 'Constitutional Variation among Strains of Authoritarianism' in Tom Ginsburg and Alberto Simpser (eds) *Constitutions in Authoritarian Regimes* (CUP, 2013); Tom Ginsburg, Zachary Elkins and James Melton, 'The Content of Authoritarian Constitutions,' in Tom Ginsburg and Alberto Simpser (eds.) *Constitutions in Authoritarian Regimes* (CUP, 2013); James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A reevaluation of explanations for judicial independence' (2014) 2 *Journal of Law and Courts* 187.

democracies. Adopting democratic constitutional features can a double-edged sword for authoritarians. It is true that authoritarians may be tempted to incorporate democratic constitutional features in order to attract foreign investors and stimulate the economy, or to satisfy popular demands in order to secure public support.[36] However, the incorporation of democratic constitutional features brings along constitutional norms that can (and should be) used against the authoritarian when the regime falls short of what the constitution demands. In other words, the constitutional elements borrowed from democracies are standards waiting to be held against the authoritarian. The democratic side of a hybrid regime constitution provides a constitutional court with more options and space to wrestle with a hybrid regime.

Some readers at this stage might have a feeling that the thesis is overly confident about the democratic potential of constitutional courts in hybrid regimes. While the assumptions just set out gives us good reasons to think normatively about how constitutional courts in hybrid regimes can further the causes of a liberal democracy in hybrid regimes, one might point out that constitutional courts in real-life hybrid regimes are inevitably subjected to authoritarian pressures. Case-studies have shown that many courts are captured by the incumbent and are complicit in authoritarian oppression.[37] Some large-N studies also call into question the general effectiveness of constitutional courts. Adam Chilton and Mila Versteeg, for example, argue that "constitutional rights do not appear to be better protected in countries with independent courts equipped with the

[36] See e.g. Daniel A. Farber, 'Rights as Signals' (2002) 31 *The Journal of Legal Studies* 83; Moustafa (n 21); Rosalind Dixon, 'Constitutional Rights as Bribes' (2018) 50 *Connecticut Law Review* 767.
[37] David Landau and Rosalind Dixon, 'Abusive Judicial Review: courts against democracy' (2019) 53 *UC Davis Law Review* 1313.

power of judicial review."[38] Instead, their findings suggest that "rights enforcement ultimately falls on citizens themselves".[39]

The thesis acknowledges the vulnerabilities and weaknesses of constitutional courts in hybrid regimes. Perhaps the tone of this thesis is best described as cautiously optimistic. A constitutional court alone most probably cannot bring about a regime-change, and political transitions rarely occur inside the courtroom. However, courts are in a position to create more favorable conditions for that to occur. Legal constitutionalism and political constitutionalism are not necessarily binary choices, and constitutional courts are able to empower the people and other constitutional actors.[40] There are also secondary but meaningful effects produced by a decision. For example, constitutional courts can cultivate people's general understanding of rights, let people's voices be heard through the legal process in politically suppressed environments, or even trigger mass mobilization by highlighting constitutional violations by the government. These effects are practically and morally significant even though the causal mechanisms behind them are hard to empirically verify. Not to mention, modest contributions by constitutional courts can already mean a lot in hybrid regimes: they have a real impact on people's lives and that impact can be substantial especially when these modest contributions are aggregated.

Furthermore, while empirical research downplays the independent influence of constitutional courts in protecting rights and promoting democracy in a general sense,[41] it does not eliminate the space for discussion as to how constitutional courts in hybrid regimes should exercise their authority. It may well be the case that many constitutional

[38] Adam S. Chilton and Mila Versteeg, 'Courts' Limited Ability to Protect Constitutional Rights' (2018) 85 *The University of Chicago Law Review* 293, 297.
[39] Ibid.
[40] Some political constitutionalists accept at least a limited role for constitutional courts to play in democracies. See Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 *University of Toronto Law Journal* 1.
[41] Ran Hirschl, 'Epilogue: courts and democracy between ideals and realities' (2013) 49 *Representation* 361, 363.

courts are generally ineffective because they are exercising their constitutional authority and powers in ways that fail to maximize their democratic potential in a sustainable manner. There are constitutional courts in hybrid regimes that have enjoyed more success than others in bringing about meaningful changes, as we shall see in a moment. The paths taken by these examples may offer much-needed direction and insights.

Many of the claims made in the thesis will be supported by comparative examples from around the world. These comparative examples mainly come from, but are not limited to, hybrid regimes. There is a growing focus on how comparative constitutional research should be conducted, and some constitutional legal scholars are accused of their methodological inadequacies. Nevertheless, there is no fit-for-all method for comparative constitutional research because the required methodology is dependent on the research aim. Those seeking to establish causation should adhere to the more rigorous social science standards. My intention here is normative and my comparative insights play a secondary (but still important) role. As Hirschl points out, "[t]he legal philosopher is interested in formulating moral justifications or principles for best practices at the ought (rather than the is) level, and may thus be forgiven for supporting her insights with a small number of possibly unrepresentative cases."[42] That is not to say that the illustrations I will be citing are particularly odd or exceptional, but that my selectiveness is perhaps forgivable and justified. The comparative evidence is used to strengthen the plausibility of my claims and to show the techniques the can be adopted by courts and judges in hybrid regimes.

While this thesis does not aspire to be an exercise in comparative constitutional law, there are three jurisdictions that the thesis will particularly draw on– Hong Kong, Pakistan and Uganda. To be more precise, there will be a relatively large number of illustrations coming from the courts of post-handover Hong Kong from 1997 to 2019,

[42] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional* (OUP 2014) 225.

Pakistan under General Pervez Musharraf from 1999 to 2008, and Uganda since its first national election in 1996. These jurisdictions and periods are given more attention for two reasons.

First, although their democratic trajectories turned out to be quite different, these jurisdictions during those specified periods of time have been widely considered by experts as hybrid regimes.[43] A more thorough account of a hybrid regime will be provided in the next chapter, but what these states have in common is the fact that they have semi-competitive electoral systems, and their intention and efforts to mimic a constitutional democracy. They are full of contradictions, and their diverging impulses of democracy and authoritarianism have led to their ambiguous outlook. I shall very briefly describe the relevant periods of these jurisdictions here.

While Hong Kong is a Chinese city, it operates under the One Country Two Systems principle. Under this constitutional principle, Hong Kong retains its own political, economic and legal systems. The Basic Law, the *de facto* constitution of Hong Kong, reflects China's assertion of sovereignty and simultaneous tolerance of Hong Kong's autonomy. Hong Kong aspires (or pretends) to be democratic, as the Basic Law specifies universal suffrage to be the ultimate method of electing the city's leader and lawmakers. Like other hybrid regimes, elections exist in Hong Kong but are far from free and fair. The system is plagued with institutionalized biases that favour the pro-Beijing faction.

[43] For Hong Kong as a hybrid regime, see Brian CH. Fong, 'State-society Conflicts under Hong Kong's Hybrid Regime: Governing coalition building and civil society challenges,' (2013) 53 *Asian Survey* 854; Ngok Ma, 'Hong Kong's Democrats Divide' (2011) 22 *Journal of Democracy* 54; Julius Yam 'Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts' (2021) 46 *Law & Social Inquiry* 153. For Pakistan as a hybrid regime, see Aqil Shah, 'Pakistan's" Armored" Democracy' (2003) 14 *Journal of Democracy* 26; Larry Diamond, 'Elections without Democracy: Thinking about hybrid regimes' (2002) 13 *Journal of Democracy* 21, 31. For Uganda as a hybrid regime, see Aili Mari Tripp, *Museveni's Uganda: paradoxes of power in a hybrid regime* (Lynne Rienner Publishers, 2010); Valérie Arnould, 'Transitional Justice and Democracy in Uganda: between impetus and instrumentalisation' (2015) 9 *Journal of Eastern African Studies* 354; Sandrine Perrot, Sabiti Makara, Marie-Aude Fouéré, and Jéróme Lafargue, *Elections in a Hybrid Regime: revisiting the 2011 Ugandan polls* (Fountain Publishers/IFRA, 2014).

Nevertheless, civil society has always been rather active and opposition has been able to win a considerable number of seats in parliamentary and local elections. There have been modest democratic reforms over the years, but democratic reform requires the consent of Beijing. It should be noted that Hong Kong is arguably no longer a hybrid regime as it took a sharp, authoritarian turn in 2020. In response to the anti-extradition bill protest – the largest protest movement in Hong Kong's history, China launched a series of crackdown at the risk of jeopardizing the city's reputation as an international financial center. With the enactment of the National Security Law, electoral reforms, rampant disqualification and arrests of opposition lawmakers and candidates, and state-run attacks on civil society, political space for opposition is close to being completely eliminated.

Pakistan has a troubled past of military dictatorships, and Musharraf's Pakistan is one of such examples. In 1999, Pervez Musharraf toppled then-Prime Minister Nawaz Sharif through a military takeover. After the bloodless coup, Musharraf proclaimed to be the president and formally took seat in 2001. Local and national elections had been held under his tenure. Freedom of press and information has improved during the time,[44] but elections were far from free and fair. Describing Pakistan as a hybrid regime at the time, Aqil Shah writes, "[Pakistan's] elections are not completely without meaning, but the principles of civilian rule and constitutionalism are honored far more in the breach than in the observance."[45] Election monitors documented the many electoral irregularities of those elections, such as misuse of state resources in support of the incumbent, and the jailing and intimidating of opposition figures.[46] Musharraf's presidency was extended for another five years after staging a controversial referendum in 2002, and the constitution was

[44] Marta Bolognani, 'Virtual Protest with Tangible Effects? Some observations on the media strategies of the 2007 Pakistani anti-Emergency movement' (2010) 18 *Contemporary South Asia* 401, 403.
[45] See Shah (n 43) 27.
[46] See Human Rights Watch, 'Elections since General Pervez Musharraf took power in 1999' (2008), available at <https://www.hrw.org/legacy/pub/2008/asia/Elections_Under_Musharraf_1999-2007.pdf>, last visited 15 November 21.

amended to empower himself and the military.[47] Near the end of Musharraf's presidency, he attempted to extend his tenure further by declaring a state of emergency and suspending national elections. Such moves, together with the removal and arresting of judges, led to a public uproar. His party was eventually defeated in the 2008 election. With impeachment looming, he resigned and went into exile. His electoral defeat is a testament to the distinctiveness of a hybrid regime, that while an election there is bent towards the incumbent, opposition success is possible.

Finally, another country with a chequered history of military dictatorship is Uganda. Taking power after a coup in 1986, Yoweri Museveni is the longest serving president of post-independent Uganda, as well as one of the world's longest-serving leaders. Uganda experienced tremendous economic growth and gradual democratic reforms under his leadership. He held his first national elections in 1996. Before the 2006 elections, Uganda operated as a "no party democracy". Coined by Museveni himself, this system did not allow multiparty competition, and opposition could only run as independent candidates. The system was packaged as a way to promote political inclusiveness and reduce conflicts from party politics. Multiparty politics was eventually introduced in 2005 after a referendum. Once described as a "beacon of hope" by then-US Secretary of State Madeleine Albright, [48] Uganda made tremendous improvements economically and democratically under Museveni's leadership, especially when compared to his predecessors. Like elections in Pakistan and Hong Kong however, Uganda's electoral system remains rife with irregularities. Corruption is widespread and electoral regulation is ineffective.[49] The incumbent party is routinely accused of using public funds to finance

[47] Husain Haqqani, 'History Repeats Itself in Pakistan' (2006) 17 *Journal of Democracy* 110, 111.
[48] Madeleine K. Albright and Yoweri Museveni, 'Joint Press Availability' (Kampala, Uganda, 10 December 1997), available at < https://1997-2001.state.gov/statements/971210b.html>, last visited 14 November 2021.
[49] The Inspectorate of Government, The Republic of Uganda, 'The third annual report on tracking corruption trends in Uganda: Using the data tracking mechanism' (December 2012) 33.

electoral campaigns.[50] Opposition candidates have been charged and kept in pre-trial remand so as to limit their ability to campaign. Most controversially, Museveni had amended the constitution a number of times to lift the age of retirement and term limit. With an internet blackout before voting day, the locking up of the main opposition presidential candidate and largescale crackdown on opposition protests, the most recent election in 2021 saw the lowest voter turnout rate in Uganda's history and is described by a commentator as "one of the most violent in recent memory".[51] Through tactics of patronage and violence (both real and the threat thereof), Museveni remains undefeated in the ballot box.

Aside from all being hybrid regimes, the second reason for picking them is that these jurisdictions have courts with prolonged spells of successfully challenging the regime. The track-records of these courts are not spotless, and they have suffered varying degrees of attacks from the incumbents. But all things considered, there is general agreement that they are success stories despite harsh political climates. The Hong Kong judiciary is, as Eric Ip puts it, "the only political organ that has ever succeeded in continually resisting Beijing in the constitutional history of the People's Republic of China".[52] Pakistan's Supreme Court "remained an active and organized democratic enclave under the military rule of Pervez Musharraf from 1999 to 2008."[53] The High Courts of Uganda is similarly described as a "vocal, assertive judiciary valiantly

[50] See Julie K. Faller, 'The System Matters: Corruption and vote choice in Uganda' (2015) 53 *Commonwealth & Comparative Politics* 428.
[51] Sophie Neiman, 'Will the U.S. Still Back Uganda's Museveni Despite Another Sham Election?' (*World Politics Review*, 25 January 2021), available at < https://www.worldpoliticsreview.com/articles/29376/after-uganda-elections-will-the-u-s-still-back-museveni-s-brutal-regime>, last visited 14 November 2021.
[52] Eric C. Ip, 'Constitutional Competition Between the Hong Kong Court of Final Appeal and the Chinese National People's Congress Standing Committee: A Game Theory Perspective' (2014) 39 *Law & Social Inquiry* 824, 825.
[53] Bruce Gilley, 'Democratic Enclaves in Authoritarian Regimes' (2010) 17 *Democratization* 389, 393.

attempting to maintain its power and independence" [54] and "consistently resisted government meddling in verdicts, efforts to ban the right to bail, and countless other attempts to limit its authority."[55]

Perhaps one might question that Pakistan is the only state among the three that arguably democratized (or headed towards a more democratic route).[56] The fact that Hong Kong and Uganda went the other way or remains a hybrid regime, however, does not discredit the accomplishments of their respective courts. Afterall, democratic transition, or regime change more broadly, is a complex phenomenon involving many actors within and beyond the polity. There is a tendency to reduce democratization into discrete events, and to glorify those who are closest to and prompted the single event of transformation. The reality though is that democratization is a logical outgrowth of a long and arduous struggle between the incumbent, the people and other actors including the courts. Understanding democratization as a process as opposed to a single event helps us better appreciate what can be offered by constitutional courts. As we will see later in the thesis, courts may not always lead a democratic transition, but they can certainly support democratic practices and structures, as well as delay authoritarian erosion.

Courts from these three jurisdictions have made tremendous achievements in making lasting democratic contributions. Courts in hybrid regime Hong Kong, for instance, have time and again ensured fair and proper trials for dissidents and promoted the development of civil rights; regarded by the local community as the "guardian of the people's interests",[57] the Pakistani Supreme Court "challenged the foundations of General

[54] Rachel Ellett, 'Emerging judicial power in transitional democracies: Malawi, Tanzania and Uganda', PhD Thesis, Northeastern University, 2008 408.
[55] Mari Tripp (n 43) 87.
[56] Other recent examples of hybrid regime incumbents losing in elections include Yahya Jammeh in The Gambia and Barisan Nasional in the 2018 Malaysian general election.
[57] Ayaz Amiz, 'My Lord the Chief Justice Takes Notice' (*Dawn*, 5 May 2010), as quoted in Asher A. Qazi, '*Suo Motu*: Choosing not to legislative Chief Justice Chaudhry's strategic agenda' in Moeen H. Cheema and Ijaz Shafi Gilani (eds) *The Politics and Jurisprudence of the Chaudhry Court 2005-2013* (OUP 2015) 305.

Musharraf's regime in a series of landmark decisions"[58] and subsequently triggered the democratization movement in Pakistan; and some of the notable feats of the Ugandan judges include ruling unconstitutional a referendum that was allegedly rigged and going on strike to protest against attacks on the rule of law. Resisting a military dictator or one of the most powerful political party in the world is no easy task. Their all-things-considered success stories are, to a large extent, attributable to the vision of the judges in cultivating judicial independence and judicial power, their acumen in choosing the right battles to fight and their dedication to the values of constitutional democracy. These stories illustrate the normative claims later and show the possibility of courts playing a modest democratic role in hybrid regimes. The techniques they have used may also inspire other judges who are in similarly suffocating environments.

5. Constitutional Court

Before introducing the remaining chapters, the coming two sections define two basic terms of this thesis – constitutional court and democracy. The aim is to clarify what I mean when using these concepts, as well as to highlight some of their relevant features that will help develop arguments later in the thesis.

The account of constitutional court proposed here is what I call "the standard account". It is uncontroversial and should accord with a common understanding of a constitutional court. Nevertheless, there are perhaps other ways of defining a constitutional court, and the standard account does not pretend to be a complete account. Under the standard account, there are three dimensions of a constitutional court – constitutional,

[58] Kureshi (n 21).

political and legal.[59] Each dimension highlights crucial features that define a constitutional court. In later chapters when we begin the discussion on constitutional courts, we will look at how each dimension becomes relevant and salient in a hybrid regime.

Beginning with the constitutional dimension, a constitutional court is a court that enjoys constitutional jurisdiction. These courts enjoy constitutional adjudicative powers to enforce the constitution, with access to a range of tools that are unique to them.[60] A constitutional court is, of course, not the only constitutional actor, as the people, political representatives and political parties also have roles to play in defining, interpreting and applying the constitution. However, a constitutional court has a particularly direct access to the constitution. Its authority over the constitution is an especially strong one because it enjoys legal mandate from the constitution to interpret and enforce it. It is a powerful constitutional actor as well. Constitutional amendment requirements tend to be stringent. The harder it is to amend the constitution, the more constitutionally durable a constitutional court's decision becomes.

It needs to be highlighted that, the term "constitutional court" as used in this thesis covers all models of constitutional court, including the centralized constitutional court (also known as the Kelsenian or European model) *and* the decentralized constitutional court (also known as the American model). Constitutional courts under these two models display important differences in terms of, *inter alia*, breadth of jurisdiction, form of constitutional review, length of judicial tenure, position within the judicial hierarchy and docket load.[61] Many suggestions to be proposed later in the thesis are contingent upon the

[59] The standard account is inspired by Dieter Grimm's account of a constitutional court. Dieter Grimm, *Constitutionalism: Past, present and future* (OUP 2016) Chapter 9.
[60] Some of the tools will be discussed in Chapter Four.
[61] For a comparison of the two models of constitutional review, see Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and empirical reasoning in judicial review* (Bloomsbury Publishing 2018) Chapter 1; Alex Stone Sweet, 'Constitutions and Judicial Power', in Daniele Caramani (ed.), *Comparative Politics* (Oxford and New York: Oxford University Press, 2008).

institutional features of a constitutional court, and the specific *kind* of constitutional court at stake will naturally affect how and the extent to which some of the suggestions play out. For instance, centralized constitutional courts under the Kelsenian model and apex courts under the American model tend to have greater access to resources and support than the lower courts; accordingly, centralized constitutional courts and apex courts will have relatively more latitude when it comes to judicial strategizing. The thesis operates on a level of generality that is of significance to all kinds of constitutional courts (i.e. courts that have constitutional jurisdiction). Issues that are common to constitutional courts are highlighted and addressed throughout the thesis, even though sometimes they may be applicable to varying extent depending on how a constitutional court is institutionally structured.

Because of a constitutional court's jurisdiction over constitutional issues, a constitutional court also has a political dimension. It has become fashionable for constitutional scholars, especially political scientists, to describe constitutional courts as political actors or political institutions. While one should use this label carefully as it may give out a rather simplistic impression of how constitutional courts actually work, there is some truth in this description. A constitutional court is necessarily political because of its origin and impact. Constitutional courts are instituted by the constitution, and constitutional judges are appointed by political representatives. Both processes are political in nature as it involves political actors and are dependent on how political powers are distributed. Even more obvious is the point about its political impact. A constitutional court deals with constitutional issues, which often involve fundamental norms of a polity. It regulates how political powers are exercised and checks to see if laws and policies are constitutionally valid. In addition to constitutional review powers, many constitutional courts are endowed with ancillary powers, such as the power to issue advisory opinions,

the power to correct legislative omission, and the power to adjudicate electoral disputes.[62] Some would argue that these powers are beyond a constitutional court's role of a "negative legislator". Nevertheless, these functions are commonly found in today's constitutional courts and only further increase their political impact. A constitutional court is political in nature because its targets are political and the issues they face have strong political overtones.

What differentiates a constitutional court from the political branches is a constitutional court's legal dimension. It is legal in several senses. Unlike elected representatives, a constitutional court is not *directly* accountable to the people. Judicial independence, instead, is a hallmark of a constitutional court. It is not a constitutional court's duty to track the preferences of the people but instead to give life to the constitution according to constitutional legal principles. The independence of the constitutional court in exercising its functions is of fundamental importance to a constitutional court's identity, as what the constitution demands of may be contrary to the views of the people and its representatives. The fact that it is institutionally isolated, or more institutionally isolated than the political institutions, helps promote the values of impartiality and fairness. Furthermore, despite the political significance of a constitutional court, what differentiates it from a statesman is the fact that it *must* apply a legal methodology when performing its functions.[63] Constitutional judges must speak in the language of the law when writing their judgments. They must rely on constitutional-legal principles such as stare decisis[64] or canons of interpretation to decide cases. Judicial discretion would still exist within the

[62] Tom Ginsburg and Zachary Elkins, 'Ancillary Powers of Constitutional Courts' (2008) 87 *Texas Law Review* 1431.

[63] There are lawmakers who adopt the language of the law in legislative debates, such as resorting to proportionality tests in deciding the desirability of a bill or using burden of proof concepts to deflect responsibilities. The normativity of these practices aside, unlike constitutional judges, these lawmakers are not duty-bound to resort to legal principles or use legalese in these settings.

[64] Some constitutional courts are not bound by precedents but referring to precedents is often treated as a legitimate mode of argumentation.

boundaries of the law, but the legal methodology has considerable constraining effects on judicial decision-making. Constitutional judges cannot reach an outcome simply because of pressure from an interest group, for instance. The legal methodology defines how a constitutional court should perform its duties. The principled nature of a constitutional court completes the standard account of a constitutional court.

It is worth noting that while the thesis focuses on constitutional courts, the insights offered are potentially relevant to ordinary courts in hybrid regimes. The reason for singling out constitutional courts is because its nature defines it proximity to hybrid regime constitutional politics, but ordinary courts dealing with criminal trials of dissidents or adjudicating a private dispute between competing political factions, for instance, can also be of constitutional relevance and/or political significance. Ordinary judges can be similarly committed to democratic principles *and* impacted by authoritarian pressures as well. Therefore, the normative and sociological discussions later in the thesis are to some degree applicable to courts generally in hybrid regimes, and that the practical guidelines to be offered may also be helpful to ordinary judges.

The relevance of the thesis can also be extended beyond constitutional courts or courts generally in hybrid regimes. Democracies, hybrid regimes, and pure authoritarian regimes are not hard categories, and a degree of fluidity exists among them. This is especially true in today's world. As mentioned above, democratic backsliding is a striking global phenomenon in the past decade or so, and authoritarianism is creeping into all types of regimes.[65] Contemporary processes of degradation are usually gradual and subtle. Courts in other regime types may be facing similar challenges as a result. It is hoped that lessons learned here can inspire not only courts in hybrid regimes but also those in

[65] Daly (n 7); Diamond (n 7).

democracies resisting erosion as well as in post-authoritarian states struggling to institutionalize democratic ideals.

6. Democracy

Given the thesis is about the democratic role of a hybrid regime constitutional court, a definition of democracy provides the contents to fill the theoretical framework to be discussed. Democracy here is defined in normative and not descriptive terms. We need to know what democracy means in order to evaluate whether a court is enhancing democratic norms. An account of democracy informs us about the principles that are relevant to a constitutional court in playing a democratic role. Like the definition of constitutional court above, the account of democracy offered does not aspire to be a complete account, but aims to be enough for the thesis.

The theoretical framework to be offered can accommodate robust accounts of democracy, but the thesis adopts a rather minimalist conception of democracy as it is already sufficient to animate the discussion and facilitate evaluation. The account of democracy adopted here is borrowed and adapted from Aziz Huq and Tom Ginsburg. In *How to Save a Constitutional Democracy*,[66] the authors identify three requirements for a democracy: periodic free and fair elections; the protection of first-generation or liberal rights such as freedom of speech, assembly and association; and the rule of law. These "system-level properties… intertwine and interact closely"[67] to make up a particular conception of democracy – liberal constitutional democracy. Accordingly, democracy here refers to pluralistic political competition within constitutional boundaries. Their account

[66] Huq and Ginsburg (n 8).
[67] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, 87.

is a particularly attractive one for this thesis as the legal and institutional focus of the three components helps orient discussions about the moral qualities that inform how judicial power should be exercised. The three components will be elaborated in the coming paragraphs, with some adjustments that are made for the purposes of the thesis.

Free and fair elections are central to a democracy. Huq and Ginsburg follow Joseph Schumpeter by defining free and fair elections in relation to the regularity in transfer of powers. That is, a free and fair election allows for "a genuine possibility of alteration in power".[68] The topic of how to determine free and fair elections will be revisited in the next chapter. What I hope to add here is the guiding principle behind this element. Political equality is the foundational value of a democracy. There are many ways to justify this value, from equal respect[69] to non-domination.[70] Regardless of its many justifications, political equality is based on the idea that individuals are of equal moral worth, and a system of government should be designed to protect and promote people's equal political liberty. Disagreement among reasonable persons is a hallmark in every social group, and the challenge we face is finding a method to resolve disagreements without undermining the equality principle. Meaningful elections are then not only a means for transferring powers peacefully, but are also a way to realize political equality given the context of disagreement. As a set of procedures for selecting political representatives, a free and fair electoral process instantiates people's equal political influence over the political process. In more institutional terms, the system must confer an equal right to vote and an equal right to run for election to every person, as well as have fair rules regulating the electoral process and how powers are transferred.

[68] Huq and Ginsburg (n 8) 10.
[69] Jeremy Waldron, *Law and Disagreement* (OUP 1999).
[70] Bellamy (n 24).

A democracy is not only about the moment of voting, however. Equal and universal suffrage would mean little if the people, for instance, are not allowed to exchange or express their views freely. In addition to free and fair elections, the enforcement of liberal rights, or what might be called first generation rights, is another important condition of democracy. These rights – including but not limited to freedom of speech, association and assembly – guard against state interference with people's liberty and give people the power to influence politics. They guarantee the communicative context necessary for the realization of political equality and the proper functioning of a democracy.[71] Huq and Ginsburg rightly acknowledge that the three rights specified do not exhaust the list of rights necessary to a democracy. The right to freedom of press and the right to information are, for one, obvious extensions of the right to freedom of expression. People need to be sufficiently informed to have a meaningful exchange of ideas. Freedom of press and freedom of information facilitates the realization of freedom of expression and ensure the making of informed political decisions. Parliamentary immunity – that is, lawmakers' legal immunity for what they say during parliamentary proceedings – and the right to form political parties are also derived from freedom of expression and freedom of association respectively.[72] The authors also suggest a more novel example: the right against unreasonable search and seizure in the United States does not look related to a liberal right on first sight, but it can and has been used a freedom against state coercion that seeks to stifle political speech and association.[73] This second component can accommodate a wider range of rights and entitlements as long as they serve to maintain the integrity of and conditions necessary for a democratic political process.

[71] Robert Post, 'Democracy and Equality' (2006) 603 *The Annals of the American Academy of Political and Social Science* 24, 28-29.
[72] Huq and Ginsburg (n 8) 12-13.
[73] Ibid 12.

The final component is the rule of law. Rule of law makes a distinctive contribution by highlighting how powers should be structured and exercised in a democracy. Huq and Ginsburg argue that rule of law is "functionally necessary to allow democratic engagement without fear or coercion."[74] The authors follow Lon Fuller's famous institutional requirements in defining this component. That is, the legal regime of a democracy must be, amongst others, public, transparent, predictable and stable. Constitutionalism, as a form of institutionalized constraint, is commonly regarded to be the manifestation of rule of law. "[A] measure of institutionalization and legalized routines"[75] create "even-handedness and apolitical administration".[76]

Democratic engagements require an environment that respects the formal demands of the law, and the institutional requirements of rule of law seek to minimize the chances and space for arbitrary power. Accordingly, the rule of law is, as Martin Krygier constantly reminds us, a "response to a problem, often described as arbitrary power."[77] Arbitrariness can mean many things, but power is commonly viewed as arbitrary when it is uncontrolled and unpredictable, as well as when it is exercised in a way that lacks due respect to its subjects.[78] Arbitrariness is a particular problem that characterizes authoritarian regimes. Aside from limited or non-existent political pluralism, authoritarian regimes including hybrid regimes are said to have "ill-defined limits",[79] a "pretense of accountability"[80] and "arbitrary governmental authority".[81] Indeed, contemporary usage of the term

[74] Huq and Ginsburg (n 67) 87.
[75] Huq and Ginsburg (n 8) 13
[76] Ibid.
[77] Martin Krygier, 'What's the Point of the Rule of Law' (2019) 67 *Buffalo Law Review* 743, 746.
[78] See Martin Krygier, 'The Rule of Law and State Legitimacy' in Wojciech Sadurski, Michael Sevel, and Kevin Walton (eds.), *Legitimacy: The State and Beyond* (OUP 2019).
[79] Juan J. Linz, 'An Authoritarian Regime: The Case of Spain' in Erik Allardt and Yrjö Littunen (eds) *Cleavages, Ideologies and Party System* (Westermarck Society, 1964) 255.
[80] Lee Morgenbesser, 'The Menu of Autocratic Innovation' (2020) 27 *Democratization* 1053.
[81] Gábor Attila Tóth, 'Constitutional Markers of Authoritarianism' (2019) 11 *Hague Journal on the Rule of Law* 37, 47.

"authoritarianism" tends to be referring to illiberal and oppressive political practices.[82] This is, of course, not incidental: that authoritarian regimes are prone to arbitrariness is a consequence of their unchecked powers.

While democracy depends on rule of law, rule of law as a democratic principle, however, cannot be fully satisfied without competitive elections. Aside from minimizing arbitrariness and creating a favorable environment for democratic interactions, rule of law seeks to ensure the law's intended purpose, as *intended by a democratic legislature.* "The rule of law", as Nick Barber writes, "requires that law make the differences it purports to make".[83] Under a democracy, the difference the law purports to make is decided according to the people. It is the consent of the people that gives law its legitimate authority. A spirit of a democracy is self-governance. Democracy seeks to create a system that is made for the people and by the people. Rule of law connects this democratic aspiration with reality by making sure that democratically made laws are taken seriously. Without competitive elections, the contents of the law and the political system more broadly are easily subjected to manipulation by a politically unchecked power.[84] Rule of law would be of significantly reduced value if it is simply ensuring the will of the authoritarian as reflected in the law, as the law needs to be morally valuable to make the rule of law morally valuable. Rule of law's relationship with democracy is, consequently, a mutually dependent one: rule of law is necessary to protect the people's choice in a democracy, but a lack of meaningful elections would also undermine the efficacy of rule of law.

Added together, the three components – free and fair elections, the protection of liberal rights and the rule of law – form the conception of democracy that will be used throughout this thesis. This is by no means the only way of conceiving a democracy (and

[82] Marlies Glasius, 'What Authoritarianism is… and is not: a practice perspective' (2018) 94 *International Affairs* 515.
[83] N.W. Barber, *The Principles of Constitutionalism* (OUP, 2018) 85.
[84] See Ibid 107-112.

rule of law). But under this conception, a constitutional court emerges to be a crucial actor in safeguarding democratic principles given the conception's institutional and legal focus. Constitutional courts are needed to adjudicate on the propriety of an election, to safeguard liberal rights and to make sure that the administration is governing according to rule of law principles. Later in the thesis, the democracy-enhancing functions of a constitutional court in a hybrid regime will be explored. The analysis and the relevant principles will be informed by this conception of a democracy.

7. Roadmap

The rest of the thesis is organized as follows. Chapter Two presents an account of a hybrid regime and sets out its constitutional features. The chapter is neither a thorough survey nor critique of the debates within the field of regime classification. Rather, drawing on the insights from some of the existing definitions, a hybrid regime is defined according to its deliberateness in pretending to be a democracy and its semi-competitive political system. The definition offered is capacious enough to accommodate different institutional contexts and legal traditions, but specific enough to meaningfully distinguish a hybrid regime from a democracy and other kinds of authoritarian regimes. The constitution is accordingly impacted by the features of a hybrid regime, resulting in a lack of coherency in political legitimacy, an ambiguous institutional outlook and a two-levelled constitutional dynamic that is constantly in flux. Themes related to a constitutional court will also be highlighted throughout the chapter to set up the discussions later in the thesis.

Chapter Three situates a constitutional court within a hybrid regime context by reviewing two common ways of understanding a constitutional court in an authoritarian context – the Pessimistic Model and the Optimistic Model. They are not categories of real-

world courts, but represent two different bodies of literature and portray different imageries of a hybrid regime constitutional court. A constitutional court is a very weak constitutional actor under the Pessimistic Model. That model sees a constitutional court as an instrument of the regime. In contrast, the Optimistic Model depicts a constitutional court as a democracy-builder capable of and tasked to transform a hybrid regime into a democracy. The two models reveal important insights, with the prior calling attention to the empirical realities of authoritarian judicial politics and the latter emphasizing the moral responsibility of judges in hybrid regimes. Nevertheless, it will be argued that both are necessary incomplete. Reconciling the two models, the chapter proposes a more attractive account that recognizes what a constitutional court can realistically achieve in a hybrid regime.

Chapter Four examines the democratic role of a constitutional court in a hybrid regime. The discussion begins by considering the counter-majoritarian difficulty or democratic objections against judicial review in light of a hybrid regime. The fact that these objections, as it will be shown, are severely blunted as a result of the democratic deficit of a hybrid regime allows us to consider more closely how a constitutional court can be supportive of democratic ideals in a hybrid regime. Specifically, five different kinds of democracy-enhancing roles will be proposed: (1) the referee role, (2) the interpretative role, (3) the participatory role, (4) the quasi-representative role, and (5) the educative role. As emphasized before, these roles do not seek to substitute the political process, but instead draw on familiar aspects of a constitutional court and are responses to the various types of democratic failures in a hybrid regime. These roles are not without limitations, and one of such relates to the competency of constitutional courts. It will be argued that some of these concerns are answerable, and that a certain level of departure from the normative

boundaries imposed by competency considerations is also justifiable given the potential democratic impact these roles can bring.

Chapter Five looks at a practical problem faced by a hybrid regime constitutional court: the legitimacy paradox. A hybrid regime constitutional court must be sensitive to the views of two different constituencies: the democratic constituency and the authoritarian constituency. The two constituencies are natural extensions of a hybrid regime. The problem, however, is that the two constituencies subscribe to fundamentally opposing ideologies and tell contradictory stories of judicial legitimacy. The different ways in which the two constituencies shape judicial power in a hybrid regime will be illustrated. A failure to accommodate either or both constituencies destabilizes a court's constitutional position and would render our normative discussion on democratic roles redundant. The chapter draws on a sociological conception of judicial legitimacy and an audience-based framework to better understand the nature of the dilemma and its practical implications to a constitutional court.

Chapter Six and Seven seek to address the tensions arising from the application of the democracy-enhancing roles (Chapter Four) in the face of the legitimacy paradox (Chapter Five). More specifically, Chapter Six proposes an adjudicative theoretical framework that systematically integrates democratically informed judging with judicial strategy. Building on Roni Mann's non-ideal constitutional theory,[85] the framework involves two basic steps: identifying the ideal position with an institutional blindfold on, and lifting the blindfold to check whether, and if so how, the ideal position should be supplemented by judicial strategy. The framework helps judges determine when it is permissible to allow prudential considerations to impact judicial decision-making. Different strategies and the conditions under which they might be salient, as well as the

[85] Roni Mann, 'Non-ideal Theory of Constitutional Adjudication' (2018) 7 *Global Constitutionalism* 14.

effects of the strategies, will also be covered. The framework can accommodate other adjudicative theories and may be of relevance to political contexts outside a hybrid regime.

Chapter Seven discusses how judges can protect the judiciary and reinforce its democracy-enhancing roles by creating allies and defusing enemies. The chapter extends the audience-based framework proposed in Chapter Five and draws our attention to what judges can and should do outside the courtroom, in addition to the adjudicative context. The chapter highlights the institutions that are capable of protecting the court, and the techniques that judges can apply to build relations with these institutions. It also discusses ways in which judges can address hostile parties and more drastic measures that they can resort to when the court or the polity is facing an existential crisis. The tools discussed in this chapter may seem at odds with the traditional conception of the judicial role. Nevertheless, the fact that constitutional protection of the court tends to be relatively weak in a hybrid regime offers justification for judges to take on a more social role. The relational focus of the discussion underscores the socially constructed nature of judicial power especially in a hybrid regime.

Chapter Eight concludes by summarizing the key arguments of the thesis and reflecting on the importance of human agency and judicial choices.

CHAPTER TWO

HYBRID REGIME

1. Introduction

This chapter has two objectives. The first is to answer the question of "what is a hybrid regime?". Hybrid regime is an ambiguous regime-type. The idea was first introduced around the end of the Cold War,[1] which was at the time understood as systems that "combine elements of both authoritarianism and democracy".[2] Many terms have been subsequently developed, including but not limited to "illiberal democracy",[3] "competitive authoritarianism", [4] "partial democracy", [5] "electoral authoritarianism", [6] "semi-democracy",[7] "semi-authoritarianism"[8], "quasi-democracy"[9] and "pseudo-democracy".[10] The "excessive proliferation"[11] of hybrid regime terms has caused conceptual confusion to the field.[12] While the insights of some of these existing hybrid regime concepts will be relied upon, the thesis will not coin a new hybrid regime term and will instead call it by its

[1] Hybrid regime was not a new phenomenon, but the proliferation of hybrid regimes after the third wave of democratization necessitated a new concept. See Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (CUP 2002) 60. Robert Dahl's model of polyarchy introduced in 1971 provided a rough model for conceptualising middle-ground regime types. See Robert Dahl, *Polyarchy: Participation and opposition* (YUP 1989).
[2] Terry Lynn Karl, 'The Hybrid Regimes of Central America' (1995) 6 *Journal of Democracy* 72, 73.
[3] Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22.
[4] Levitsky and Way (n 1).
[5] Lee Epstein, Jack Knight and Olga Shevtsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117.
[6] Andreas Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* (OUP 2013).
[7] Larry Diamond, *Developing Democracy: Toward Consolidation* (JHUP 1999).
[8] Marina Ottaway, *Democracy Challenged: The rise of semi-authoritarianism* (Carnegie Endowment for International Peace 2003).
[9] Diamond (n 7).
[10] Nic Cheeseman and Brian Klaas, *How to Rig an Election* (YUP 2018).
[11] David Collier and Steven Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' (1997) 49 *World Politics* 430, 451.
[12] See Lee Morgenbesser, 'Elections in Hybrid Regimes: Conceptual stretching revived' (2014) 62 *Political Studies* 21; Andrea Cassani, 'Hybrid What? Partial consensus and persistent divergences in the analysis of hybrid regimes' (2014) 35 *International Political Science Review* 542.

name – hybrid regime. The term best captures a hybrid regime's affirmative practices and the notion of hybridity.

A hybrid regime presents itself as a functioning democracy, but the incumbent has disproportionate control over the rules of the game. Hybrid regime elections are, as a result, semi-competitive. Incumbent success is probable, though opposition success is possible. Elections in a hybrid regime are also disingenuous: they pretend to be democratic but are actually unfair. Part 2 of the chapter will explore this account of a hybrid regime in more detail.

The account presented is to be understood as an ideal type. It does not seek to correspond to reality, as some hybrid regimes may fit this account better than others. Rather, by abstracting from real world instances, the account picks out and emphasizes certain features of a hybrid regime in order to illuminate later discussions. The account is not the only way to look at a hybrid regime, but the features to be discussed are shared among many hybrid regimes and are of significance to the thesis.

The second objective of the chapter is to pick out the points of tension between a hybrid regime's constitution and the constitution of a good state. Through these tensions, we can better understand the implications a hybrid regime has on a constitution. By constitution, I do not mean here the written constitution, or large-C constitution. Constitution here refers to the elements that build up and constitute a state. The chapter shows that three constitutional features tend to be found in a hybrid regime as a result of how it is defined here: rivaling constitutional ideologies of democracy and guardianship (Part 3); a trifurcated dual state legal order (Part 4); and two levels of constitutional battle (Part 5). Along the way and as a preface to the next chapters, I will outline how these features might impact a constitutional court in a hybrid regime.

2. Defining a Hybrid Regime

Much of the literature in the field of comparative constitutional studies relies on the democracy-versus-authoritarian regime dichotomy.[13] Democracy and authoritarian regime are characterized as binary categories, and an authoritarian regime is defined negatively in relation to a democracy. That is, a state is classified as an authoritarian regime when it lacks any one of the necessary elements constituting a democracy, such as free and fair elections and civil-political rights protection.

The dichotomous approach has its methodological advantages. It makes it convenient and more feasible to conduct certain kinds of large-N empirical studies. It especially excels when the comparators exhibit sharp empirical differences. Nonetheless, the fact that a regime is not a democracy does not necessarily mean that it is an authoritarian regime. Failed states, for instance, are neither democratic nor authoritarian. More importantly, this approach is a rather poor measuring rod when the subjects of study sit along the spectrum between democracy and pure authoritarian regime. Under the dichotomous approach, a hybrid regime would be classified as an authoritarian regime because it falls short of a democracy, but it is evident that a hybrid regime like Pakistan or Turkey has little in common, political structure wise, with regimes that are close to the authoritarian end of the spectrum like Mainland China and Saudi Arabia. The dichotomous approach obscures the distinct political patterns generated by a hybrid regime. Critiquing the current body of literature, Tamir Moustafa writes,

[13] See Tamir Moustafa, 'Law and Courts in Authoritarian Regimes' (2014) 10 *Annual Review of Law and Social Science* 281, 294.

> "The once hard-and-fast distinction between democratic and authoritarian polities is increasingly blurred, as is clear from the proliferation of new adjectives and categories to describe hybrid regimes. A sharp dichotomy between democratic versus authoritarian political systems is less helpful than ever for understanding the way that power is organized, institutionalized, and contested in any given polity."[14]

In light of the emergence of regimes that are neither classically democratic nor authoritarian, there is a necessity to further differentiate between a hybrid regime and a pure authoritarian regime in order to better capture social reality. On top of a descriptive necessity, introducing the concept of a hybrid regime also helps us recognize the normative superiority of a hybrid regime as compared to a pure authoritarian regime, as result of a hybrid regime embodying some democratic norms and institutions. Putting it differently, the adoption of the concept of a hybrid regime has both descriptive and normative implications regarding how we understand constitutionalism in these ambiguous states.

a. Semi-competitive elections

There are two defining features (and several sub-features) of a hybrid regime. The first relates to the regime's level of electoral competitiveness. This is the most common way of defining a hybrid regime, especially among political scientists. A hybrid regime's level of electoral competitiveness is semi-competitive.[15] Semi-competitiveness is a relative

[14] Ibid.

[15] It should be noted that some scholars make a distinction between hegemonic electoral authoritarian regime and competitive authoritarian regime: the incumbent almost always wins in the prior, whereas the opposition enjoys a better chance in the latter. The difference is in the degree of electoral uncertainty. While the two terms offer a finer typology by establishing an additional cut-point, my account is sufficient for current purposes to highlight the distinctiveness of a hybrid regime, as compared to a democracy and a

quality and measured in degree: in between free and fair, and non-competitive. A free and fair electoral system defines a democracy, while elections are non-competitive or non-existent in a pure authoritarian regime.

To understand what semi-competitiveness is, it is helpful to first clarify what "free and fair" and "non-competitive" mean respectively. As suggested in Chapter One, a democratic system is understood to be the best means of giving substance to the idea of political equality. Democracy, then, is not only about universal suffrage or majoritarianism. Formal features of an electoral system must be guided by the normative value of political equality to be counted as a democracy. A free and fair electoral system treats citizens as political equals. It guarantees that all citizens can formulate and signify their preferences freely. Restrictions on the public's ability to participate and contest in elections should also be minimal.

How do we know if an electoral system is free and fair? There are several kinds of analytical tools that might help answer this question, and these tools will help us diagnose electoral systems in the other regime-types as well. Samuel Huntington has famously suggested the two-turnover test – that is, a state must survive two electoral turnovers of power – to check whether a democracy is truly consolidated.[16] While looking at peaceful turnover rates can be indicative, this test is not conclusive. Post-war Japan, for instance, would only be counted as a democracy under this test starting from 2009, even though democratic institutions and norms were entrenched well before 2009. The test fails to account for the fact that dominant parties can legitimately exist in democracies.

A way to address this gap is to examine the institutional guarantees of the state. A free and fair election requires certain institutional guarantees, including universal and

pure authoritarian regime. The current account covers competitive authoritarianism and, to a large extent, hegemonic electoral authoritarianism. See Schedler (n 6), Levitsky and Way (n 1).

[16] Samuel Huntington, *The Third Wave: Democratization in the late twentieth century* (University of Oklahoma Press 1991).

equal suffrage, the right to run for office, freedom of expression and assembly, and alternative sources of information.[17] An electoral system is counted as free and fair when *all* these institutional conditions are present. In other words, democracy is treated as a "bounded whole" concept, whereby all the institutional features constituting a democracy must be present.[18]

On top of looking at turnover rates and institutional conditions, the question can also be approached from the angle of the citizens. Andreas Schedler argues that a democratic system must guarantee the citizens' effective realization of "democratic choice".[19] This choice consists of seven inter-connected dimensions and is conceived as a logical sequence: (1) empowerment: citizens must be authorized to access state power; (2) freedom of supply: citizens must be free to select from a range of choices; (3) freedom of demand: citizens must be free to form preferences; (4) inclusion: all citizens are entitled equal opportunities to participate in the political process; (5) insulation: citizens must be free to express preferences; (6) integrity: citizens' preferences are weighed with equal consideration; and (7) decisiveness: elections must have consequences and the consequences must follow directly from the electoral results. The list, I reiterate, is interconnected. A fair electoral system must guarantee the complete fulfilment of all seven dimensions. Universal suffrage is meaningless, for instance, if choices are restricted. Sub-optimal effects in a prior stage will be carried forward to the next and thereby affecting the entire chain of democratic choice. "Partial compliance with democratic norms does not add up to partial democracy", as Schedler warns, "[and] [g]ross violation of any one condition invalidates fulfilment of all others."[20]

[17] See Dahl (n 1).
[18] Giovanni Sartori, *The Theory of Democracy Revisited* (Chatham House 1987) 184.
[19] Schedler (n 6) 83.
[20] Ibid 86.

Free and fair elections require the maximization of the substantive value of political equality in the electoral process. A non-competitive electoral system, representing the other end of the spectrum, is completely devoid of this normative value. Voting is meaningless and electoral results are virtually predetermined. Electoral results are expected with certainty because of *ex ante* and/or *ex post* repression and manipulation.[21] There is no expectation of electoral turnover, if an electoral system is at all present. Marred by institutional deficiencies, the electoral system is designed to deliberately obliterate the democratic choice of the people. A non-competitive electoral system is a sham and should be treated as a separate species from those of a democracy and a hybrid regime.

A semi-competitive electoral system represents the intermediate area between a free and fair system, and a non-competitive one. A semi-competitive system is characterized by an uneven playing field. And crucially, one party – the incumbent, is able to, and does, establish the asymmetry. The incumbent has disproportionate control over the rules of the game, and it abuses its position to tilt the playing field in order to gain systemic advantage. A semi-competitive system is, however, neither merely a decoration nor only a tool to strengthen authoritarian rule. In this asymmetric arena for political competition, there is meaningful space for the opposition to compete, even though it is in a disadvantaged position.

A semi-competitive system may look similar to that of a democracy, but closer examination reveals substantive flaws. With self-evident titles, Schedler's article 'The Menu of Manipulation', and Nic Cheeseman and Brian Klass' book *How to Rig an Election* document the many kinds of strategies available for authoritarians to manipulate and rig elections.[22] Party-bans, threats, bribery, divide and conquer strategies, and abusing

[21] For the relationship between certainty of outcome and democracy, see Adam Przeworski, *Democracy and the Market: Political and economic reforms in Eastern Europe and Latin America* (CUP 1991) 10.
[22] Andreas Schedler, 'Elections Without Democracy: The menu of manipulation' (2002) 13 *Journal of Democracy* 36; Cheesman and Klass (n 10).

emergency powers – these are a few of the many familiar techniques that authoritarians have relied on to defeat their opposition. There are more creative ways to hack an election. For instance, Musharraf introduced a requirement in 2002 that parliamentary candidates must hold a bachelor degree, a policy that denied ninety-six percent of all voters the right to run for office.[23] In Hong Kong, those who are not regarded as patriots cannot run for elections. This rule, broadly interpreted by the regime, effectively bars a vast number of opposition from competing in elections. While such rigging are oftentimes quite public in nature, authoritarians are innovating, making it harder to put one's finger on the abuses. For example, Turkey and Philippines have been using troll armies online to spread propaganda and to counter critics, while a substantial number of non-democratic regimes have hired public relations firms to help cover up or downplay their negative publicity.[24]

Because of the countless ways to weaken the democratic core of an electoral system, there is "extraordinary political diversity"[25] across electoral systems of hybrid regimes. Nevertheless, the common thread is that, these violations of democratic norms are not as egregious as those in pure authoritarian regimes and that the chain of democratic choice, though severely impaired, is not entirely disconnected. There is some resemblance between electoral results and voters' choice. Voting in a semi-competitive electoral system is not meaningless because reasonable opportunities and political space exist for the opposition.[26] To win the same number of seats as the ruling faction, the opposition has to incur a significantly higher cost compared to the incumbent. As Diamond puts it,

[23] Aqil Shah, 'Pakistan's "Armored" Democracy' (2003) 14 *Journal of Democracy* 26, 28. The policy was subsequently struck down by the Supreme Court.
[24] Lee Morgenbesser, 'The Menu of Autocratic Innovation' (2020) 27 *Democratization* 1053.
[25] Milan W Svolik, *The Politics of Authoritarian Rule* (CUP 2012) 19.
[26] Levitsky and Way (n 1) 8-12.

"[opposition success] requires a level of opposition mobilization, unity, skill, and heroism far beyond what would normally be required for victory in a democracy."[27]

The silver lining though is that, authoritarian success is not guaranteed, and the incumbent faces genuine electoral uncertainty, albeit to a more limited degree than in a democracy. Or as Steven Levitsky and Lucan Way put it, "incumbents are forced to sweat."[28] Transfer of power through the ballot box unfortunately has never occurred in Museveni's Uganda and post-handover Hong Kong, but in both states, the incumbents had to invest tremendous amount of resources into electoral campaigning (and other questionable strategies). Unlike elections in pure authoritarian regimes, those in hybrid regimes are not trivial. The 2008 parliamentary election in Pakistan is further evidence that an election can unseat a hybrid regime incumbent, with Musharraf finally resigning to avoid impeachment after his party's electoral defeat. The electoral defeat of Yahya Jammeh in The Gambia and Malaysia's general election in 2018 are other examples of hybrid regime incumbents being electorally unseated. Hybrid regime elections matter because they are sufficiently autonomous to affect the political trajectory of the regime.[29]

Schedler has an excellent way of describing elections in hybrid regimes: "[a]t each election, authoritarian success is the rule (the probable outcome), opposition success the exception (the possible outcome)."[30] The estimative words of "probable" and "possible" are on one hand describing the chances of the events. That is, as a result of the incumbent abusing its positional advantage, opposition success is only a possible outcome in this asymmetrical arena. The estimative words are also reflecting the state of mind of the political actors. The opposition must *believe* that there is this possibility; otherwise, it

[27] Larry Diamond, 'Elections Without Democracy: Thinking about hybrid regimes' (2002) 13 *Journal of Democracy* 21, 24.
[28] Levitsky and Way (n 1) 12,
[29] Schedler (n 6) 375.
[30] Ibid 141.

would not justify the opposition's investment of time and resources in competing in an unfair election. The opposition's choices are contributing to the definition of a semi-competitive election. It is the fact that they *choose* to compete and invest time and resources into campaigning that creates the degree of uncertainty of a semi-competitive election. The subjective belief of the opposition is a response to the institutional environment it is in. It would be irrational for the opposition to maintain its efforts if, from the opposition's perspective, there is absolutely no hope in winning the election. Since 2020, the Hong Kong and Mainland Chinese governments have implemented a series of measures to tighten the space for opposition in Hong Kong, including amongst others the enactment of the National Security Law and the disqualification of a number of democratically elected opposition lawmakers. An indicator of Hong Kong's authoritarian turn is the decision for virtually all remaining opposition lawmakers to resign together. This move was characterized as a sign of protest against the regime, but more relevantly, it also shows that the system is no longer believed to be semi-competitive anymore. The opposition's attitude in this instance shows that the system has entered a non-competitive phase.

b. "We are a democracy"

The second defining feature of a hybrid regime is its intention to pretend to be a democracy. "Virtually all hybrid regimes in the world today are quite deliberately *pseudodemocratic*",[31] Larry Diamond writes. Frequently described as the main game in town, democracy is "the most common…[claim to political legitimacy] to be found in the

[31] Diamond (n 27) 24.

modern world."[32] Authoritarians today have accordingly felt an "unprecedented pressure" to adopt "the democratic form". [33] Indeed, wearing the democratic cloak not only legitimizes the regime to a certain extent, but it also comes with instrumental benefits such as improving diplomatic relations, gaining access to international trade agreements, avoiding economic sanctions, reinforcing its soft powers, and receiving international donor aid.

One way of pretending to be a democracy is to speak its language.[34] Uganda's "no-party democracy" before 2006 was packaged as a kind of democracy that is more suitable for Africa. Even foreign donors were convinced by this system, with representatives of the West commenting at the time that "what is happening in Uganda is . . . your own type of democracy that is trying to fit into the Ugandan context."[35] Shortly after taking power through a military coup, Pakistan's Musharraf had promised to restore the state to what he called a "real democracy".[36] Reforms, however, mostly occurred only on a local level,[37] and there were routine attempts to rig elections.[38] Leaders from Singapore,[39] Hungary[40] and Russia [41] have all consistently described their states as democracies and cited

[32] Craig Matheson, 'Weber and the Classification of Forms of Legitimacy' (1987) 38 *The British Journal of Sociology* 199, 203.
[33] Diamond (n 27) 24.
[34] Ottaway (n 8).
[35] As quoted in Nelson Kasfir, 'African Ambiguities: "No-party Democracy" in Uganda' (1998) 8 *Journal of Democracy* 49, 50.
[36] 'Pakistan Enters 'Era of Real Democracy'' *CNN* (23 March 2008).
[37] Sumita Kumar, 'Sharif Vs. Musharraf: The future of democracy in Pakistan' (2001) 24 *Strategic Analysis* 1861.
[38] Shah (n 23) 27.
[39] Lee Hsien Loong, 'Transcript of PM Lee Hsien Loong's speech at the Debate on the Motion of Thanks to the President on 2 September 2020', 2 September 2020, available at <https://www.pmo.gov.sg/Newsroom/PM-Lee-Speech-at-the-debate-on-the-motion-of-thanks-to-the-president-Sep-2020> (last visited 5 November 2020).
[40] *The Economist*, 'How Viktor Orban hollowed out Hungary's democracy' (31 August 2019), available at < https://www.economist.com/briefing/2019/08/29/how-viktor-orban-hollowed-out-hungarys-democracy> (last visited 5 November 2020).
[41] *Radio Free Europe/ Radio Liberty*, 'Russia: Excerpts From Putin's State-Of-The-Nation Speech' (25 April 2005), available at <https://www.rferl.org/a/1058630.html> (last visited 5 November 2020).

democratic principles in support of their policies despite their clear violations of democratic norms.

A hybrid regime reminds people that it is a democracy by describing itself as such in the written constitution as well. "[D]emocracy is achieved by the unremitting struggle of the people against oppression and tyranny", writes the Constitution of Pakistan in its preamble. Universal suffrage is expressly provided as the ultimate goal in Hong Kong's Basic Law – the city's mini constitution.[42] And the Constitution of Uganda stipulates a list of "democratic principles", which encompasses values such as civic participation, representation and political organization.[43] These constitutional promises are not entirely shams, as hybrid regimes do make some effort to give substance to those guarantees, and as we shall see shortly, the claims made by hybrid regime incumbents are made believable by the existence of democratic institutions.

Another rhetorical technique is to manipulate concepts closely associated with a liberal democracy, most notably the rule of law. As a global financial hub that claims to be democratic, Hong Kong has cited rule of law and "international practice" as reasons to justify controversial decisions and policies in numerous occasions including the proposal of the controversial anti-extradition bill in 2019 and subsequent crackdown on opposition movement.[44] A similarly thin and narrow conception of rule of law can be routinely observed in Singapore.[45] Prime Minister Lee Hsien-loong calls "upholding rule of law key to Singapore's survival."[46] Rule of law, which seems to mean law and order here, is used

[42] Basic Law of the HKSAR, Articles 45 and 68.
[43] Constitution of the Republic of Uganda, Objective II.
[44] Jennifer Creery, 'Hong Kong Leader Carrie Lam Says Gov't Cannot 'Breach' City's Constitution in Conceding to Protester Demands' *Hong Kong Free Press* (16 October 2019), available at <https://hongkongfp.com/2019/10/16/hong-kong-leader-carrie-lam-says-govt-cannot-breach-citysconstitution-conceding-protester-demands/> (last visited 5 November 2020).
[45] Yvonne Tew, *Constitutional Statecraft in Asian Courts* (OUP 2020) 109-112.
[46] *Channel News Asia*, 'Upholding Rule of Law Key to Singapore's Survival: PM Lee' (1 April 2017), available at <http://www.channelnewsasia.com/news/singapore/upholdingrule-of-law-key-to-singapore-s-survival-pm-lee-8709316> (last visited 5 November 2020).

to justify dissent suppression and corporal punishment. By paying lip service to and manipulating liberal democratic ideas, a hybrid regime can "distract audiences from anti-democratic practices"[47] and deflect domestic and international critics.

Aside from rhetorical devices, a hybrid regime, more importantly, institutionalizes aspects of democracy. Hybrid regimes adopt the "trappings of democracy"[48] while simultaneously subverting them. This paradox stems from the regime's survival needs: to maintain political legitimacy while managing challenges arising from the adoption of democratic institutions. The more notable "democratic" institutions adopted by a hybrid regime include multi-party elections, a constitution with human rights protection, courts with *de jure* judicial independence, and a civil society with a plurality of voices. Indeed, elections in Musharraf's Pakistan, Museveni's Uganda and post-handover Hong Kong were of significance; constitutional challenges against these regimes were sometimes successful; and, civil society in these states were somewhat vibrant.

The fact that democratic institutions exist in a hybrid regime does not mean their democratic substance is adopted wholesale however. Elections in a hybrid regime, as discussed, are characterized by an uneven playing field that benefits the incumbent. A bill of rights may be selectively enforced in favor of the incumbent and its allies. *De jure* judicial independence, that is the formal guarantee of judicial independence, and *de facto* judicial independence, that is whether the courts actually enjoy autonomy, are associated but separate matters. Courts in hybrid regimes, as I noted in the introductory chapter, only enjoy moderate levels of judicial independence at best. And while there is political space for the opposition and dissidents to operate and organize in civil society, this space is constrained and controlled by the incumbent. The result is what Daniel Brumberg calls

[47] Ozan Varol, 'Stealth Authoritarianism' (2014) 100 *Iowa Law Review* 1673, 1716-1717.
[48] Aili Mari Tripp, *Museveni's Uganda: Paradoxes of power in a hybrid regime* (Lynne Rienner Publishers 2010) 1.

"dissonant institutionalization", whereby "competing images of political community and the symbolic systems legitimating them are reproduced in the formal and informal institutions of state and society."[49]

The key theme here is the paradoxical nature of a hybrid regime's institutionalization of aspects of democracy. This paradox will dissolve, however, if it edges too close to the authoritarian end. Its claim to democracy must be *credible* in order for it to profit from the claim's benefits. Even contemporary China and Zimbabwe describe themselves as democracies, but probably most outsiders do not see them that way. That is of course not to say that pure authoritarian regimes are politically illegitimate states. They can still thrive on performance legitimacy or justify themselves using other political theories.[50] The point is rather that there are certain benefits associated with presenting a state as a democracy, and the claim must be sufficiently believable in order for the gains to accordingly come through. What this means is that a hybrid regime's authoritarian impulses are tempered by its need to appear democratic. Emptying out democratic institutions is against the spirit of hybridity, and a hybrid regime retains at least a minimal level of normative substance in its democratic institutions.

In summary, elections in hybrid regimes are unfair but semi-competitive. Elections could be won by the opposition, but the incumbent makes it very unlikely by imposing an asymmetry in the electoral arena. A hybrid regime purports to be a functioning democracy by adopting democratic institutions and deploying rhetorical devices. Paradoxically, it subverts the democratic institutions to limit opposition challenge.

3. Democracy and Guardianship: The Two Constitutional Ideologies

[49] Daniel Brumberg, *Reinventing Khomeini: The Struggle for Reform in Iran* (University of Chicago Press 2001) 33-4.
[50] See Dingxin Zhao, 'The Mandate of Heaven and Performance Legitimation in Historical and Contemporary China' (2009) 53 *American Behavioral Scientist* 416.

In the following parts, we move on to look at three implications of a hybrid regime on constitutions. At the end of each of the three coming parts, I shall also highlight briefly how these three implications might be relevant to a constitutional court in a hybrid regime, so as to foreshadow the themes of discussions in the later chapters.

This first feature is two conflicting ideologies being encompassed within a single constitutional order, creating a dissonance at the heart of a hybrid regime's constitution.[51] Constitutions are normally disharmonic, thereby creating space to accommodate different views in society.[52] The problem here is that the disharmony is at a foundational level as the two ideologies of a hybrid regime represent two irreconcilable visions of a legitimate state. As we saw, a hybrid regime has diverging impulses of a democracy and authoritarianism. This is reflected in the way a hybrid regime institutionalizes aspects of democracy while coring part of their substance. And as it will be explained, the legal order of a hybrid regime is structured in a way that no single form of political ideology is capable of legitimation. Democratic ideals can justify a hybrid regime's democratic institutions and practices, but clearly not the authoritarian ones given they are against the very spirt of democracy.

The best normative reading of the authoritarian institutions and practices of a hybrid regime is that they are exemplifications of guardianship. Guardianship is a theory of legitimate political authority that is, in many ways, antithesis to democracy. As Robert Dahl puts it, guardianship is the "perennial alternative"[53] to democracy. Guardianship represents the idea that society should be governed only by elites. Guardianship is justified on instrumental grounds, that it is better at producing political decisions of a higher quality.

[51] See also Feyzi Karabekir Akkoyunlu, 'The Rise and Fall of the Hybrid Regime: Guardianship and democracy in Iran and Turkey', Ph.D. dissertation, LSE, 2014.
[52] Gary Jacobsohn, *Constitutional Identity* (HUP 2010).
[53] Dahl (n 1) 52.

The idea of guardianship can be traced back to Plato's *Republic*, where he argued that society should be ruled by a few with "the expert knowledge of kingship".[54] Political power under guardianship is distributed according to competence and virtue, as opposed to equally under democracy. The right to rule is reserved for those who are able to understand the interests of others and come up with the best solution to realizing the common good, as well as capable of governing virtuously. Classically, guardians are likened to kings of philosophy. There are many contemporary versions of guardianship, including epistrocracy[55] and meritocracy.[56] These newer models of guardianship do not rely solely on idealized guardians but also on institutional designs that structure the constitution according to guardianship standards. For instance, supporters have proposed restricted franchise (that is, franchise is restricted to those who pass a competence test) and weighed voting based on political knowledge (that is, the weight of one's vote is determined by one's demonstrated knowledge in politics) to realize guardianship ideals.[57]

The intuitive appeal of guardianship should not be ignored. In the recent decade, political communities and academia have witnessed a comeback of this idea. The rise of populism and democratic backsliding have fueled scepticism towards democracy. As people turn against democracy, they look to solutions with guardianship-eseque flavors. Singapore and China, with their lack of democracy but perceived stability and economic success, are seen as the posterchildren of guardianship. Some elected leaders are looking to learn from these cases and explore how guardianship can be incorporated into democracies.[58] Voters in democracies are blamed for making poor political decisions.

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[54] Plato, *Republic* 426d, 477d-e.
[55] Jason Brennan, *Against Democracy* (Princeton University Press 2016).
[56] Daniel Bell, *The China Model: Political meritocracy and the limits of democracy* (Princeton University Press 2015).
[57] Brennan (n 55) 15.
[58] Joshua Kurlantzick, 'Why the 'China Model' Isn't Going Away', *The Atlantic* (21 March 2013), available at <https://www.theatlantic.com/china/archive/2013/03/why-the-china-model-isnt-going-away/274237/>, last visited 5 November 2021.

Frustration with the "ignorant" has led to calls for the exclusion of the irrational, uninformed or unintelligent. These critics argue that incompetent voters need to be protected from their own ineptitude, and guardianship is regarded as a solution to limit the harms caused by political ignorance.

It should be clear why guardianship and democracy are treated as rivalling concepts of political authority. Political equality is a tenet of democracy, and guardianship is in clear violation of this principle. Guardianship seeks to trade political equality in return for the improvement in political outcomes. The political process, under guardianship, is only a tool for reaching good collective decisions, and the attractiveness of a political process depends on its ability in fulfilling this function effectively.[59] As Jason Brennan argues, "democracy is a hammer… [as] it is a means to an end, but not an end it itself…[D]emocracy is not intrinsically just."[60] Supporters of guardianship suggest that guardianship is not necessarily arbitrary: disenfranchisement is even just if it can lead to more competent electorate and better political outcomes.[61]

Authoritarianism is not the same as guardianship, and not all the supporters of guardianship are defending dictators. Authoritarianism, as commonly used today, refers to arbitrary and illiberal practices.[62] Guardianship, like democracy, is an ideal, or a normative political theory about state legitimacy. Many authoritarian regimes we see in reality are, to borrow Aristotle's language, "deviant" versions of guardianship. Just like tyranny is the perverse version of kingship under Aristotle's classification of constitutions, real-life authoritarian regimes are oftentimes mistaken applications of guardianship. Guardianship is not the only ideal that has a deviant side, as democracy can also degenerate into

[59] Brennan (n 55) 11-14.
[60] Ibid 14.
[61] Ibid 17-8.
[62] Marlies Glasius, 'What Authoritarianism is… and is Not: A practice perspective' (2018) 94 *International Affairs* 515.

populism or a tyrannical majority. However, guardianship is highly prone to becoming an excuse for authoritarianism.

Under the political context of reasonable disagreement, it is challenging, to say the least, to establish standards that determine the correctness of political outcomes and what it means to be politically competent. Theories of guardianship fail to supply convincing standards on these questions, and the arbitrarily imposed will of the dictator would as a result fail to give due respect to its people. Guardianship is also susceptible to abuse by the leaders due to a lack of check. Under a democracy, powers are disbursed and elections are periodic. These institutional guarantees drastically reduce the chances of elite entrenchment. [63] Conversely, guardianship breeds elite entrenchment, with "elite" arbitrarily defined. As competent as the guardians might be, guardianship's incentive structure promotes abuse of powers for private gains. The success of guardianship relies on the self-restraint of the ruler, but people with this level of virtue are rare. Quoting Aziz Huq and Tom Ginsburg, "a healthy skepticism about political actors is a powerful force for keeping those leaders honest and faithful to the moral and legal obligations of office."[64] Democracy is far from perfect, but despite its flaws, democracy is better at resisting authoritarian capture. Not to mention, by eliciting the consent of the people through elections, democracy must be more respectful of political equality and individual autonomy.

As a regime type, a hybrid regime is its own type because of its distinct institutional structure and the unique patterns of political dynamics it creates. Unlike democracy and guardianship however, a hybrid regime does not represent a political ideal. Instead, the two rivalling modes of legitimacy – democracy and guardianship – supply the normative

[63] Samuel Bagg, 'The Power of the Multitude: Answering epistemic challenges to democracy' (2018) 112 *American Political Science Review* 891.
[64] Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 245.

legitimacy for a hybrid regime. The problem is that that the two theories are not compatible. The grinding and clashing between the two competing ideals create a dissonance at the heart of the constitution of a hybrid regime. Subscribing to both theories of political authority is impossible and creates a constantly shifting evaluative basis. Disenfranchisement is regarded as a flaw under democracy for example, but may actually be consistent with guardianship if its justification is to limit voter ignorance or promote state stability. This constitutional dissonance can be intensely destabilizing as the regime struggles to find a coherent theory to justify itself. It also creates polarization within society whereby different social groups subscribe to the opposing ideologies. That is not to say that a hybrid regime is self-defeating. Empirical evidence shows that hybrid regimes can be quite stable, as they can rely on micro-level political strategies to mitigate the practical effects of this dissonance.[65] Nevertheless, this dissonance cannot be fully resolved without either side giving up on the ideological fight. This is an inherent weakness of a hybrid regime.

Two conflicting roles of a constitutional court emerge as a result of the constitutional dissonance of a hybrid regime: one based on liberal democratic principles, and another based on guardianship or the authoritarian's ideology. In other words, as a result of the two rivalling political theories within a hybrid regime, two different conceptions of a constitutional court are produced. According to the story of democracy, the constitutional court acts as a check on arbitrary public power and should apply the constitution in accordance with liberal constitutional principles. Competing against this story is one based on guardianship, where there is an expectation that the constitutional court should obey and implement the will of the authoritarian. The constitutional court is

[65] Honorata Mazepus et al., 'A Comparative Study of Legitimation Strategies in Hybrid Regimes' (2016) 37 *Policy Studies* 350.

reduced to an instrument of the regime under this story. The constitutional court faces what I call a legitimacy paradox under such circumstances, and this paradox will be taken up in Chapter Five.

From the perspective of a constitutional court, the conflicting ideologies can be a potentially valuable asset that gives the court the authority to push or nudge the hybrid regime towards a more democratic constitution. The grinding and clashing of ideologies only occur when the norms underlying the two political ideologies are being enforced and put into practice by constitutional actors. The constitutional court has a role to play in this ideological tug of war. Its role may be limited in the sense that it is not a positive legislator and cannot initiate democratic reforms, but through its decisions and perhaps in an incremental fashion, it can shore up democratic norms by holding the regime accountable to the constitutional democratic norms that it purports to abide by. The destabilizing effect of this dissonance may also weaken the ability of the regime to rein in on a court that can mobilize the support of the democracy-support portion of the population. If exploited in the right way by the constitutional court, the dissonance can become the Achilles heel of a hybrid regime.

4. Trifurcated Dual State

A state's constitutional ideology affects the shape of the legal order, and the principles governing how a legal order is structured give flesh to a state's constitutional ideology. This part argues that the legal order of most hybrid regimes is best characterized as a "trifurcated" version of a dual state, to use Cora Chan's terminology.[66] Before offering my account of a trifurcated dual state, I will first explain what a dual state is.

[66] Cora Chan, 'The Dual State and Non-liberal Constitutionalism' (forthcoming) (on file with author) 4-5.

Written during the earlier years of the Third Reich, Ernst Fraenkel argued that the Nazi regime was far from lawless and instead consisted of two "states", the normative state and the prerogative state. The two states are legal in character, but are not separate legal systems. They belong to the same legal order. The normative state is, as Fraenkel describes, "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies";[67] whereas the prerogative state is the "governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees."[68] The normative state represents law-based governance, whereas the prerogative state, law-like arbitrary governance. More importantly, the normative state is subordinate to the prerogative state. The prerogative state has jurisdiction to decide jurisdiction, or "kompetenz-kompetenz". It is hence misleading to describe the two states as two halves of a legal order, as they are not in equal footing.

While dual state is a concept borne out of Nazi Germany, it has been subsequently developed and used as an analytical tool to study legal systems in authoritarian regimes.[69] Considering how central law is to how authoritarians today rule, it is not surprising to find legal orders in many authoritarian regimes that fit the dual state model. The two states entail two different visions and principles of governance. The prerogative state enables the authoritarian to exert control over matters of fundamental importance. Curiously though, the normative state reflects the authoritarian's (weak) commitment to constitutional-legal norms. The normative state is sustained typically due to instrumental reasons, such as

[67] Ernst Fraenkel and Jens Meierhenrich, *The Dual State: A contribution to the theory of dictatorship* (OUP 2018) xiii.
[68] Ibid.
[69] Jens Meierhenrich, *The Remnants of the Rechtsstaat: An ethnography of Nazi law* (OUP 2018) Chapter 9; Jan Christoph Suntrup, 'Between Prerogative Power and Legality – Reading Ernst Fraenkel's The Dual State as an analytical tool for present authoritarian rule' (2020) 11 *Jurisprudence* 335, 348.

creating the stability and predictability necessary for the economy to flourish and providing a democratic disguise for a hybrid regime.

The normative state under the traditional model of a dual state is not the same as a liberal and democratic system.[70] The authoritarian's political dominance affects the law-making process and the substance of resulting laws. Kim Lane Scheppele's concept of "autocratic legalism" reminds us that authoritarians can attack the principles of democracy and constitutionalism while being fully compliant with rule-of-law principles, thinly defined, and procedural norms.[71] Singapore's infamous defamation law, for example, belongs to the normative state – its creation and implementation are fully compliant of legal norms; but in terms of its impact, that law is a tool to maintain social stability and target dissenters. An authoritarian may rely on both the normative and prerogative states to assert its powers.

The traditional model of dual state describes a bifurcated legal order, with one domain (the normative state) being regulated by legal rules, and the other (the prerogative state) governing arbitrarily. While this version of a dual state rightly captures some of the tensions arising from the conflicting visions within a hybrid regime, a further distinction should be made with regard to the normative state to better represent the legal order of a hybrid regime.

The normative state of a hybrid regime frequently goes *beyond* mere legality. Unlike the normative state of a pure authoritarian dual state, one will almost always find liberal constitutional guarantees in the normative state of a hybrid regime dual state. These guarantees are not trivial at all. In Hong Kong, Uganda and Pakistan for example, the

[70] Douglas Morris, 'The Dual State Reframed: Ernst Fraenkel's Political Clients and his Theory of the Nazi Legal System' (2013) 58 *The Leo Baeck Institute Yearbook* 5. However, the traditional account of a normative state allows for the possibility for a liberal democratic system. Legality and liberal democratic norms can be, and are oftentimes, compatible.
[71] Kim Lane Scheppele. 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 545.

protection of rights is not limited to private law or politically uncontroversial areas. Opposition had relied on the normative state to meaningfully challenge the government. Legal mobilization movements and successful constitutional review challenges can routinely be observed as well. The liberal part of the normative state, of course, does not govern all areas outside the prerogative state, but its reach and impact can be substantial and significant.

The normative state of a hybrid regime has liberal tendencies because of the defining characteristics of a hybrid regime. A hybrid regime's imperative to imitate a democracy necessitates the adoption of laws, legal structures and institutions with liberal constitutional contents. As I have already argued, constitutions in hybrid regimes are not mere shams, and liberal constitutional guarantees are more likely enforced in hybrid regimes compared to pure authoritarian regimes. Furthermore, since the degree of political pluralism in a hybrid regime is meaningful, checks on how public power is exercised by the legislature exist. In many cases, there will be consequences for constitutional transgressions, and lots of important questions of law and constitutionality are open to contestation in a hybrid regime. The authoritarian may be instituting liberal constitutional guarantees for instrumental or disingenuous reasons, but self-interest of the authoritarian is precisely why the liberal part of the normative state is sizable and can meaningfully exist in a hybrid regime. This creates an additional and more robust "layer" to the normative state of a hybrid regime.[72]

In short, the normative state of a hybrid regime comprises of two layers: the "legality normative state" that fulfils the minimum requirements of rule of law, and the "liberal normative state" that is protective of liberal constitutional norms. Because of these liberal pockets, the legal order of a hybrid regime is better characterized as a trifurcated,

[72] Chan (n 66) 4.

as opposed to bifurcated, dual state. These three domains – the prerogative state, the legality normative state and the liberal normative state – combine and form the legal order of a hybrid regime. The existence (and size of) the liberal normative state is what usually distinguishes the legal order of a hybrid regime from that of a pure authoritarian regime.

While the two layers of the normative state help legitimate a hybrid regime, the authoritarian essence of a hybrid regime is preserved through the prerogative state. When the regime faces an existential threat, it can resort to the prerogative state for political control instead of revealing its true colors through raw violence. The prerogative state describes areas where the authoritarian has absolute discretion. Authoritarians today have learnt to take advantage of its political dominance to mask arbitrary governance under the auspices of the "law". Life is unpredictable under the prerogative state. For example, the military has a huge presence in Uganda and Pakistan and relies on the prerogative state to maintain its political power. The military courts there have been routinely used to try opposition lawmakers[73] and normal civilians.[74] A hybrid regime authoritarian is generally reserved in acting on its prerogative powers though, at least when compared to a pure authoritarian regime. This is because a hybrid regime cannot credibly call itself a democracy when what remains of the legal order of a hybrid regime is the prerogative state.

However, the potential to unleash the prerogative power should not be ignored and underestimated in a hybrid regime.[75] This potential is reflected in its political structure. In

[73] Amnesty International, 'Uganda: Opposition MPs must not be tried in military court' (16 August 2018), available at <https://www.amnesty.org/en/latest/news/2018/08/uganda-opposition-mps-must-not-be-tried-in-military-court/> (last visited 13 November 2021).
[74] International Bar Association Human Rights Institute, *Judicial independence undermined: A report on Uganda* (September 2007), available at < https://allafrica.com/download/resource/main/main/idatcs/00011366:c4998078afbb451431dc9f210ed92a03.pdf> (last visited 13 November 2021).
[75] This potential may seem to exist in democracies as well. We might, for instance, find statutory or constitutional provisions conferring similar discretion to the political branches. In reality, this potential is checked in democracies as there are legal and constitutional principles as well as political mechanisms to limit the use of this discretion. This potential is not a free-pass in a democracy, but it is real in authoritarian regimes.

Hong Kong, for example, alongside its liberal constitutional order is the unchecked discretionary power of Beijing to have the final say over the interpretation of Hong Kong's mini constitution. Having issued only five interpretations since the handover, one might argue that Beijing had approached Hong Kong constitutional questions with great self-restraint. However, the flashing of this nuclear option is a reminder to the opposition of what might ensue if they are not willing to play along. This creates coercive effects similar to those when the prerogative state is actually activated. The mere potential to unleash the prerogative state is oftentimes enough to subdue the opposition and achieve political control.

The three domains of a trifurcated dual state interact with one another, [76] and they are "independent yet interrelated".[77] The proportion of the three domains is a function of not only the formal legal and constitutional provisions, but more importantly organic developments in constitutional politics. The prerogative state, for example, might expand when the authoritarian is facing a major crisis, crowding out the normative state as a result. There are more subtle and less "transgressive" means for the prerogative state to corrupt the normative state.[78] As authoritarian norms begin to prevail, state agents such as judges and lawmakers may act with "anticipatory obedience"[79] and exercise discretion in ways that correspond to the will of the authoritarian "in the absence of any directives… from the prerogative state".[80] The corrosive effect of the prerogative state in this instance will undermine the liberal normative state, but not *necessarily* the legality normative state as anticipatory obedience of such can still be justified legally.

[76] Meierhenrich (n 69) 182-7.
[77] Ibid 245.
[78] Ibid 183.
[79] Ibid 184.
[80] Cora Chan, 'From Legal Pluralism to Dual State: Evolution of the relationship between the Chinese and Hong Kong legal orders' *Law & Ethics of Human Rights* (Forthcoming) (on file with author) 20.

The authoritarian can reduce the sizes of the two layers of the normative state, but it is also possible for the normative state to resist authoritarian encroachment or even expand. State agents in charge of enforcing the constitution and tensions created as a result of the conflicting ideologies of a hybrid regime can lead to changes in the ratio. The resilience of the normative state, especially the liberal normative state, depends on the will and capacity of state agents to safeguard liberal constitutional norms. A constitutional court emerges to be a crucial actor that can shape the size of the normative state, as it understands the language of the constitution and can adapt to the political circumstances of a hybrid regime. A constitutional court has the power to interpret and apply the constitution in ways that fit the three domains. The boundaries between the domains are porous,[81] and a decision in one domain can have implications to the other domains. Since the boundaries are defined and determined in practice by judicial interpretation, the scope of the liberal normative state can be expanded by the constitutional court if it handles related constitutional questions properly. Legal reasoning is the practice of argumentation based on similarity and legal principles: a rule established in a prior case will be applied to a subsequent case with similar factual patterns.[82] Equality principles laid down in an LGBTQ rights case, for example, may be subsequently developed into equality principles that are applicable to a broader range of circumstances beyond sexual orientation discrimination. Sitting at the fuzzy boundaries of the three domains, a constitutional court can exploit the porous nature of a dual state by planting democratic norms that can be used in the future to undermine the prerogative state and reinforce the liberal normative state.

5. Two-leveled Constitutional Battle

[81] Mark Tushnet, 'The Possibility of Illiberal Constitutionalism' (2017) 69 *Florida Law Review* 1367, 1375.
[82] Meierhenrich (n 69) 240-2.

Finally, a hybrid regime creates a particular dynamic within the constitutional order. As suggested earlier, elections in a hybrid regime are autonomous and consequential. Quoting Schedler, "the conflictive interactions that [hybrid regime elections] generate possess a logic of their own, an importance of their own, and effects of their own."[83] The rules are bent towards the regime, but there is sufficient space for the opposition to meaningfully compete within the rules of the game so as to gain political power. An important goal of the opposition is, however, to also change the constitution so as to remove the asymmetry. As a result, the constitutional dynamics of a hybrid regime occur consistently and simultaneously on two levels: *within* constitutional rules and *over* constitutional rules.[84]

A two-levelled constitutional dynamic is not necessarily unique to hybrid regimes. In a democracy, constitutional actors fight over electoral votes and constitutional rules as well. However, *most* of the political competition in a democracy happens within agreed upon constitutional rules. Election is accepted as the only legitimate way of constituting a government and transferring powers. As long as the fairness of the system is not an issue (which normally is the case for a democracy), the constitutional battle will remain within the rules of the game. Once in a while, there is a pressure to change the constitution so as to reflect updated norms or correct latent defects, but the frequency of such urge is relatively low compared to authoritarian regimes. In pure authoritarian regimes, elections are not meant for political competition. Elections are tools of governance that allow dictators to gather information and co-opt elites.[85] Electoral competition is largely non-existent as we discussed. When the results are predetermined, it makes little sense for the opposition to invest much of their energy in competing within the constitutional rules. The

[83] Schedler (n 6) 374.
[84] Ibid Chapter 4.
[85] Jennifer Gandhi and Ellen Lust-Okar, 'Elections under Authoritarianism' (2009) 12 *Annual Review of Political Science* 403.

more pressing problem that needs to be fixed is the very constitution. The opposition seeks to initiate reforms and bring fundamental changes by changing the constitutional rules or creating a new constitution.

A perpetual two-levelled constitutional battle is a necessary feature of a hybrid regime. The possibility of winning an election (though unlikely) provides sufficient incentive for the opposition to invest in competing within constitutional rules. "[A]s soon as political institutions are granted minimal margins of power and autonomy," Schedler points out, "they can turn against the dictator."[86] Political competition within the constitutional rules will be activated once the electoral game is sufficiently competitive. The rules are unfair, but if they invest enough and can overcome coordination challenges, they might be able to win in the ballot box. Winning in the ballot box gives the opposition the political power to shake things up fundamentally.

Deciding whether to compete within or over constitutional rules is not a binary choice though, and in a hybrid regime, the two levels of competition occur alongside one another. If the fairness of the game is the real problem, it also makes sense for the opposition to compete over the rules. As Schedler puts it, "[u]nwilling or unable to compete within given rules, parties extend their struggle to the rules itself. Rather than focusing their competitive energies on playing the game, they get continually drawn into fights over the basic rules and conditions of the game."[87] The consequence of the institutional asymmetry is a simultaneous gravitation towards battles over the constitution. To win on this level usually requires an even higher level of public attention and mobilization. Consequently, the opposition may organize mass protests and expose structural irregularities so as to prompt public resistance. Aside from winning the support

[86] Schedler (n 6) 73.
[87] Ibid 116.

of the people, other constituencies such as foreign states and state agents are also potentially important actors on this battlefront. A regime relies on state agents such as the bureaucracy and police to conduct its affairs. But like any collective entity, a hybrid regime faces agency problems. Successful conversion of state agent into opposition allies can effectively destabilize a hybrid regime, which in turn provides more bargaining power to the opposition. Similarly, for a hybrid regime that relies on international aid or is tightly connected to the international community, the opinion of foreign states may play a major role in its constitutional making process. International pressure may serve as a catalyst for constitutional reform.

The challenge faced by the opposition under this two-levelled constitutional battle is deciding how to divide their resources. Each strategic choice costs the opposition time and resources. The two levels are tightly connected, and a decision at one level has implications to the options on the another level. For example, the opposition will have to decide the extent to which they should participate or boycott an unfair election. A higher level of commitment in participation may increase their chances of winning the election, but again there might be a limit as to how high those chances actually are given the asymmetry. Boycott delegitimizes the election and may trigger mass mobilization, capturing the attention of the international community. This option also saves campaigning costs that can be invested in other non-electoral strategies. The risk, however, is losing an important political voice and representation, and giving away veto and monitoring powers within public institutions by abandoning the within-constitutional rule battlefront. This challenge is also reflective of the autocrat's logic of instituting elections, that these strategic dilemmas fragment opposition challenges. It is far from easy for the opposition to make a series of right decisions, and wrong decisions may weaken their challenges on

both fronts. To compound the problem, the opposition is not a monolithic entity as well and there are collective action challenges that need to be resolved.

The interconnectedness of the two levels is also illustrated in the tough choices confronting the incumbent. The incumbent must also decide how to act and react in the two levels. As mentioned early on in this chapter, the regime is characterized by its paradoxical intentions: to pretend to be a democracy while subduing opposition challenges. As the opposition's popularity grows, the incumbent may be tempted to tweak the rules further or even resort to naked repression so as to guarantee electoral success. An unintended consequence, however, may be to trigger backlash from the public and international community. Assuming that a hybrid regime has not given up on its democratic pretenses, the incumbent must also balance its strategies carefully so as to keep winning elections without undermining its democratic image.

A constitutional court is a crucial constitutional actor that has a say in both levels of the constitutional battle. Constitutional courts have the power to determine whether political outcomes are reached in accordance with the rules of the game. This is not about challenging the authority of the rules, but whether the political outcomes are properly reached given pre-existing rules. Some constitutional courts with jurisdiction over election petition and administrative law questions can apply procedural law, rule-of-law principles and administrative law doctrines to decide on the validity of political outcomes. On top of ensuring actors are playing by the rules, a constitutional court provides one of the most direct avenues to change the rules of the game. A constitutional court determines the meaning of the constitution. When the fairness or constitutionality of the rules are questioned, courts are asked to step in and "clarify". Its decisions may also help raise public and international awareness on controversial issues, and become focal points for mass mobilization and catalysts for regime change.

Considering the centrality of constitutional courts in the two levels, it is no wonder that a constitutional court is within the strategic equations of both the opposition and incumbent. The opposition must decide how much it should invest in legal mobilization. Court cases can be costly and time-consuming. The chances of success may also depend on legal merits and the type of issue being litigated. Even if a favorable judgment is secured, the implementation of the decision depends on the will of the government. Nevertheless, the relative expected gains of pursuing a legal strategy, which will be further explored in Chapter Four, may still sometimes be higher than competing in the political process. The incumbent must also decide how to balance political control and judicial autonomy. Competent judges may legitimate and improve a hybrid regime's legal system, but these judges may not always be loyal. Even if the regime can control the appointment process, to protect their own legacy or out of self-respect, not all appointed judges turn out to be necessarily loyal to the regime. The incumbent may be tempted to resort to *ex post* means of interference, such as removing judges who challenge the regime, diluting the powers of defiant judges (such as in Hungary and Poland) or even assassinating them (such as the execution of the Chief Justice of Uganda, Benedicto Kiwanuka). Some of the more drastic interferences will backfire on the regime. The lawyers and judges movements in Pakistan and Uganda were direct responses to the naked repression against judges. Both movements have won the support of the people and the international community.

6. Conclusion

With diverging impulses of democracy and authoritarianism, a hybrid regime has the schizophrenic intention of imitating a democracy while limiting its own democratic potential. The definitional features of a hybrid regime have three different kinds of

constitutional implication. On an ideological level, a hybrid regime does not have a unifying theory of political legitimacy. Instead, it must cope with two rivalling stories of legitimacy: democracy and guardianship. On a legal-institutional level, democratic institutions curiously co-exist with authoritarian ones, with different conceptions of "legality" competing with each other. In terms of constitutional dynamics, political competition in a hybrid regime is constantly two-levelled, with constitutional actors competing within and over constitutional rules.

These questions necessarily impact the way a constitutional court behaves and how it should act in a hybrid regime, which will be the focus of the rest of the thesis. A constitutional court is conditioned by the socio-political context it operates in. The dynamic interplay between democracy and authoritarianism created by the hybridity forces us to reconsider the nature and normative role of a constitutional court. Some of the themes to be explored have already been identified in this chapter, and will be explored more in depth subsequently. The next chapter situates a constitutional court in a hybrid regime context. We will look at two common ways to think about a constitutional court in a hybrid regime, as well as pick out insights that are relevant to developing an attractive account of a constitutional court.

CHAPTER THREE

CONSTITUTIONAL COURTS IN HYBRID REGIMES

1. Introduction

The chapter seeks to situate constitutional courts within a hybrid regime context. Three models about what courts could be like in hybrid regimes will be presented. The first two are what I call the Pessimistic model and the Optimistic model. They represent two different bodies of literature and two contrasting views of constitutional courts in hybrid regimes.

The chapter starts by examining the Pessimistic model in Part 2. A court can do very little to resist an authoritarian, let alone promote democratic norms, under this model. It characterizes a constitutional court as part of the authoritarian hierarchy of a hybrid regime, and views the court as an instrument of authoritarian governance. Those attached to this model are skeptical about whether judicial autonomy can truly exist. The regime chooses to institute and maintain a constitutional court for self-serving reasons, and the political environment leaves little space for judicial maneuvering.

While this model rightly highlights how a constitutional court is structurally constrained by a hybrid regime, it will be argued that the Pessimistic model tends to overstate the degree of actual control a hybrid regime has over it. As a result of how a hybrid regime is configured, it will be shown that several conditions that are conducive to the development of judicial autonomy and judicial power are present.

Part 3 proceeds to discuss a more encouraging depiction of a constitutional court. Those who subscribe to the Optimistic model believes that a court can bring transformative changes to a hybrid regime. It views a constitutional court as the guardian of liberal

democratic norms, possessing almost mystical powers of bringing democratic changes to a hybrid regime. The Optimistic model stands for a body of literature that is less concerned about how the authoritarian conditions impact a constitutional court, but more about a constitutional court's moral responsibility under a hybrid regime.

This model rightly raises important questions about the normative role of a constitutional court in a hybrid regime, and challenges some of the assumptions about constitutional theory that are typically taken for granted in liberal democratic contexts. However, the Optimistic model, it will be shown, is too confident in the capabilities of a constitutional court. It pays insufficient attention to prudential and institutional implications posed to a constitutional court by the political circumstances of a hybrid regime.

While each model captures distinct elements and raises important issues regarding constitutional courts in hybrid regimes, each of them has gone too far. Drawing on the lessons learnt from the analyses of the previous two models, Part 4 concludes by presenting a more attractive model – the Realistic model. By "realistic", I do not mean that courts in real life correspond more closely with this model, although it is informed by a nuanced take on judicial-political dynamics in a hybrid regime. Rather, under this model, it is realistic or not implausible for a constitutional court to aspire to take up meaningful roles in a hybrid regime. The Realistic model serves as the basis for our theoretical inquires in the coming chapters.

2. The Pessimistic Model

The origin of the Pessimistic model can be traced back to a few decades ago when constitutional courts outside democracies were seen as insignificant institutions. This

stems from a widely held assumption that judicial politics is conditioned by regime-type politics.[1] Operating in an environment with powers concentrated, constitutional courts in authoritarian polities were taken as "mere pawns of their rulers".[2] After all, it seems logical to suppose that only loyal judges who dare not challenge the ruler could keep their jobs. It was unimaginable for judges to rule against a regime that had powers to threaten the judges' career and personal safety. The historical consensus was that the "judicialization of politics outside democratic polities" was "very unlikely".[3] Structurally constrained, constitutional courts in authoritarian regimes were traditionally thought of as being politically uninvolved and obedient agents of the regime. Anecdotal evidence at the time also seemed to support this view. As Tamir Moustafa's observes, "[t]he assumption [that courts in non-democratic regimes were little more than window dressing for dictators] was so widely accepted that research on judicial politics in nondemocracies was rare prior to the 1990s."[4]

The literature developed over the next thirty years or so and scholars became more aware of the judicial behavioral variations among non-democratic regimes. Some in fact play a central role in authoritarian politics, enjoying substantial powers to decide on mega-political questions.[5] There are even courts that successfully challenged and defied the regime.[6]

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[1] See Donald W Jackson and C. Neal Tate (eds), *Comparative Judicial Review and Public Policy* (Greenwood Publishing Group, 1992); C. Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (NYU Press, 1995).
[2] Tamir Moustafa and Tom Ginsburg, 'Introduction: The functions of courts in authoritarian politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The politics of courts in authoritarian regimes* (CUP, 2008) 1.
[3] C. Neal Tate, 'Why the Expansion of Judicial Power?' in Tate and Vallinder (n 1) 28.
[4] Tamir Moustafa, 'Law and Courts in Authoritarian Regimes' (2014) 10 *Annual Review of Law and Social Science* 281, 282.
[5] Ran Hirschl, 'The Judicialization of Mega-politics and the Rise of Political Courts' (2018) 11 *Annual Review of Law and Political Science* 93; Tom G. Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (CUP, 2017); Tom Ginsburg, 'The Politics of Courts in Democratization: Four junctures in Asia' in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds) *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013).
[6] For some of the examples, see Eric C. Ip, *Hybrid Constitutionalism: The politics of constitutional review in the Chinese Special Administrative Regions* (CUP, 2019) 8 note 69; Yasser Kureshi, 'When Judges Defy Dictators: An audience-based framework to explain the meregence of judicial assertiveness against authoritarian regimes' *Comparative Politics* (forthcoming) note 1.

While these more recent studies have helped significantly advance debates, many maintain a similarly pessimistic tone as their predecessors when it came to what courts could do in an authoritarian context. Courts may not be puppets as the literature previously suggested, but they are still largely the authoritarians' instruments of governance.[7] Courts are instituted and maintained for the benefit of the incumbent. Judicial independence is a function of the extent of courts performing certain functions on behalf of the regime. For example, having a constitutional court might bolster the legitimacy of the regime,[8] attract investors,[9] help side-line opposition by enforcing oppressive laws,[10] or preserve hegemonic powers more generally.[11] These explanations focus on the incentives of the incumbents in having a semi-independent court.[12] Accordingly, the Pessimistic model can account for why we might observe the occasionally successful judicial challenges in hybrid regimes. In fact, consistent with the logic of these endogenous explanations, some might even argue that these challenges are sometimes tolerated because they help improve the image of a hybrid regime as they are seen as evidence of political contestation.

As an instrument of the incumbent, the court continues to be subjected to its control. There seems to be few limits about how the incumbent exercises its controls. The literature on court-packing suggests that there is a wide arsenal of tools to discipline a judiciary when the costs of a defiant court outweigh its potential benefits. Some of these techniques are supplied or authorized by the constitution and hence appear soft and lawful to maintain public optics, such as changing the composition of the court to adjusting the retirement

[7] Moustafa (n 4).
[8] Raul A. Sanchez Urribarri, 'Courts Between Democracy and Hybrid Authoritarianism: evidence from the Venezuelan Supreme Court' (2011) 36 *Law & Social Inquiry* 854.
[9] Tamir Moustafa, *The Struggle for Constitutional Power: Law, politics, and economic development in Egypt* (CUP 2007).
[10] Ibid; Jothie Rajah, *Authoritarian Rule of Law: Legislation, discourse and legitimacy in Singapore* (CUP 2012).
[11] See generally Ran Hirschl, *Towards Juristocracy: The origins and consequences of the new constitutionalism* (HUP 2009).
[12] See Georg Vanberg, 'Constitutional Courts in Comparative Perspective: A theoretical assessment' (2015) 18 *Annual Review of Political Science* 167.

age limit. Decapitating the judicial support structure[13] and changing access to justice rules[14] are attacks not directed at the judiciary but equally effective at limiting a court's effectiveness.

The Pessimistic model, as we can see, depicts a highly constrained constitutional court. This is perhaps unsurprising as much of the literature on authoritarian judicial politics focuses on how regime-type politics influences judicial behavior. If the premises are that the strength of a court is associated with regime-type and that governmental powers are centralized in non-democratic regimes, it would be expected to reach such defeatist conclusions about the democratic potential of constitutional courts in hybrid regimes. Judges are thought to be "products of the political divisions and the processes by which they are selected." [15] The judiciary is part of the government structure and necessarily subordinate to the regime. It follows that, it is the incumbent that decides the degree of freedom enjoyed by the judges. The power imbalance between the regime and the court suggests that courts are always at the mercy of the regime. The fact that the courts do not advance the authoritarian's interests in a straightforward manner may explain the occasional judicial defiance. For instance, a court that stabilizes the regime by channeling conflicts may sometimes open space for opposition challenge.[16] Nevertheless, the Pessimistic model maintains that these instances of judicial defiance are negligible or only mirages carefully engineered by the regime for its own benefits. Courts are inconsequential actors according to this view.

[13] See Charles R. Epp, *The Rights Revolution: Lawyers, activists, and supreme courts in comparative perspective* (University of Chicago Press 1998).
[14] See Ceren Belge, 'Friends of the Court: The Republican alliance and selective activism of the Constitutional Court of Turkey' (2006) 40 *Law & Society Review* 653.
[15] Mark Rush, 'Review of Fragile Democracies by Samuel Issacharoff' (2016) 15 *Election Law Journal* 193, 194.
[16] Moustafa (n 4) 287.

This model uncovers a lot of the complex judicial political dynamic underlying an authoritarian context. It highlights the motivations and survival needs of an authoritarian, as well as how a court fits into the authoritarian's agenda. However, what the Pessimistic model tends to overstate is the power and efficacy of a hybrid regime. In other words, the political costs suffered by the incumbent as a result of interfering with and attacking courts are given insufficient attention to by this model. There is a questionable assumption behind this model about how a hybrid regime can seem to almost always act in a way that it intends to.

An authoritarian regime is not a monolithic entity. This is especially the case for a hybrid regime, which is characterized by ideological tensions and fragmented politics. As a collective entity, the incumbent may have mixed intentions and different expectations of courts. Some within the ruling coalition might value the reputational gains of an independent court and hence allow for more judicial autonomy, while more domineering elites may demand direct control over courts. Hence, even those in power may disagree about what role a court should play and the appropriate degree of influence they should accordingly have over it, and that the court might be the forum for disputes within the elite. Even if the regime can form its collective intention, it does not mean it can act at will. Like any other collective entity, a hybrid regime is subjected to, amongst others, institutional rules (such as internal decision-making procedures), internal resistance (such as infighting among the authoritarian bloc), external resistance (such as risk of sanction from foreign states), risk of public mobilization, and electoral pressure in states with at least nominally competitive elections.[17] Many of these political constraints are not always as principled or ideal as constitutional rules, but they are effective to the extent of actually putting a brake

[17] See Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (CUP 2002); Ip (n 6).

on the authoritarian. In economics terms, the incumbents would have to incur "political transaction costs" to constrain courts.[18] Sanctioning a court involves bargaining, coordination, enforcement, and informational costs on the regime. These costs impair the regime's ability to discipline courts. The higher the political transaction costs, the more likely we can find an independent and strong constitutional court in a hybrid regime.[19] Lastly, one must not forget that the regime is not infallible. It can make mistakes, for example, by appointing judges who turned out to be not as loyal as the incumbent expected. Iftikhar Chaudhry in Pakistan voted in ways that aligned with the incumbent before he was appointed as the Chief Justice, and Geoffrey Ma, the second Chief Justice of Hong Kong, represented the government in some of the landmark constitutional cases in Hong Kong before joining the bench. It is fair to say the Chaudhry and Ma courts were not as loyal to the incumbents as it was previously expected.

What I have just described does not necessarily contradict the Pessimistic model. There is a power imbalance between the regime and the court, and the regime's intentions and expectations shape the behavior and capacity of a court. What tends to be missed in these discussions though is the fact that a hybrid regime oftentimes cannot act in whatever way it wishes. The regime's ability to act is shaped by a multitude of internal and external factors. These factors diminish the regime's ability to exert control over the court, and may provide time and space for the constitutional court to pursue its own agenda effectively.

a. Features of a hybrid regime that support judicial autonomy

[18] Ip (n 6).
[19] Ibid.

A hybrid regime is not solely constraining of a constitutional court. There are also features that offer conditions conducive to the development of an autonomous and strong constitutional court. Some of these features are derived from the fact that the high political friction environment of a hybrid regime retards the regime's ability to act and react. Others rely on exploiting the regime's incentives and motivations in instituting a court in the first place. For example, the need to attract investors is said to be a factor supportive of an independent judiciary under authoritarian contexts. Focusing on the Egyptian Constitutional Court, Moustafa argues that the regime relies on the judiciary to promote economic growth.[20] The need to maintain a stable and prosperous economy may create spill-over effects that contribute to judicial independence. His theory is also to a certain extent applicable to Hong Kong, as undermining judicial independence may discredit the regime's reputation as an international financial center. Similarly, a number of commentators attribute judicial independence in Uganda to pressure from international and foreign donors.[21] The incumbent, Rachel Ellett argues, depends on development aid to pay off the regime's allies.[22] One important precondition for those aid is the maintenance of judicial independence. The regime risks losing an important stream of funds if it keeps attacking the courts whenever they issue decisions that are against the government.

To further illustrate how a hybrid regime can actually empower a constitutional court, three features based on the characteristics of a hybrid regime that support the development of judicial autonomy and judicial power will be identified: semi-competitive elections, political fragmentation, and a claim to democratic legitimacy. The intention is

[20] Moustafa (n 9).
[21] Rachel Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African courts* (Routledge 2013); Erica Bussey, 'Constitutional Dialogue in Uganda' (2005) 39 *Journal of African Law* 1, 13.
[22] Ellett (n 21).

not to provide an exhaustive list of supportive factors, especially since there are possibly many context-specific conditions applicable to particular kinds of hybrid regimes that can equally, if not more significantly, support a constitutional court, such as the needs to attract foreign investors and maintain development aid as I just described.[23] Instead, the hope here is to highlight conditions common to hybrid regimes as a result of their political configuration.

i. Semi-competitive elections

The electoral logic of judicial independence suggests that the political uncertainty generated by elections prompts political actors to adopt an impartial arbitrator.[24] Under electoral uncertainty, political actors of different factions have a reasonable chance of defeat. The uncertainty acts in a way almost like the veil of ignorance, allowing political actors with diverging intentions to agree on the adoption of independent courts. The electoral logic rests on the self-interested nature of political actors and their inability to accurately predict where their interests are going to lie after an election. An independent court is a form of political insurance for all conflicting parties involved to hedge against future risks. The hypothesis predicts that the higher the degree of electoral competition, the more likely an autonomous court will emerge.

The electoral logic of judicial independence was initially tested in consolidated democracies such as the United States and Japan, as well as new democracies.[25] The theory

[23] The factors to be discussed should be treated as weights. That is, the more of these factors are present, the more likely an autonomous court would emerge. It should also be mentioned that these factors are political determinants of judicial autonomy and power. Other more jurisdiction-specific, legal factors that are not discussed can also be significant, such as legal tradition, constitutional design and formal judicial rules.

[24] J. Mark Ramseyer, 'The Puzzling (in) dependence of Courts: A comparative approach' (1994) 23 *The Journal of Legal Studies* 721.

[25] Ibid; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional courts in Asian cases* (CUP 2003).

was believed to be inapplicable to non-democratic regimes because of the lack of electoral competitiveness.[26] One of the problems with this assumption stems from the dichotomous understanding of regime-types. It fails to recognize that elections in some authoritarian regimes can still be sufficiently meaningful and autonomous. The level of electoral competitiveness in a hybrid regime may be enough to activate the electoral logic of judicial independence.

Brad Epperly's work confirms the relevance of the theory in hybrid regimes.[27] Motivated, again, by the need to move away from dichotomies, Epperly's large-N study finds that the electoral logic is applicable to non-democratic regimes, and that autocracies that are more electorally competitive tend to have more autonomous courts than those that are politically closed. In other words, moderate levels of political competition results in moderate levels of judicial autonomy. Explaining this phenomenon, he argues that the electoral logic of judicial independence is especially relevant to hybrid regimes because of the autocrat's fear of losing power. As pointed out in the previous chapter, elections in hybrid regimes are unfair, but sufficiently contested to impose an uncertainty to the incumbent. Having a semi-competitive election increases the probability of the authoritarian in losing power in elections, and this electoral uncertainty is itself a reason to confer autonomy to courts. But more importantly, the risk associated with losing power is huge for an authoritarian. Authoritarians would have accumulated a long list of political enemies during their reign. Unsurprisingly, more than half of all post-tenure authoritarians have been punished, with their political rights stripped, property confiscated and personal security jeopardized.[28] As a political insurance, an independent court, as he finds, provides the necessary protection to minimize the risk exposure of an authoritarian by safeguarding

[26] Moustafa and Ginsburg (n 2) 28.
[27] Brad Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy* (OUP 2019).
[28] Ibid 34-35.

rights. The expected cost of defeat in the ballot box (that is, the chance of defeat as well as the risks associated with defeat) justifies the authoritarian's decision to confer moderate levels of autonomy and power to the courts in hybrid regimes.

ii. Political fragmentation

Political scientists posit that divided politics creates opportunities for courts to develop judicial autonomy and judicial powers.[29] Divided politics, or political fragmentation, refers to the number and nature of veto players involved in a decision-making process. Veto players are actors whose consents are necessary to changing the status quo, and a change of the status quo requires the consent of all veto players.[30] Veto players can be institutional or partisan in nature.[31] Institutional veto players are assigned by the constitution, whereas partisan ones are outcomes of organic politics. For example, the three branches are usually institutional veto players under separation-of-powers; in legislatures where multiple majorities are possible, the different majorities are partisan veto players. The more veto players' consents required, the harder it is to change the status quo. Aside from the number of veto players, their nature also matters. The more ideologically dissimilar the veto players are, the harder it is to reach agreements or compromises.[32] A higher level of political fragmentation means that it is more difficult for all veto players to reach a consensus to change the status quo. Court-curbing actions – like any other legislation, policy or constitutional amendment – are only possible when

[29] Rebecca B. Chavez, John A. Ferejohn, and Barry R. Weingast, 'A Theory of the Politically Independent Judiciary' in Gretchen Helmke and Julio Rios-Figueroa (eds) *Courts in Latin America* (CUP, 2011). An underlying logic that ties the electoral logic and political fragmentation theories is the diffusion of political powers.
[30] George Tsebelis, *Veto Players: How political institutions work* (Princeton University Press 2002) 19.
[31] Ibid 19-20.
[32] Ibid 20.

political actors with veto powers can agree. The difficulty in sanctioning courts under divided politics suggests wider space for judicial maneuvering. The theory predicts that a politically fragmented environment will more likely generate independent judiciaries and durable judicial decisions.

The ideological tension between democracy and guardianship as described in the first chapter manifests in all levels of a hybrid polity, including the governing bloc and civil society.[33] An effect of this ideological tension is political fragmentation across different levels of society. With little in common between the rivalling theories of democracy and guardianship, the ability of a hybrid regime to ensure ideological homogeneity must be weak. The bureaucracies in Pakistan and Hong Kong, for example, have openly resisted the regime and ideologically differentiated themselves from their rulers on several occasions. Those instances go to show the kinds of internal challenges the regimes have to overcome in punishing defiant courts.[34] An authoritarian regime can use top-down techniques to politically indoctrinate elites and state agents, but these techniques are difficult to impose in a hybrid regime because of its more decentralized structure and its need to maintain political pluralism, at least superficially.[35] The regime's inability to maintain ideological coherence results in more space for judicial maneuvering.

The regime and the opposition's struggle to compete for popular support aggravate the political fragmentation of a hybrid regime.[36] Elite alliance and the regime's organizational power are unsettled by opportunities for elites to join the oppositional front.[37] Normally, elite defection is unlikely if the ruling party is strong and/or the

[33] Ip (n 6) 47.
[34] See ibid; Yasser (n 6).
[35] Ip (n 6) 47-8.
[36] Andreas Schedler, *The Politics of Uncertainty: Sustaining and subverting electoral authoritarianism* (OUP 2013) 49-50.
[37] Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid regimes after the Cold War* (CUP 2010) 68-70.

opposition party is weak. The power dynamics between the regime and the opposition can shift, however, and the opposition in a hybrid regime can sometimes pose a credible threat. In these instances, the oppositional front presents attractive opportunities for elites who are seeking to defect. Or in some occasions, elites who benefit from abandoning the regime may form their own party, causing infighting that threaten the bonds within the governing coalition.

Applying the political fragmentation theory, a hybrid regime court is afforded more leeway to exercise judicial powers given the fragmented nature of a hybrid regime. Since conflicting state ideologies permeate all levels of a hybrid regime society, implementing court-curbing actions can be challenging as the regime needs to convince many ideologically dissimilar veto players within and outside the governing bloc.[38] Also, as a fragmented state generates more political deadlocks, there would accordingly be a higher demand for judicial resolution of political questions.[39] A moderately independent judiciary provides a viable choice to those who are exhausted by the ineffectiveness of the political arenas and believe that the relative net gains might be higher when pursuing a judicial route. As Taiwan entered its hybrid regime era from 1986 to 1996 and with electoral politics gradually opening up during the period for instance, data shows that its constitutional court had been much more active than before.[40] The establishment of an opposition party (the Democratic Progressive Party), together with conflicts internal to the incumbent party at the time (Kuomintang had split into reformist and conservative factions) created an environment that was instrumental to the growth of an assertive constitutional court. Partisan disputes and growing support for constitutional reform resulted in room for judicial autonomy. A notable example of the Taiwanese constitutional court using an

[38] See Julio Ríos-Figueroa, 'Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002' (2007) 49 *Latin American Politics and Society* 31.
[39] John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 *Law and Contemporary* 41.
[40] Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart Publishing 2016) 170.

opportunity to resolve a political deadlock to advance constitutional democratic norms is the landmark decision Interpretation No. 261, which signified a detachment from the state's authoritarian past and provided the constitutional foundation for the next election and democratic reforms.[41] Because the incumbent was the dominant party at the time, incumbent infighting also manifested as intra-branch disputes.[42] This led to a significant increase in the number of separation-of-power cases during the same period.[43]

iii. The democracy claim

As established in the previous chapter, a hybrid regime likes to call itself a democracy. A hybrid regime will do many things to sustain this claim, from instituting formally democratic elections to learning to speak the language of democracy. One important institution that would confer democratic legitimacy to a hybrid regime is the constitutional court. For one, rule of law and judicial independence have become closely associated with democracy. "Democracy clauses" that demand these guarantees are increasingly common in international trade agreements and aid programs.[44] From policy makers' perspective, adopting judicial independence is democratically fashionable, and that it seems to signal to others the regime's commitment to bind itself to the rules and reduce opportunistic behavior. Furthermore, it adds to the competitive image of a hybrid regime. As Raul Sanchez Urribarri writes, a hybrid regime's "legitimacy and performance resides, to a large extent, on keeping certain contestation arenas open or, at least, preserving the

[41] Chien-Chih Lin, 'Autocracy, Democracy, and Juristocracy: The Wax and Wane of Judicial Power in the Four Asian Tigers' (2016) 48 *Georgetown Journal of International Law* 1063, 1122-1123.
[42] Wen-Chen Chang, 'Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective', JSD Dissertation, Yale Law School, 2001, Ch 6, 12-13.
[43] Dennis T. C. Tang, 'Judicial Review and the Transition of Authoritarianism in Taiwan' in Taiwan Studies Promotion Committee of Academia Sinica (ed.), *Change of An Authoritarian Regime Taiwan in the Post Martial Law Era* (Academia Sinica 2001) 452.
[44] Ozan Varol, 'Stealth Authoritarianism' (2014) *Iowa Law Review* 1673, 1727.

appearance of contestation."[45] An active constitutional court that is willing to resist the regime gives an impression that political pluralism exists in a hybrid regime. Maintaining a moderately autonomous constitutional court, as a result, helps appease dissenting parties as well as foreign and international stakeholders who are committed to democratic norms.

In order to derive the legitimacy and instrumental benefits arising from adopting judicial independence, the regime's commitment to the judiciary must be sufficiently credible. It is one thing to institute a constitutional court and textually guarantee its independence in the constitution, and another to actually give the court resources and space to perform its duties independently. As a legitimizing ideology, judicial independence cannot just be an empty expression.[46] A hybrid regime must substantiate its claim to judicial independence. The governed and other relevant constituencies need to have reasons to believe that the government has tied its own hands in order for judicial independence to provide the expected stabilizing effects.[47] The claim collapses if the regime does not honor the agreement. "In politics as elsewhere," as Jon Elster writes, "to make a promise and then break it is worse than not making it in the first place."[48] Seen as a betrayal of trust, failing to honor judicial independence guarnatees will be counterproductive.

An implicit bargain between the regime and the constitutional court emerges here. The regime relies on the constitutional court for legitimacy gains, while the constitutional court can only carry out its duties if the regime exercises self-restraint. To maintain this bargain, the regime needs to "find a balance between keeping effective control of the

[45] Sanchez Urribarri (n 8) 878.
[46] As E.P. Thompson famously wrote, "[t]he essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equality; indeed, on occasion, by actually being just." E.P. Thompson, *Whigs and Hunters: The origin of the Black Act* (Breviary Stuff Publications, 1975) 263.
[47] Barry R. Weingast, 'The Political Foundations of Democracy and the Rule of the Law' (1997) 91 *American Political Science Review* 245.
[48] Jon Elster, *Ulysses Unbound: Studies in rationality, precommitment, and constraints* (CUP, 2000) 148.

political space and legitimizing its authority."[49] The court must, of course, be careful not to push its luck too far, as the regime might be forced to retaliate in order to preserve its core interests. However, the regime must also tolerate challenges from the constitutional court up to a certain extent so as to show that its intentions are genuine and sincere in order to complete the democratic look. As mentioned, the regime's earlier motivation in instituting an independent constitutional court can be exploited in the judiciary's favor. In this instance, the need to maintain a democratic appearance necessarily limits the court-curbing options available to the regime. In some circumstances as it will be discussed in later chapters, the court can rely on the regime's democratic claim to hold the regime accountable as well. The implicit bargain between the regime and the court effectively becomes a shield, and a sword sometimes, for constitutional courts to make more assertive decisions.

3. The Optimistic Model

While a court under the Pessimistic model can do little to bring about democratic changes in a hybrid regime, the Optimistic model portrays a very different looking court. Unlike the Pessimistic model which the focus is on the constraining effects of a hybrid regime, the Optimistic model starts with a very different question about the moral responsibility of a constitutional court in a hybrid regime. A court, under this model, is designated the role of being the bulwark against authoritarian oppression as well as leading a hybrid regime towards democracy. The court is viewed almost as the savior of the oppressed, or the "alchemist" that is capable of turning an autocracy into a democracy.[50]

[49] Sanchez Urribarri (n 8) 859.
[50] Daly (n 5).

Many living in hybrid regime polities and international policymakers are attached to the Optimistic model. These people are motivated by the many kinds of injustice they experience or see in a hybrid regime. "People demand justice to escape domination", as Ian Shapiro famously writes.[51] Frustrated by how the political process is bent towards the incumbent, the public and opposition in hybrid regimes have a propensity to turn to the judiciary for solutions. Afterall, judges are commonly regarded as the personification of justice, symbolizing fairness and impartiality. With the anti-democratic nature of political institutions in hybrid regimes reinforcing the people's faith in formally independent judiciaries, these courts are seen as "beacon[s] of hope".[52] The appointment of Zühtü Arslan as the President of the Turkish Constitutional Court, for example, was described as a potential "safeguard against autocracy and… a much-needed glimmer of hope for Turkish democracy."[53] As a prominent Pakistani journalist describes, the Chaudhry Supreme Court was regarded as "the last station on the line, the only forum capable of providing relief".[54] In Hong Kong, some argue that courts are actually better at representing popular will than the political branches.[55] Writing in the context of post-Soviet states, Armen Mazmanyan notes, "while judicialization is conventionally treated as a counter-democratic practice, in non-consolidated democracies it clearly signals success of democratization."[56] The World Bank and other international development organizations project a similar kind of imagery of courts. Rule of law and judicial independence are

[51] Ian Shapiro, 'On Non-domination' (2012) 62 *University of Toronto Law Journal* 293.
[52] Ergun Özbudun, 'Turkey's Judiciary and the Drift Toward Competitive Authoritarianism' (2015) 50 *The International Spectator* 42, 53.
[53] Melis Cengiz and Kemal Kirişci, 'A glimmer of hope for the future of Turkish democracy?' *Brookings Opinions* (9 March 2011) <https://www.brookings.edu/opinions/a-glimmer-of-hope-for-the-future-of-turkish-democracy> (last visited 5 November 2021).
[54] As cited in Shoaib Ghias, 'Miscarriage of Chief Justice: Judicial power and the legal complex in Pakistan under Musharraf' (2010) 35 *Law & Social Inquiry* 985, 993.
[55] Eric Ip, 'The Democratic Foundations of Judicial Review under Authoritarianism: Theory and evidence from Hong Kong' (2014) 12 *International Journal of Constitutional Law* 330.
[56] Armen Mazmanyan, 'Judicialization of Politics: The post-Soviet way' (2015) 13 *International Journal of Constitutional Law* 200, 201.

believed to promote democratic and economic growth. International policymakers have tremendous faith in the democratic potential of courts, as reflected by the billions of dollars having been spent by these groups in the past three decades on legal reform and rule of law projects globally.[57]

The model is reflective of an aspiration shared by many who live in hybrid regimes, but not many constitutional lawyers have developed these intuitions. Instead, the closest we find to theorizing the views of the Optimistic model are the discussions in the democratization jurisprudence literature on the role of courts in transitional regimes and new democracies. There might be two reasons explaining this gap in the literature on constitutional theory in authoritarian contexts. The first is, as the discussion on the Pessimistic model illustrates, authoritarian regimes are traditionally thought to eliminate all room for discussion of the democratic role of constitutional courts. That is, authoritarian regimes are assumed to be too restrictive for the development of any attractive normative account of constitutional courts. The assumption may be true in a pure authoritarian context, but the fact that there are moderate levels of judicial autonomy in hybrid regimes suggests that normative questions about the democratic role of constitutional courts are worth exploring.

Second, one might assume that what constitutional courts should do in authoritarian contexts is obvious and straightforward: decide against the regime or overturn authoritarian policies. Some might even be tempted to simply equate an anti-regime decision with the advancement of democratic norms. These reflexive responses are unhelpful assertions that simply restate democratic ideals in the abstract and/or fail to consider the pragmatic challenges and contextual dynamics faced by a court. Not to

[57] See David Trubek, 'The 'Rule of Law' in Development Assistance: Past, Present, and Future' in David Trubek and Alvaro Santos (eds) *The New Law And Economic Development: A critical appraisal* (CUP 2006).

mention, an anti-regime decision does not necessarily promote democracy. To develop meaningful normative guidelines suitable for a hybrid regime political context requires properly accounting for the characteristics of a hybrid regime as well as the ways in which these characteristics impact a constitutional court both normatively and practically.

Given the limited theoretical discussion on the normative role of a constitutional court in an authoritarian context, it would be helpful to look at the democratization jurisprudence literature in order to better understand how might the Optimistic model can be defended. Since that literature is framed for a different context, any borrowing should be made with caution. Transitional or new democracies are characterized by their progression towards consolidated democracy, "inordinate pace of change" and a "period of intense flux" of constitutional change.[58] These temporal features are absent in a hybrid regime. Uncertainty about the rules of the game and how constitutional developments will unfold is a hallmark of a transitional regime,[59] but that level of uncertainty is missing in a hybrid regime as transformative changes are not to be expected within the foreseeable future. Its hybridity persists without fundamental resolve for a substantial period.

Nonetheless, the incidental fact that some transitional regimes are considered to be or resemble hybrid regimes suggest that the institutional context of the democratization jurisprudence literature is not too dissimilar to that of a hybrid regime. A hybrid regime is analytically distinct from a transitional or new democracy, but they share features that shape constitutional courts in similar ways. Constitutional courts in transitional regimes, for example, have to deal with their authoritarian legacies, while those in hybrid regimes have to manage authoritarian realities.

[58] Daly (n 5) 152.
[59] See Andreas Schedler, 'Taking Uncertainty Seriously: The blurred boundaries of democratic transition and consolidation' (2001) 8 *Democratization* 1.

More importantly, similarly to the Optimistic model, the democratization jurisprudence is interested in the democracy-enhancing prospects of a constitutional court *and* shares similar high hopes in the transformative potential of a court. Marcus Mietzner, for instance, observes, "[t]hat constitutional courts can play a positive role in the stabilization of transitional democracies is not a new theoretical insight".[60] Francesco Biagi's recent study of European constitutional courts finds that in the context of democratic transition and consolidation, "the role played by the constitutional courts is of the utmost importance."[61] László Sólyom makes a similar point, that constitutional courts are "inseparable from democratic changes".[62] Given the similarities in motivations and aspirations, lessons helpful to our current inquiry can probably be drawn from that literature.

a. Democracy by judiciary, and democratic hedging

This part picks out the works of two authors, Kim Lane Scheppele and Samuel Issacharoff, to illustrate the Optimistic model. Scheppele presents a cogent defense for a rather provocative idea, that constitutional courts can sometimes be more democratic than the elected branches in new democracies. Likewise, a core idea found in many of Issacharoff's works is that transitional or young democracies that are under authoritarian threat justifies strong judicial intervention. It should be mentioned, again, that both Scheppele and Issacharoff's works are not focused on hybrid regimes *per se*, even though the political contexts they write on are sometimes substantively similar to hybrid regimes. Going

[60] Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The role of the constitutional court' (2010) 10 *Journal of East Asian Studies* 397, 398.
[61] Francesco Biagi, *Three Generations of European Constitutional Courts in Transition to Democracy* (CUP 2020) 15.
[62] László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy: With special reference to Hungary' (2003) 18 *International Sociology* 133, 135.

through their arguments helps us understand how the Optimistic model can be theorized. The following paragraphs review the two authors' works and pick out insights relevant to a hybrid regime context.

In Scheppele's article titled "Democracy by Judiciary", Scheppele notes that constitutions in many post-authoritarian democracies reflect a substantive vision of democracy.[63] Haunted by their pasts, these third-wave democracies experience "problems with elections" and "problems in communication between elections".[64] Focusing on the experiences of Hungary during the 1990s, Scheppele describes how the representative institutions failed to translate the demands of the people. Electorates were incapable of checking the inadequacies of their representatives due to a poor economic state.[65] In light of the circumstances, it was legitimate, she claims, for the constitutional court to step in. The constitutional court's duty was to reflect the substantive promises of the constitution by performing political representative functions essential to the proper functioning of a democracy. She characterizes the Hungarian Constitutional Court at the time as a highly democratic institution by showing how widely accessible the court was and how it provided a relatively superior avenue for the people to participate in policy-making.[66] The court had famously heard around two thousand petitions a year and struck down one third of all the laws challenged in its first six years, as well as ordered the legislature to pass laws on certain rights through the "unconstitutionality by omissions" doctrine.[67]

Treating this form of governance as an ideal type, she notes,

[63] Kim Lane Scheppele, 'Democracy By Judiciary: Or, why courts can be more democratic than parliaments' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds) *Rethinking The Rule Of Law After Communism* (Central European University Press 2005) 26, 38.
[64] Ibid 31-37.
[65] Ibid 33, 47, 52.
[66] Ibid 41-42.
[67] Ibid 33-34, 42, 44.

> "presidentialism and parliamentarism are not the only forms of democratic system on offer, as the political scientists customarily claim. It is logical to think that the third branch – courts – could also be as dominant in some sorts of democratic governments as presidents and parliaments can be… [W]hether a court is democratic or not is an empirical question, not an a priori claim."[68]

She calls this idea "democracy by judiciary" or "courtocracy", meaning a government with a "judiciary as the branch with the most power and the final word."[69] A court is democratic under her account when its outcomes are actually protecting democratic rights, with democracy substantively defined.

Issacharoff, in a series of works, has similarly advocated for courts playing a strong, democratic role in a range of political contexts. The seed of his arguments can be traced back to a famous article he co-authored with Richard Pildes in 1998. In 'Politics as Markets', the two authors analogized the economic market to the political market to argue that the American courts should adopt a jurisprudential approach that increases the cost of political lock ups in order to destabilize attempts to monopolize the political market.[70] Just as how the American courts at the time were looking at more structural features in deciding anti-trust cases, Issacharoff and Pildes argued that courts should also look at second-order considerations such the organizational form of politics in determining whether political actors were engaging in anti-competitive behavior under electoral law. Some may be reminded of the anti-trust analogy of John Hart Ely's procedural theory of judicial

[68] Ibid 44-45.
[69] Ibid 44.
[70] Samuel Issacharoff and Richard H. Pildes, 'Politics as Markets: Partisan lockups of the democratic process' (1998) *Stanford Law Review* 643.

review.[71] And like Ely, the authors argue that as outsiders, courts are well-positioned to protect the political market. But while Ely focuses on rights protection, Issacharoff and Pildes' attention is more on the political structure.

In the next two or so decades, Issacharoff has developed this insight and applied it to a range of political contexts. For fragile democracies, Issacharoff is concerned with the threat of anti-democratic groups.[72] There is a need to preserve the structure of a democracy from these internal threats while maintaining a healthy level of political pluralism. Inspired by the economic market analogy, he contends that restrictions are necessary to protect the core of a democracy. The restrictions he suggests are supported by comparative experiences and include for instance content-restriction on electoral speech and party bans. Importantly, the interpretation and enforcement of these rules depend on courts. Independent courts are treated as necessary checks against self-serving political actors.[73]

He advocates for a similarly strong constitutional court in a new democracy.[74] Constitutional courts in new democracies, he argues, have the responsibility of guaranteeing the basic requirements of a competitive democracy. He calls this "democratic hedging". "[P]recisely when the political branches are immature and the stabilization of democracy is precarious", Issacharoff suggests, "that courts emerge as central actors in consolidating the constitutional order."[75] This argument resembles Scheppele's, in that the weakness of civil society serves as a justification for a strong court. A constitutional court is an effective and flexible *ex post* remedy under Issacharoff's characterization, as the court can rely on powerful tools such as the basic-structure doctrine to respond to a wide range

[71] See John Hart Ely, *Democracy and Distrust: A theory of judicial review* (HUP 1980) 102-3.
[72] Samuel Issacharoff, 'Fragile Democracies' (2006) 120 *Harvard Law Review* 1405.
[73] Ibid 1467.
[74] Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2010) 99 *Georgetown Law Journal* 961.
[75] Ibid 1003.

of circumstances.[76] The responsibility of the court here is to buy time for the polity to build its democratic culture while in the meantime guarding the democracy against a strong party's effort to centralize powers and undermine accountability.[77]

More recently, he extended his argument to consolidated democracies, exploring the role of courts in democracies that are undergoing democratic backsliding.[78] Consolidated democracies, he warns, "may become fragile under excessive pressure on the structural preconditions for democratic governance, at least at times."[79] There is a democracy-enhancing role for courts to play in consolidated democracies when their integrity and stability are beginning to be threated. Consistent with his arguments before, the role here is a structural one.[80] Courts are capable of playing this role because, as he suggests, their arguments are open to public scrutiny,[81] legal reasoning establishes an "indirect electoral link" to the public,[82] rule-of-law metrics exist to help assess the correctness of their decisions,[83] and they are subjected to some political accountability, notably through the appointment process.[84] Arguing against Jeremy Waldron and Richard Bellamy, Issacharoff contends that their theories are based on idealized assumptions as opposed to the "messy reality of lived experience."[85] Recognizing how the democratic structure and democratic norms are subverted in real-life democracies, oversight must come from institutions external to the political branches, that is the courts.[86]

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[76] Ibid 1002.
[77] Ibid 965, 1001, 1004.
[78] Samuel Issacharoff, 'Judicial Review in Troubled Times: Stabilizing democracy in a second-best world' (2019) 98 *North Carolina Law Review* 1.
[79] Ibid 26.
[80] Ibid 9.
[81] Ibid 42.
[82] Ibid 49.
[83] Ibid 43.
[84] Ibid.
[85] Ibid 6.
[86] Ibid 15.

b. Theoretical insights relevant to the Optimistic Model

Given the extensiveness of Issacharoff's body of work, this chapter cannot do justice to the breadth and complexity of some of the arguments mentioned. Of importance here, though, is the fact that both Scheppele and Issacharoff's cited works share certain themes that are relevant to developing the Optimistic model. These themes, as will be discussed below, allow us to have closer look at the possible justifications of the Optimistic model.

i. Source of authority: constitutionalism

The subtext underlying the Optimistic model is that the court is legitimately exercising its powers against the incumbent. But where does this normative legitimacy come from? Both authors highlight two sources of judicial authority that are relevant to the Optimistic model. The first is constitutionalism. Constitutions should treat people as constitutional equals. This onus does not only fall on the legislature, and other institutions have a role in securing this goal.[87] When the constitution of a hybrid regime fails to treat people equally however, judicial intervention can possibly be justified so long as the constitutional court functions to support political equality. In circumstances where other constitutional mechanisms are lacking or inadequate, a constitutional court has a greater responsibility to hold the regime accountable, as Scheppele argues.

Issacharoff's argument in relation to constitutionalism is more "formalist".[88] Constitutional courts, as Issacharoff writes, are "little detained by concerns over the authority for judicial review or over the countermajoritarian consequences of

[87] N.W. Barber, *The Principles of Constitutionalism* (OUP 2018) 186.
[88] Theunis Roux, 'The South African Constitutional Court's Democratic Rights Jurisprudence' (2013) 5 *Constitutional Court Review* 33, 44.

constitutional challenge."[89] The fact that a court is *expressly* gifted with constitutional jurisdiction under the constitution provides a crucial source of authority for a constitutional court to be politically interventionist under Issacharoff's account. Constitutionalism only justifies the existence of the constitutional powers under Issacharoff's account however, and he seems to be silent as to how constitutionalism actually guides the exercising of judicial power after its creation. Nevertheless, both accounts suggest that constitutionalism, broadly speaking, is one of the key sources of judicial authority in conceptualizing the democratic role of a constitutional court.

ii. Source of authority: democracy

A second complementary source of authority is democracy. This is reflective of the motivation of those who subscribe to the Optimistic model: in courts we trust when the political process fails us. A lack of democracy leads people to project their faith in courts, and that a court is legitimate when it can somehow shore up democratic ideals. There might be a question of where this type of judicial authority comes from. The written constitution, by defining the state as a democracy and detailing the mechanics of the democracy, can be an explicit source. Both Scheppele and Issacharoff, however, seem to assume that democracy is a freestanding higher principle, with Scheppele defining democracy more substantively than Issacharoff. The political culture and socio-economic conditions are included as part of Scheppele's definition of democracy, while Issacharoff's conception is closer to the procedural account proposed in the first chapter. Regardless, their arguments rely on a similar intuition that a lack of democracy – that is when the actual state of affairs falls short of the standards prescribed by the definition of democracy adopted – defines

[89] Issacharoff (n 74) 964.

the legitimacy basis of a constitutional court. Whether a constitutional court is legitimate depends on the extent to which its actual performance helps promote democratic ideals.[90]

iii. Countering the countermajoritarian difficulty

The Optimistic model challenges the age-old countermajoritarian difficulty. The countermajoritarian difficulty posits that judicial review, or judicial intervention in politics more broadly, is undemocratic. Unelected judges, lacking democratic mandate, have no authority to veto the outcomes of the democratic process. The Optimistic model is unbothered by the countermajoritarian difficulty. For one, many courts outside democracies seem to enjoy popular support when it overrules the political process. And more importantly, the reason why judicial intervention seems legitimate is because the political process of a hybrid regime is not democratic. This is a point raised by Scheppele and Issacharoff. They rightly notice something strange about applying the countermajoritarian difficulty to non-democratic contexts or democracies that are not fully mature. The lack of democratic credentials of the political branches raises questions about whether people's interests are properly represented in a hybrid regime. Not only is the gap in democratic credentials between the political branches and a constitutional court significantly narrowed, but also there are reasons to be concerned about pathologies associated with a lack of democracy, such as corruption and human rights violations. A change in regime-type forces us to re-evaluate the normative reasons for and against judicial review in non-democratic regimes, especially when judicial review is targeting the causes and consequences of authoritarianism.

[90] For example, Issacharoff notes, "the legitimacy of these courts subsequent to the founding may turn on the degree that they reinforce the "democratic hedge" that accompanied the founding." Ibid 986. And as quoted above, Scheppele's view is that whether a court is democracy enhancing is an empirical matter.

iv. Political skepticism

A sense of skepticism towards political representatives in hybrid regimes also pervades the Optimistic model. This sort of skepticism is not unique to hybrid regimes. Both authors point to how messy real-life politics actually is. Even consolidated democracies such as the United States and the United Kingdom, according to Issacharoff, fall short of the idealized conditions in political theory.[91] The Optimistic model has an intuitive appeal to those who share this skepticism towards political representatives. Distrust in the political branches motivates arguments for judicial intervention.[92] As Issacharoff's argues, "[i]n the manner that foxes should not be posted at the henhouse door, so it is that deference to the legislative process cannot serve as the answer to systematic assaults on the process of electoral accountability."[93] To what extent a court can fill the shoes or compensate for the errors of the political branch is open to discussion, but this skepticism is certainly one that has its audience in a hybrid regime, where the political process there is only pretending to be democratic.

v. Democratic functions

The Optimistic model, most importantly, is about a democracy-building court. The authors highlight two general ways for a court to be democracy-building. Scheppele's account is

[91] Issacharoff (n 78). Ely also famously remarked that "[o]bviously our elected representatives are the last persons we should trust with identification of [political failures]." Ely (n 71) 103.
[92] When arguing for a transformative judicial role, Rui Teitel similarly points to how political actors in transitional regimes tend to lack the experience, legitimacy and competence to lead the process. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation* (1997) 106 *Yale Law Journal* 2009, 2033.
[93] Issacharoff (n 78) 16.

more intuitive and focuses on individual rights. A constitutional court is often said to be a guarantor of rights, and Scheppele's account is a variation of this standard account. In addition to enforcing the rights within the constitution, a constitutional court can safeguard democratic rights by becoming a channel for the people to participate in policy-making. Issacharoff's account, in contrast, is structural. A court's role, under his account, is to preserve the "structural preconditions" of a democracy.[94] His idea draws inspiration from his anti-trust analogy, and perhaps from the comparative experiences on the basic structure doctrine that he cites. A structural role must rely on a particular conception of democracy in order to make clear what the structural preconditions of democracy are. Issacharoff adopts a procedural conception of democracy, with the goal of democracy being the preservation of pluralistic competition. According to him, a court is not simply tasked to vindicate the infringement of a constitutional right, but to also mitigate structural deficiencies of a polity and ensure a healthy degree of political competition.

c. Overoptimism and its dangers

The works of both authors are valuable contributions. Their arguments help illustrate the potential democratic roles that courts can play in hybrid regimes. Their ideas have intuitive appeal to those living in hybrid regimes and desperate for democratic change. The five themes summarized suggest ways in which the Optimistic model can be justified. They raise important normative questions about the legitimacy and function of a constitutional court in a hybrid regime. These questions will be taken up in the next chapters.

The goal of the rest of this part is to explain why the Optimistic model is overly confident about what a constitutional court can achieve in a hybrid regime. The Optimistic

[94] Ibid 26.

model reflects what courts are hoped to do in a hybrid regime. Implicit in the model is a constitutional court that is almost as powerful as the incumbent, capable of standing against authoritarian encroachment. This is not an empirically plausible assumption though, as we saw from the Pessimistic model. Courts in hybrid regimes may not be as weak as the Pessimistic model suggests, but they are certainly not strong enough to live up to many aspirations of the Optimistic model. Below are four reasons why the Optimistic model described above is unworkable or even counterproductive in a hybrid regime. They are not intended as critiques of Scheppele and Issacharoff's works, but are instead focused on a hybrid regime context.

The first objection is that by inflating the potential of a constitutional court, the model may risk overlooking the pragmatic challenges faced by a constitutional court in a hybrid regime. On a moral level, a hybrid regime constitutional court may be justified to act in ways that are more progressive than what conventional theories suggest. On a pragmatic level, pushing a constitutional court too far leads to "risks that run beyond ineffectiveness and even backlash."[95] Not only will its decisions be ignored or reversed, but also that its confrontational attitude may lead to political responses that undermine the institutional integrity of a constitutional court. In Scheppele's article for instance, she concludes by noting how the Hungarian court's earlier efforts led to its ultimate downfall. In 1998, in retaliation for the court's assertiveness, the newly elected government replaced the bench with its allies.[96] As valiant as the court was, its overinflated self-perception had undone its past institutional-building progress. This kind of political risk is even more commonplace in authoritarian regimes. Judicial powers were similarly stripped away in Ukraine, Russia, Egypt and Turkey as a result of political fallouts and prior

[95] David Landau, 'Samuel Issacharoff. Fragile Democracies: Contested Power in the Era of Constitutional Courts. Cambridge University Press, 2015' (2015) 13 *International Journal of Constitutional Law* 1082, 1084.
[96] Scheppele (n 63) 53-54.

confrontations.[97] The harsh institutional terrain of a hybrid regime warrants judicial sensitivity and possibly compromises. To temper ideals, a workable constitutional theory that is applicable to a hybrid regime must include a dose of pragmatism in order to ensure its effectiveness and durability.

Second, the Optimistic model dangerously borders on the idea of courts as a "surrogate" of elected institutions.[98] A court that supports democratic values is not the same as a court that replaces the democratic process, even though the differences between two may sound trivial at first. Regardless of how judicial decisions can sometimes be consistent with liberal-democratic standards, a democracy run by a judiciary is oxymoronic as courts are not constructed as elected institutions. We might call a dictator benevolent if his or her decisions are rights-protective, but a dictatorial state is hardly democratic as the decision-making procedure disenfranchises the people. Similarly, a hybrid regime that is led by a court is still non-democratic, however reflective of public opinion its decisions are. Democracy is not only about outcomes, and those who are attracted by the Optimistic model should be careful of not pushing the idea too far. The goal is not to replace a hybrid regime with a rights-conscious court. To avoid developing another form of guardianship, we should instead investigate the ways in which a constitutional court can improve the democratic process of a hybrid regime.

Third, while the Optimistic model rightly identifies some of the ways in which a constitutional court can support democracy, it tends to be silent about the side-effects associated with stretching the constitutional role of a constitutional court. Courts can perform many functions but are not necessarily good at some of them. This potentially weakens the arguments in support of the Optimistic model. The Hungarian court, under

[97] Adam Chilton and Mila Versteeg, 'Courts' Limited Ability to Protect Constitutional Rights' (2018) 85 *The University of Chicago Law Review* 293, 294-5.
[98] Daly (n 5) 261.

Scheppele's characterization, had intervened in a number of social policies relating to the *Bokros* package. Due to time constraints, the court bypassed consultations with experts and reviewed "as much of the law as they could."[99] Her example certainly shows that the court can perform some political representative functions (by allowing civil society to represent their interests through the legal process and checking the quality of the laws). The point about the court's expediency can be elf-defeating though, as it suggests that the judges had probably decided consequential policies based on highly questionable empirical assumptions. Institutional concerns are by no means fatal to the search of a democracy-enhancing role, but a theory that demands venturing out of the traditional constitutional boundaries of a constitutional court needs to be honest about some of its possible limitations and be shown why this expansion is justifiable despite some of the new problems it might create.

Finally, the Optimistic model depends on an idealized vision of judges. Judges under this model are uncorrupted and principled outsiders who have a strong sense of moral responsibility. Many judges in a hybrid regime fall short of this vision, however. The influence of authoritarian politics on the judiciary suggests that there will be judges who are afraid to assert themselves against the incumbent, or indifferent or even repugnant to the democratic cause. That is, of course, not to say that all hybrid regime judges behave like those portrayed by the Pessimistic model. The relationship between the regime and the court is never straightforward, and judges are complicated figures. Issacharoff reminds us that even authoritarian regimes need good judges with proper legal training to administer justice in the normative half of the dual state.[100] Bound by their oath to the constitution and the higher principle of justice, these judges may turn out to be willing to

[99] Scheppele (n 63) 48.
[100] Samuel Issacharoff, *Fragile Democracies: Contested power in the era of constitutional courts* (CUP 2015) 138-139.

defy the regime out of moral conscience, self-respect, or simply because they care about their reputation. Examples from places like Hong Kong, Pakistan and Uganda support this possibility in hybrid regimes. In the meantime, we must also recognize that even democratically committed judges may be complicated by other incentives that are legitimately at play such as personal safety and career security. Accordingly, a workable theory here should be sensitive to the human side of judges and the personal or moral struggles they might face as well.

4. Conclusion: The Realistic Model

This chapter concludes by presenting a more attractive view of constitutional courts called the Realistic model. The Realistic model takes and combines what we have learnt from the two models above. This model is realistic not necessarily because it is a more accurate representation of how constitutional courts in hybrid regimes actually behave. It is, instead, realistic about what constitutional courts could achieve in a hybrid regime.

Like the Pessimistic model, the Realistic model acknowledges that judicial autonomy in a hybrid regime is limited by authoritarian politics. Those attached to the Optimistic model are bound to be disappointed as the sort of judicially-led transformative changes promised by that model is improbable. However, the Realistic model diverges from the deterministic shade casted by the Pessimistic model, as the Realistic model holds that a constitutional court can possibly expand beyond a marginalized position. Towards the end of Part 2, I have outlined three political determinants of judicial autonomy that can be found in most hybrid regimes, including its semi-competitive elections, its fragmented political system and its claim to be a democracy. That discussion shows how the Pessimistic model tends to overstate the limits of a constitutional court. Most importantly,

it reinforces the Realistic model's view that meaningful levels of judicial autonomy can exist in a hybrid regime.

The Optimistic model may be too optimistic about what courts can do, but the Realistic model shares the same democratic motivations as the Optimistic model. The fact that the scope of action of a constitutional court is wider than what might be expected under the Pessimistic model opens the space for us to consider a democracy-enhancing role in a hybrid regime. The possible justifications of a democracy-enhancing role have been briefly introduced in our discussion on the Optimistic model. The political challenges arising from a hybrid regime complicate this debate by forcing us to take the authoritarian realities seriously when theorizing about the normative role of a constitutional court. Nevertheless, through the Optimistic model, we can start to imagine ways in which a constitutional court can enhance democracy. What exactly does a democracy-enhancing role entail will be the subject of the coming chapters, and the themes highlighted in Part 3 – in relation to judicial legitimacy, the countermajoritarian difficulty, and institutional limitations – serve as a rough theoretical framework for us to build on.

Finally, the Realistic model rests on a perspective that views the relationship between a constitutional court and regime politics as a dialectical and ongoing process.[101] This contrasts with the unidirectional approaches underlying the Pessimistic model (whereby regime politics is conceived as a one-way, independent causal factor of judicial behavioral variations) and the Optimistic model (whereby the focus is mainly on how a constitutional court can impact constitutional politics). While this aspect of the Realistic model may seem like a subtle difference, its actual implications are far from insignificant

[101] See Michael McCann, 'Causal Versus Constitutive Explanations (or, On the Difficulty of Being so Positive…)' (1996) 21 *Law & Social Inquiry* 457.

as it goes to a more fundamental level about how judicial politics in a hybrid regime should be understood.

Under the Realistic model, the court and the regime are interdependent. A constitutional court relies on a hybrid regime for resources and implementation, but a hybrid regime also needs a constitutional court for political legitimacy and other instrumental gains. While the interdependence is not necessarily symmetrical – with the power balance tilting towards the regime more, the constitutional court is in a unique position within this interdependence to change the power balance and the constitution of a hybrid regime. As a result, neither the court nor the regime has sole control over the development of constitutional politics. Repeated interactions between the constitutional court and other political actors determine constitutional changes. This dialectical perspective better accounts for the complex and dynamic developments of authoritarian judicial politics. It also underscores the fact that a court is simultaneously constrained by *and* constitutive of constitutional politics: a constitutional court internalizes some of the norms and expectations posed by the hybrid regime, but, most importantly, the hybrid regime is also shaped by the decisions of the constitutional court. This dialectical perspective of the Realistic model, once again, explains why it might be realistic for a constitutional court to play a democracy-enhancing role in a hybrid regime.

CHAPTER FOUR

FIVE DEMOCRATIC ROLES

1. Introduction

The previous chapter concluded with a realistic account of a hybrid regime constitutional court. A hybrid regime poses constraints on a constitutional court, but a constitutional court also enjoys a reasonable amount of space to shape the political environment. The regime and the constitutional court are mutually dependent, and their relationship is a dynamic and interactive one. Given a moderate level of judicial autonomy exists in a hybrid regime, it is plausible for a constitutional court to play a democratic role in a hybrid regime, however modest that role may be.

This chapter furthers the line of inquiry by presenting a way to look at constitutional courts in hybrid regimes that reveals their democracy-enhancing potential. Courts, it will be argued, should play a role in protecting and promoting democratic values in a hybrid regime, and how that can and should be done will be illustrated. Some of the arguments here stretch beyond democracy and address pathologies associated with a lack of democracy such as poor governance and corruption as well.

Part 2 opens the discussion with the familiar counter-majoritarian difficulty. The debate centers around the question of whether judicial review can be justified under democratic theory given the lack of democratic credentials of a constitutional court. The counter-majoritarian difficulty is chosen as the opener as the debate brings out the questions that need to be thought through when a democratic role is claimed for a court. Part 2 argues that the counter-majoritarian concerns are severely blunted in a hybrid regime because the democratic conditions necessary for the counter-majoritarian difficulty

to hold are lacking or weakened. The different ways in which those democratic objections are undermined by a hybrid regime will be illustrated.

The fact that the counter-majoritarian objections are of significantly reduced relevance to a hybrid regime does not automatically entail that a constitutional court has the moral authority to take on a democratic role in a hybrid regime. It does however give us greater room to consider how a constitutional court can be supportive of democratic ideals in a hybrid regime. Five different democracy-enhancing roles of a constitutional court will be proposed, alongside the tools that would help facilitate the realization of these roles. Each role contributes to democracy in different ways and relies on a particular aspect of a constitutional court. The five democratic roles include: (1) the referee role, (2) the interpretative role, (3) the participatory role, (4) the quasi-representative role, and (5) the educative role. They will be examined in part 3.

It should be emphasized that the democracy-enhancing roles proposed are not necessarily unique to a hybrid regime. As pointed out in the first chapter, some degree of fluidity exists among regime types. Democracies may typically call for judicial restraint, but there can be bad days in democracies where political failures similar to those we encounter in hybrid regimes may necessitate creativity on the part of the judges or a greater degree of judicial intervention.[1] Similarly, while it would normally be unwise, or even impossible, for constitutional courts to challenge pure authoritarian regimes, there may once in a while be good days where a window of opportunity is presented for courts to develop judicial power and press on against the authoritarian. The democratic roles presented in this chapter may be of particular relevance in the good and bad days of pure

[1] For how courts can sometimes counter political malfunctions in a democracy, see e.g., Rosalind Dixon, 'The Core Case for Weak-Form Judicial Review' (2016) 38 *Cardozo Law Review* 2193.

authoritarian regimes and democracies respectively. This is not necessarily a weakness, as it would only extend the applicability of the judicial roles.

Crucially though, the roles suggested are tailormade for constitutional courts in hybrid regimes. Each role seeks to address the democratic deficit of and recurring political problems in hybrid regimes. While the democratic roles and the accompanied tools may guide and assist courts outside hybrid regimes, they are intended for constitutional courts in hybrid regimes because of the types of challenges they come across. Furthermore, these roles and tools are best fit for constitutional courts in hybrid regimes because of what these courts can realistically achieve. Demanding courts to replace the political branches in authoritarian contexts is, for instance, not only impractical, but also imprudent because of the near certainty of political backlash. For similar reasons, the very fashionable basic structure doctrine or unconstitutional constitutional amendment doctrine is not included because the required level of judicial power and autonomy to meaningfully apply the doctrine is missing in most instances.[2] On the other hand, these roles are oftentimes only wishful in pure authoritarian contexts due to the limited space for judicial maneuvering. In short, the democratic roles are framed for a hybrid regime and are sensitive to the potential and limitations of constitutional courts in hybrid regimes.

[2] There are instances where hybrid regime courts have applied these doctrines, but the conditions for *meaningful* deployment of them are oftentimes missing. For example, in 2018 the Constitutional Court in Uganda ruled unconstitutional a constitutional amendment that sought to extend the term of parliamentary office. The same case however upheld the amendment to remove the age limit for presidential candidates, effectively allowing Museveni to run for another term. While the court had adopted the basic structure doctrine in the case, the decision was widely criticized as wrongly applying the doctrine. The Supreme Court upheld the lower court's decision. This case needs to be read in the context of Museveni's hawkish attitude towards the Ugandan judiciary. For the Constitutional Court's decision, see: *Male Mabirizi & Ors v Attorney General* [2018] UGCC 4 (26 July 2018). See also: Karoli Ssemogerere, 'Uganda's age limit petition: Constitutional Court demurs on substance, cautious on procedure' *Constitution Net* (14 August 2018) available at <https://constitutionnet.org/news/ugandas-age-limit-petition-constitutional-court-demurs-substance-cautious-procedure> (last visited 5 November 2021); 'Museveni attacks judges over age limit petition ruling' *The Observer* (30 July 2018) <https://observer.ug/news/headlines/58314-museveni-attacks-judges-over-age-limit-petition-ruling.html> (last visited 5 November 2021).

Towards the end of the chapter, part 4 will address how competency concerns impact the democratic roles proposed. The roles are democratically legitimate not because constitutional courts are electorally representative, but because they show how courts can and should support and forward democracy. There are, nevertheless, two limiting principles that need to be addressed: institutional competence and judicial power. These factors respectively impose normative and prudential limitations on the democratic roles. The topic of judicial power will be the subject of the coming chapters, and part 4 here confronts the prior issue. While questions of competency should not be taken lightly, they are not absolute arguments and must be assessed in a comparative institutional manner. It will be argued that these roles are justifiable because there is a lack of better alternatives in a hybrid regime. Courts are second-best solutions here: they may not normally be the best institution in tackling these political failures, but the inadequacies of the political process in a hybrid regime offer reasons for a constitutional court to take up a larger responsibility. Limited departure from the normative boundaries posed by competency concerns is, as a result, justifiable.

2. The (Ir)relevance of Democratic Objections

Coined by Alexander Bickel, the famous counter-majoritarian difficulty describes the normative legitimacy challenges encountered by an unelected institution that exercises political power in a democratic society.[3] Critics of judicial review argue that the delegation of (quasi) law-making power to the court is in tension with popular self-government. To allow democratically made laws to be reversed by those who are not electorally

[3] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the bar of politics* (YUP 1986).

accountable is counter-majoritarian, they say. At its core, the counter-majoritarian difficulty is based on the idea of political equality. The authority to resolve political disputes should be left to the people and its elected representatives, as opposed to unelected judges.

Democratic objections against judicial review can be supported by different conceptions of democracy and are not necessarily limited to a majoritarian conception. Hence, the term counter-majoritarian difficulty can mislead. I shall refer to democracy-based arguments against judicial review here as democratic objections.

There are broadly three types of democratic objections: the intrinsic objection, the instrumental objection, and the cultural objection. They will be presented relatively briefly as they are well-known and widely discussed elsewhere. Discussions in this part will condition how a court in a hybrid regime should approach its democratic role and, more broadly shape and inform the second half of the chapter.

a. Intrinsic objection

The intrinsic objection contends that judicial review violates the right to equal political participation. As noted in the first chapter, reasonable disagreement about morality and the meaning of rights is a hallmark of any society. Democracy is arguably the best way to resolve disagreements and reach collective decisions in society while preserving the value of political equality. Democracy ensures people's equal political input through equal and universal suffrage, and facilitates an equal treatment of such input through its deliberative process. The political process of a democracy enjoys superior law-making authority as it confers roughly an equal right to the people to decide on law and policy matters. Judicial review gives the constitutional court a power similar to that wielded by the political

branches. Constitutional courts establish new social or political norms by, for instance, disapplying statutes or giving a new meaning to a constitutional provision. Judges are unelected however and does not enjoy the formal democratic mandate of the people. Hence, critics contend that judicial review undermines democracy by displacing the decision-making authority of the people. The decision-making process of judicial review disenfranchises the democratic will[4] or, as argued more radically by Richard Bellamy, is a form of political domination or arbitrary power.[5]

b. Instrumental objection

Critics also argue that judicial review is undemocratic because it generates bad political outcomes. Political outcomes can be democratically bad here in two senses. The first is that judicial decisions do not represent the political will of the people. As opposed to the intrinsic argument suggested which is right-based, the current argument is focused more on the nature of the outcomes produced by courts. The standard story suggests that the political branches are designed in ways to decide and vote according to the preferences of the people. Facing the prospect of electoral defeat, politicians are incentivized to track the views of their constituencies. Politicians also are in close proximity to their constituents and have the tools to learn their likes and needs. In contrast, some argue that unelected judges sitting in their chambers are insulated from popular pressure and cannot properly ascertain the views of society. Judges are limited by the law and to the evidence and

[4] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2005) 115 *The Yale Law Journal* 1346.
[5] Richard Bellamy, *Political Constitutionalism: A republican defence of the constitutionality of democracy* (CUP 2007).

arguments put forward by the litigants. Their decisions, as result of their inability to gauge public opinion, counter the democratic will.[6]

An objection similar in spirit is that judges lack the capacity in making political decisions correctly. The political branches are set up in ways to ensure better expertise and information-gathering power in policy-making.[7] For instance, legislatures are much larger in size than courts so that they can accommodate a broader range of views during law-making; experts can assist the democratic process to compensate the knowledge gap on more technical issues; and the political branches in general are equipped with more flexible solutions to address complex or polycentric problems. The branches are created for different purposes, and John Finnis calls this the "asymmetry of aims".[8] Demanding the judicial branch to take on a political role would as a result lead to "serious long-term bad consequences".[9] While a court lacks the institutional strengths of the political branches, some might argue in response that judges are at least better at getting the correct meaning of rights.[10] Judges may be poor policy-makers, but constitutional judges are not asked to make policies; instead, they decide whether the law or policy in dispute violates a constitutional right. Judges are legally trained and apply the relevant interpretative techniques to decide on the meaning of the constitution. In reply, critics maintain that questions of rights involve or are no different than questions of morality. Given how we disagree on politics, courts do not have privileged access to the truth on questions of rights. There are, then, not only no reason to believe that courts will get rights questions correct,

[6] See Or Bassok, 'The Two Countermajoritarian Difficulties' (2011) 31 *Saint Louis University Public Law Review* 333, 340-1.
[7] See Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and empirical reasoning in judicial review* (Bloomsbury Publishing 2018).
[8] John Finnis, 'Judicial Power: Past, present and future' (2015) Judicial Power Project, 10 < http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf> (last visited 5 November 2021).
[9] Ibid 11.
[10] Ronald Dworkin, *Law's Empire* (HUP 1986).

but also good reasons to suspect that they may get them wrong because of their institutional deficiencies.

c. Cultural objection

Critics are also worried about the negative impact judicial review might have on the political culture of a democracy. These social effects are more subtle and indirect. A healthy democracy relies on a robust political culture where, among others, the citizenry is politically engaged, tolerant of reasonable disagreements, willing to speak to reason and respectful of constitutional norms. Court skeptics argue that the existence of an active constitutional court, or what Mark Tushnet terms as the problem of "judicial overhang",[11] will gradually subvert the political foundations of a democracy in several ways.

First, it may "promotes legislative disregard of the constitution",[12] or what Wojciech Sadurski identifies as "legislative apathy".[13] Political representatives, officials and the people may feel alienated to the constitution when a constitutional court always has the final word. This resulting lack of motivation and responsibility distances the political actors from the constitution.

Second, the expansion of the judicial realm takes the constitution away from the people and their elected representatives. Political constitutionalists argue that the meaning of the constitution should be the product of an ongoing political deliberation.[14] This form of constitutionalism is inherently democratic and guarantees equality, openness and inclusiveness in constitution making. Political constitutionalists believe that judicial

[11] Mark Tushnet, *Weak Courts, Strong Rights: Judicial review and social welfare rights in comparative constitutional law* (Princeton University Press 2009) 98.
[12] Ibid.
[13] Wojciech Sadurski, 'Judicial Review and he Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275, 286.
[14] Bellamy (n 5).

dominance over the constitution would remove meaningful constitutional participatory experiences from the people. Judicial review, it is argued, is undemocratic as it stifles popular political participation and public deliberation.[15] This goes against the aim of building a "democratic public culture".[16]

Third and relatedly, some suggest that a constitutional court may promote "pure interest-based politics",[17] as opposed to a more value-based or deliberative form of politics. Lacking a sense of responsibility and connection to the constitution, political actors might view constitutional rules being thrusted upon by an elitist constitutional court, and hence perceive the constitution as mere rules of a political game. To these political actors, the imposed rules derive legal authority simply because they happen to be the law decided by the court. The constitution becomes devoid of moral substance as a result. For instance, Tushnet argues that strong-form judicial review will encourage mere position-taking by politicians. That is, lawmakers can "get political mileage out of taking a position on this question, without worrying that anything actually will happen, because the courts will find the statute unconstitutional anyway."[18] In the long-run, the existence of a constitutional court, one might argue, might lead to an unattractive, Schumpeter-like form of politics that is characterized only by self-interest and competition.

d. Democratic objections in a hybrid regime?

[15] See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP, 2004); Tushnet (n 11). For a critique of the idea of popular constitutionalism, see Robert Post and Reva Siegel, 'Popular Constitutionalism, Departmentalism, and Judicial Supremacy' (2004) 92 *California Law Review* 1027.
[16] Bellamy (n 5) 7.
[17] Ibid 44.
[18] Tushnet (n 11) 82.

Those defending judicial review have advanced a number of rebuttals.[19] A common counterargument is to justify judicial review by reconceptualizing democracy. Democracy, some say, cannot be only about majoritarianism (or majority preferences) given the dangers of the tyranny of the majority. Liberalism is built into the definition of democracy under this approach. Judicial review reinforces democracy by protecting minority rights and reducing majoritarian biases.[20] Some rely on empirical evidence to show that the counter-majoritarian difficulty is, in reality, exaggerated.[21] These arguments are descriptive and point out how judicial outcomes in some jurisdictions actually follow public opinion despite the courts' alleged limitations. Others have considered how weaker or dialogic forms of judicial review can soften the tension between democracy and constitutionalism by preserving the gains of a constitutional court while retaining the people's final decision-making authority.[22] Lowering the constitutional amendment requirements is an institutional response of similar effect. There are also those who insist that the democratic objections should not be framed in universal terms and that questions of normative judicial legitimacy are in fact highly contingent on local contextual factors. As Tom Daly remarks, "though often couched in universal language, [the counter-majoritarian difficulty] tends to speak in many ways to the very particular development of strong judicial review in the United States as a polity".[23] With express grants of judicial review powers and shorter judicial tenure in many parts of the world outside the States, the legitimacy of many constitutional courts tends to be less contested as the American-centric debate portrays.

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[19] For a comprehensive discussion of how the debate is framed in different ways, see, Nimer Sultany, 'State of Progressive Constitutional Theory: The paradox of constitutional democracy and the project of political justification' (2012) 47 *Harvard Civil Rights-Civil Liberties Law Review* 371.
[20] See e.g., Dworkin (n 10).
[21] See e.g., Barry Friedman, *The Will of the People: How public opinion has influenced the Supreme Court and shaped the meaning of the Constitution* (Farrar, Straus and Giroux 2009).
[22] See e.g., Dixon (n 1).
[23] Tom G. Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (CUP, 2017) 250.

This chapter takes no strong view on the points raised and they have been thoroughly debated by others for decades. Instead, my hope here is to test the strength of the democratic objections in a hybrid regime context. We saw briefly in the previous chapter as to how it seems intuitively strange to apply the democratic objections to polities other than well-functioning democracies. Intriguingly however, to the best of the author's knowledge, the relevance of these democratic objections outside democracies have been examined episodically only.[24] Perhaps this is because it is assumed that these objections simply do not apply. Or, perhaps because courts are thought to be weak and irrelevant in authoritarian regimes and there is no point in considering those courts' moral responsibility. Given the growing number of authoritarian regimes in the world and the varying patterns of judicial behavior among them, this is a question that deserves more attention.

The aim here is to take a careful look at how a change in political context affects the democratic objections that many take for granted in a democracy. The democratic objections, it will be shown, do not apply with full force or are of limited relevance to a hybrid regime. Some of the objections may not even be valid in a democracy. I shall start with a general argument, and then confront the three types of democratic objections introduced above individually.

Beginning with a more obvious point: the democratic objections are framed explicitly or implicitly for polities with well-functioning democratic institutions. The democratic objections presuppose a certain kind of political environment, one that is per

[24] Jeremy Waldron, it will be discussed, is open to the possibility that a case for strong judicial review can be made outside well-functioning democracies. There are others who raised suspicion in passing remarks about the applicability of the counter-majoritarian debate, or asserted that it is inapplicable, outside democracies. See e.g., Armen Mazmanyan, 'Judicialization of Politics: The post-Soviet way' (2015) 13 *International Journal of Constitutional Law* 200; Kim Lane Scheppele, 'Democracy by Judiciary: Or, why courts can be more democratic than parliaments' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds) *Rethinking The Rule Of Law After Communism* (Central European University Press 2005); Paul Gewirtz, 'Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics' (2001) 31 *Hong Kong Law Journal* 217.

definition improbable in a hybrid regime. Judicial review is illegitimate when it is juxtaposed with a democratic process that is in "good working order",[25] or "maturely self-determined polities with a discursively deliberative legislature".[26] Democratic institutions in a hybrid regime fail to meet these criteria.

Stepping back for a moment, even those studying constitutionalism in democracies have questioned whether real-life democracies in fact satisfy these criteria. For instance, poor economic conditions have undermined people's political rights and ability to access quality information; interest groups who are better organized have exercised disproportionate political power in important policy areas; and all sorts of political horse trading have led to inefficiency that impairs the government's ability to deliver public goods. Even with equal and universal suffrage, real-life democracies are still a long way from the ideal of political equality as assumed by theorists arguing against judicial review.

The reason for this gap is in part due to human nature and the messiness of reality, and in part because political equality is only an ideal. Questioning how the counter-majoritarian debate is commonly framed in the literature, Jerry Mashaw rightly observes that,

> "[i]f the suggestion is that courts reviewing statues confront the true will of the people, then the image is surely false. Not only do we not have popular democracy in the sense that this vision of the 'countermajoritarian difficulty' suggests, we could not have it."[27]

[25] Waldron (n 4) 1362.
[26] Finnis (n 8) 20.
[27] Jerry Mashaw, *Greed, Chaos, and Governance: Using public choice to improve public law* (YUP, 2008) 202.

One of the lessons offered by public choice theory, as Mashaw and other economists have demonstrated, is that democracy is an ideal but cannot be fully attained in reality. There is no such thing as the general will of the people, and the preferences of the people can never be accurately aggregated. Any method in reaching collective decisions must suffer from limitations such as cyclic preferences and some level of arbitrariness of the agenda setter. There is no real-life system that can give equal political weight perfectly. A lot of the democratic objections are, as a result, misguided as they are juxtaposing a rosy picture of democracy with a real-life version of a constitutional court.

For the sake of theory building, some critics would understandably relax the standard. Jeremy Waldron notes that the democratic condition does not "demand perfection" and only asks for "electoral and legislative arrangements [to be] in reasonably good shape".[28] Even with less stringent democratic conditions however, a hybrid regime – with its blatant and intentional violation of political equality – still clearly misses the target. Indeed, Waldron expressly leaves open the possibility that the "costs of obfuscation and disenfranchisement [relating to judicial review] are worth bearing for the time being" under circumstances outside the conditions he specified.[29]

The "core" debate about the legitimacy of judicial review and constitutional courts may be limited to a democracy, but the terms of the debate can provide us with a basic framework to approach our question of interest. I have yet to show how a constitutional court can be democratic, but understanding the problems of applying the different democratic objections to a hybrid regime would illuminate our discussion later.

Consider the intrinsic objection, which proceeds on the premise that the political process confers an equal political right. Under this argument, the political process'

[28] Waldron (n 4) 1402.
[29] Ibid 1401, 1406.

normative superiority is derived from how it is structured in an open and inclusive way. The political process in a hybrid regime is defined by its uneven playing field and a lack of electoral competitiveness, as we saw in the second chapter. The system is designed to disenfranchise dissidents and the opposition, while giving disproportionate powers to the incumbent and its allies. One's ability to participate and contest in hybrid regime politics depends largely on one's political status. People have unequal access to political channels, and social groups that are targeted by the incumbent are systemically excluded from the political process. The political process of a hybrid regime is itself a form of domination and arbitrary rule. The normative superiority of the political process as assumed in the procedural-based objection is missing in a hybrid regime context.

Two instrumental objections were raised: one based on the representativeness of a judicial decision and another based on institutional competence. The first kind of argument is an inherently dangerous one, as it assumes that the only point of the government is to mirror the views of the people. It takes a narrow understanding of democratic representation and applies it as the only yardstick across all governmental institutions including the court. Democratic representation is one of the tenets of democracy, but is not the only value of a democracy. There should be a strong presumption for political equality, but departures are sometimes justifiable for the pursuit of other goals. For example, central banks and courts are both unelected and not intended to "represent" like legislatures, but they provide expert services that improve policy-making (for the case of central banks) and ensure fairness in adjudication (for the case of courts).[30]

Notwithstanding the questionable intrinsic validity of the representation-based instrumental objection, there is also the question of whether a constitutional court is really anti-democratic when it is overruling unrepresentative or even anti-democratic outcomes.

[30] See Paul Tucker, *Unelected Power* (Princeton University Press, 2019).

Political representatives in hybrid regimes are not democratically elected and many of them lack the formal authority to represent the people.[31] They might not be viewed as legitimate representatives given how the rules are bent towards the incumbent.[32] The incumbent may even seek to distort and suppress the views of certain constituencies. Information channels are blocked to bury dissenting voices. The views of certain social groups may never make it into the political process. Meanwhile, those cozy to the regime are given disproportionate weight. The representation-based instrumental objection is premised on the idea that the political branches are necessarily better at political representation than a constitutional court. The analysis here suggests that this may not always be the case in a hybrid regime. In fact, the political branches in hybrid regimes may deliberately skew political representation in order to entrench the incumbent's power.

As for the competency-based instrumental objection, political branches in non-democratic regimes are not necessarily less capable than those in a democracy. In fact, it might be argued that some authoritarian regimes seem great at delivering basic goods, as the upside of a lack of democratic oversight can be an increase in efficiency. As a result, this democratic objection can hold true even for a hybrid regime.

However, a hybrid regime is prone to certain kinds of political failures because of how the regime is structured. There is plenty of evidence in the political science literature showing that democratic deficit and one-party dominance impact or are associated with economic performance[33] and quality of governance.[34] A lack of democracy can lead to an

[31] See Hanna Pitkin, *The Concept of Representation* (University of California Press 1967) Chapter 3 on "formal representation".
[32] See Andrew Rehfeld, 'Towards a General Theory of Political Representation' (2006) 68 *The Journal of Politics* 1 for a perception based concept of representation.
[33] See Siddharth Chandra and Nita Rudra, 'Reassessing the Links Between Regime Type and Economic Performance: Why some authoritarian regimes show stable growth and others do not' (2015) 45 *British Journal of Political Science* 253; Gabriella R. Montinola and Robert W. Jackman, 'Sources of Corruption: A cross-country study' (2002) 32 *British Journal of Political Science* 147; John F. Helliwell, 'Empirical Linkages between Democracy and Economic Growth' (1994) 24 *British Journal of Political Science* 225.
[34] See Christopher Clague et. al, 'Property and Contract Rights in Autocracies and Democracies' (1996) 1 *Journal of Economic Growth* 243; John D. Griffin, 'Electoral Competition and Democratic

array of problems including weaker government accountability, state capture, endemic corruption, less transparent decision-making, and arbitrariness. Hence, while the political branches in a hybrid regime are not necessarily less competent than those in a democracy, there is a much higher tendency for those in a hybrid regime to deviate from their intended functions. Democracy has no direct relation to this, but a lack of democratic accountability may induce corruption and poor governance, thereby impairing the competency of the political branches. These are reasons to suggest that the competency-based instrumental objection does not always hold in a hybrid regime. The question of institutional competence will be further discussed near the end of the chapter.

There were also three kinds of cultural objections relating to how a constitutional court might subvert democratic culture. When exported to a hybrid regime however, those arguments are neither here nor there given the difference in starting points. Political constitutionalists suggest that judicial intervention prevents or hinders the emergence of a democratic culture. They argue that without a strong constitutional court, lawmakers and officials will be incentivized to take responsibility for the development of the constitution. With or without a constitutional court however, the people in a hybrid regime are missing the devices to hold the incumbent electorally accountable. Political constitutionalism without democracy cannot guarantee responsive constitutional engagements. Similarly, political participatory rights are limited in a hybrid regime to begin with. The people in a hybrid regime are distanced from the constitution as the ordinary channels for political and constitutional participation are clogged. If anything, as I will explain more below, a constitutional court may provide an additional and invaluable channel for many who are frozen out of the political process to participate in the constitution.

Responsiveness: A defense of the marginality hypothesis' (2006) 68 *The Journal of Politics* 911; Michael K. Miller, 'Elections, Information, and Policy Responsiveness in Autocratic Regimes' (2015) 48 *Comparative Political Studies* 691.

It is also hard to see how a constitutional court would further encourage interest-based politics in a hybrid regime when a very unattractive form of interest-based politics seems to be a defining feature of a hybrid regime. Political scientists have long argued that a function of elections in authoritarian regimes is to allow those in power to "hold onto power".[35] Summarizing the literature on authoritarian electoral politics, Jennifer Gandhi and Ellen Lust-Okar suggested several important functions of elections in authoritarian regimes, such as "spread[ing] the spoils of office broadly among members of the elite", "aid[ing] incumbents in maintaining their ties with elites by deterring defection among members of the ruling coalition" and "serv[ing] to co-opt the opposition."[36] What these tested explanations have in common is an important assumption that authoritarian politics is, to a large extent, premised on interest-based politics. By sustaining and developing the interest-based networks among the authoritarian camp, unfair elections exploit the self-interested nature of political actors to help the incumbent stay in power. Again, if anything, the existence of a democratically committed constitutional court may help destabilize these interest-based networks and instill constitutional-democratic norms back to hybrid regime politics. How a constitutional court impacts the political culture of a hybrid regime depends not on its mere existence but on how it behaves.

3. Five Democratic Roles

The strength of the democratic objections is conditional upon the status and health of a political process. The fact that a hybrid regime is undemocratic and tends to behave in anti-democratic ways does not automatically justify a democracy-enhancing judicial role,

[35] Jennifer Gandhi and Ellen Lust-Okar, 'Elections under Authoritarianism' (2009) 12 *Annual Review of Political Science* 403, 404.
[36] Ibid 405.

but it invites us to consider how a constitutional court can protect and promote democratic values given the democratic deficit of a hybrid regime. As I have already alluded to, the democratic objections might even condition the way a constitutional court should act in a hybrid regime. For instance, there might be a case to be said about a constitutional court's role in creating a democratic culture and pushing the state to treat people as constitutional equals in a hybrid regime.

A constitutional court is not an inherently democratic institution. It is not democratically elected, and, as mentioned in the first chapter, its legal dimension functionally distinguishes it from the political institutions. Nevertheless, by virtue of its constitutional location and some of its functions, a constitutional court, it will be argued, has a role to play in supporting democratic ideals in a hybrid regime.

Five democracy-enhancing roles will be presented. Certain roles target specific democratic values – such as rule of law (referee role), political participation (participatory role), and political representation (quasi-representative role), while others are more general. And as noted in the beginning, the roles address pathologies associated with a lack of democracy as well.

The democracy-enhancing roles to be presented come with costs and risks, but as it will be shown, they can be mitigated and that they are potentially worth bearing considering the democratic returns. These roles are not particularly novel as each role relies on a familiar aspect and function of a constitutional court. By introducing a proper frame, we can see how a constitutional court can shore up democratic norms and/or inhibit the development of authoritarianism. As I have mentioned, these roles may not be unique to a hybrid regime, but they are designed for constitutional courts in hybrid regimes. The ways in which a constitutional court can enhance democracy are rather multi-dimensional: they not only address anti-democratic laws and policies, but also seek to empower the

opposition, strengthen the democratic structure, and reinforce the democratic culture. The five roles are not mutually exclusive, and each has its own place and time. They will be supported by comparative experiences to highlight the plausibility of the normative claims.

a. Refereeing role

The first role envisages a court that acts as a referee, applying clear limits on political powers and ensuring the dominant political forces are playing by the rules. This is principally a rule-of-law kind of argument: democracy requires the rule of law as it creates the circumstances for a democracy to operate, and a constitutional court is responsible for upholding the rule of law. The referee role is limited to the enforcement of unambiguous and unarguable political-constitutional rules, i.e. when the law is clear. This is arguably the most modest role among the five, but is nonetheless important as it connects the court to its adjudicative function. The referee role seeks not only to provide clarity and certainty to the constitution, but also improve the accountability of a hybrid regime incumbent and restore temporary speed bumps within the constitutional order.

i. Ely and process theory

Given that John Hart Ely's renowned process theory of judicial review is an inspiration for three of the roles to be proposed (including the referee role, interpretative role and quasi-representative role), it would be helpful to quickly outline some of his argument first. In his seminal book, *Democracy and Distrust*, Ely proposes a theory of judicial review that is "participation-oriented, representation reinforcing".[37] Courts, under his theory,

[37] John Hart Ely, *Democracy and Distrust: A theory of judicial review* (HUP 1980).

enhances participation and reinforces representation by "polic[ing] the process of representation."[38] The purpose of judicial review, Ely writes, is to "ensure that the political process [i]s open to… all viewpoints, on something approaching an equal basis".[39]

The motivation of his argument comes from his distrust towards the political process. His theory's central idea, as Stephen Gardbaum describes, is that the "protection of a system of representative democracy against erosion or degradation by elected representatives cannot be left exclusively in their hands".[40] Malfunctions within the political process is incapable of self-correction when those problems are created by the political representatives. According to Ely, there are two ways for a court to fulfil this role: by upholding rights key to the democratic process such as freedom of expression and voting rights, and protecting the rights of minorities.

The process theory sounds very attractive, as it seeks to provide a novel way out of the counter-majoritarian difficulty. Compared with Ronald Dworkin's interpretivism, Ely argues that his process theory is more democratically legitimate as courts under his theory need not engage with substantive norms and values. Judicial review is justified according to Ely as it improves democracy without taking away the democratic authority of the people. His work is also motivated by a strong skepticism towards political actors, the sort of skepticism we still see in many contemporary constitutional scholarships.[41] The fact that this political distrust still resonates with us today is perhaps one of many reasons as to why his work remains highly relevant in this modern age.

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[38] Ibid 73.
[39] Ibid 74.
[40] Stephen Gardbaum, "Comparative Political Process Theory" (2020) 18 *International Journal of Constitutional Law* 1429, 1430.
[41] Pierre Rosanvallon, *Democratic Legitimacy* (Princeton University Press 2011) 85.

A question many have had about his work, however, is whether his theory is actually value or substance free.[42] Interpretations of democratic rights and minority rights clearly have substantive dimensions and involve moral disagreements. This line of critique makes one wonder if Ely could completely avoid the counter-majoritarian difficulty as encountered by other judicial review supporting theories. Nevertheless, this critique is not necessarily fatal to his process theory. His theory is process-based because it aims to improve the democratic process, not because it focuses only on judicial review of process rights or procedures. In fact, Ely's theory is perhaps better characterized as a particular interpretative approach with a democratic orientation. Or as Aileen Kavanagh describes, his theory is "substance oriented towards, and emanating from, the American system of representative democracy."[43] While some of the arguments presented later are inspired by Ely's process theory, these objections do not matter in the context of the thesis, as it will be clearer later.

ii. Courts as referees

The first role discussed here takes a very literal interpretation of what Ely calls "court as referee".[44] "The Court as Referee" is a phrase borrowed from the title of one of his chapters where he argues that the role of a court is to police the political process. Echoing Ely's justifications, my arguments throughout the thesis share a strong distrust towards political representatives and seek to orient a hybrid regime towards a more democratic constitutional structure. Departing from Ely, the first role proposed here adopts a narrow

[42] See e.g. Laurence H. Tribe, 'The Puzzling Persistence of Process-based Constitutional Theories' (1980) 89 *The Yale Law Journal* 1063.
[43] Aileen Kavanagh, 'Comparative Political Process Theory' (2020) 18 *International Journal of Constitutional Law* 1483, 1484.
[44] Ely (n 37) 73.

understanding of "process" to mean constitutional "rules", with rules meaning directives with unambiguous triggers.[45] These rules include but are not limited to procedural requirements and clear-cut legal-constitutional boundaries. And of course, the clarity of a rule is a matter of degree, as some rules can be more unarguable than others. But within every legal community, common standards for determining the meaning of legal and constitutional provisions exist, and that there are inevitably rules closer to the "unambiguous" end of the spectrum. The referee role would be most applicable to rules close to that unambiguous end. A sports referee is only in the business of enforcing the rules of the game, and it is not their job to question the inherent fairness of the rules. Similarly, the referee role of a court is not to evaluate the substance or constitutionality of government policies or laws, but to guard against rule breaking activities and procedural irregularities. With their constitutional jurisdiction and ancillary powers, they have the tools to make sure that the rules of the constitution and political process are followed and obeyed.

By limiting a court's role to unambiguous rules and procedures, the referee role largely escapes the substance versus process criticisms that haunted Ely's process theory. As a corollary however, this role seems weak as one might question how democracy-enhancing a constitutional court is when it dodges questions of value and substance. Furthermore, some might argue that since the rules are created by authoritarians, many rules are actually unattractive. The referee role might, then, have authoritarian effects when the court is asked to uphold anti-democratic laws as well.

These are indeed strong arguments, but my reply is four-fold. First, I am not ignoring substantive approaches. In fact, judicial roles with a more substantive dimension will be explored shortly in the next subsections. The refereeing role is only one of five

[45] See Pierre Schlag, 'Rules and Standards' (1985) 33 *UCLA Law Review* 379.

roles, and courts should consider all of them whenever they are appropriate under different conditions. While mere fairness of the law and its democratic pedigree are normally beyond the purview of a constitutional court, ways in which a constitutional court can challenge the constitutionality and validity of authoritarian laws and policies will be explored. Not to mention, it is possible sometimes to couch questions of fairness, democracy and justice as questions of constitutionality and validity.

Second, while this role might sound modest, it is of crucial importance as it strengthens constitutional legal accountability in a hybrid regime. Capturing perfectly how hybrid regime incumbents today behave, Erin Jenne and Cas Mudde write, "[a]uthoritarian leaders typically undermine democratic institutions by not respecting the law. Rather than changing the rules, they bend or break them, relying on patronage and low administrative capacity to get away with it."[46] This nature of hybrid regime incumbents provides the necessary impetus for the referee role. Given the incumbent's higher default chance of winning elections and the reduced political cost in dislodging various kinds of oversight, constitutional rules with normative substance are easily ignored or disregarded without consequences or even knowledge of the public. The referee roles compel the incumbent to answer to the law, making sure transgressors stay within the outer most limits on arbitrary powers and suffer the prescribed legal and reputational consequences.

The Pakistani courts provide an excellent illustration of the referee role. Two political failures that the Chaudhry court particularly tackled were abuses of executive powers and governmental corruption. This is reflected in the kinds of cases selected by the court[47] as well as some of the high-profile challenges it made against the incumbent.

[46] Erin K. Jenne and Cas Mudde, 'Hungary's Illiberal Turn: Can outsiders help?' (2012) 23 *Journal of Democracy* 147, 148.
[47] Asher Qazi, 'Suo Motu: Choosing not to legislate, Chief Justice Chaudhry's strategic agenda' in Moeen H. Cheema and Ijaz S. Gilani (eds) *The Politics and Jurisprudence of the Chaudhry Court 2005-2013* (OUP 2015) 302.

Perhaps the most famous case in this regard is *Watan Party v. Federation of Pakistan*,[48] or more commonly known as the Pakistan Steel Mills case. The case involves the privatization of state-owned steel mills, where the opposition and labor unions as claimants argued that the enterprise was sold at too low of a price and alleged corruption. Annulling the privatization agreement, the Supreme Court described the process as "reflecting serious violation of law and gross irregularities with regard to sale of the first and the biggest steel mill that this country has."[49] Among the many glaring irregularities include: grossly understating the valuation by excluding the value of the land,[50] a mismatch between the name of the buyer and the name of the bidder,[51] dubious credentials of the real buyer,[52] and failure to complete the transaction within the prescribed period of time.[53] The incident was only one of many corrupt dealings occurring in Pakistan at the time, and the judgment was symbolic of the court's determination to crack down on public corruption. The constitutional court helped advance good governance and tackle pathologies related to a lack of democratic oversight.

The electoral arena is another area that is particularly desperate for a referee. As described in the previous chapters, incumbents win elections in hybrid regimes through all sorts of questionable tactics, many of which are unlawful. They are sometimes able to escape liability because no one called them out. In Hong Kong for example, opposition candidates have been disqualified to run for election on the grounds that they are not deemed by the incumbent to be sincere enough to uphold the city's mini-constitution. And in disqualifying these candidates, the government did not offer any opportunity for the candidates to explain themselves. On procedural fairness grounds, the courts held that the

[48] PLD 2006 SC 697.
[49] Ibid para 78.
[50] Ibid para 63.
[51] Ibid para 78, 89.
[52] Ibid para 85.
[53] Ibid para 69.

disqualifications were against "the principle of natural justice" as the government had failed to provide them with a reasonable opportunity to respond.[54]

The Ugandan courts' historical record as a referee may be mixed, but there had been a "dramatic rise in the accountability functions of the judiciary" during the 2000s, as Siri Gloppen observes.[55] The courts have played its referee role in some of Uganda's most headline-grabbing cases. A notable one involves a referendum act. Prior to 2000, Uganda was operating as a one-party system under the banner of Museveni's Movement System or no-party democracy. Article 271(3) of the Ugandan constitution, however, stipulated that a referendum determining "the political system the people of Uganda wish to adopt" must be held within four years after Uganda's first election in 1996. With restrictions over opposition parties and the incumbent's systemic advantage over the existing political structure, the opposition argued that there was no way that the referendum could had been held fairly. The result of the 2000 referendum was in favor of preserving the current political system. Seeking to overturn the referendum, the opposition took the matter to court. The Constitutional Court held that the Referendum Act was unconstitutional as it was passed without the constitutional mandated quorum.[56] A new Referendum Act that was supposed to replace the old one was also ruled unconstitutional by the Supreme Court on similar procedural grounds. The result of the referendum was however maintained, likely because the Supreme Court did not want to trigger a constitutional crisis.[57]

The kind of accountability offered by a constitutional court under the referee role is different from democratic accountability. Constitutional legal accountability is based on

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[54] *Chow Ting v Teng Yu Yan Anne (Returning Officer)* [2019] 4 HKLRD 459, para 27.
[55] Siri Gloppen et al., *Courts and Power in Latin America and Africa* (Palgrave Macmillan 2010) 85.
[56] Rachel Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Routledge 2013) 144.
[57] Erica Bussey, 'Constitutional Dialogue in Uganda' (2005) 49 *Journal of African Law* 1, 13. In *Oloka-Onyango v. Attorney General* [2014] UGCC 14, the Constitutional Court had also invalidated the infamous Anti-Homosexuality Act in 2014, similarly on the ground that the law was not passed with the constitutionally prescribed quorum. The law sought to criminalize same-sex relations, with penalty up to life imprisonment.

the idea of determining whether a law or action violates a constitutional or legal norm. Democratic accountability is based on a principal-agent relationship between the government and the people.[58] The government, as a principal, is under a duty to act on behalf of, report to and explain to its people regarding the decisions it made. As an agent, the people enjoy the power to sanction the government through elections and other established political means when the government falls below a certain standard.

However, constitutional legal accountability offers benefits that overlap with those provided by democratic accountability.[59] The government must explain itself to the people in the legal process, as constitutional legal accountability forces the state to confront issues that are otherwise ignored because of the incumbent's political dominance. A constitutional court's expressive and public character flushes out dubious intentions of those in power, improves the transparency of the government and allows the people to better monitor the state. By reminding the incumbent that rules have to be taken seriously, constitutional legal accountability promotes political responsiveness, at least in regard to the issues being challenged.

Third, on top of providing constitutional legal accountability and compensating for the lack of democratic accountability to a certain degree, the referee role supports rule-of-law values through the social effects it creates. Rule of law requires society's internalization of constitutional legal norms. This begins with the public *and* government officials' acceptance that powers must be exercised in accordance with established rules.[60] Taking the law seriously is a basic requirement of rule of law. In authoritarian regimes, government decisions are sometimes made on a whim, and the law is bent or ignored for self-serving ends. A constitutional court can help put back the fundamental values of rule

[58] Jeremy Waldron, *Political Political Theory* (HUP 2016) Chapter 8.
[59] See Jeff King, *Judging Social Rights* (CUP 2012) 60-62.
[60] See Brian Tamanaha, 'Law's Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society' (2017) 95 *Washington University Law Review* 1149.

of law by showing that rules need to be respected by everyone including powers-that-be. In sports, the referee is "a symbol of fair play, integrity and sportsmanship."[61] A similar symbolic power is at play here that has potentially far-reaching effects on the constitutional culture of a hybrid regime. More about the social effects of a constitutional court will be discussed later in the chapter.

Finally, the referee role would be justifiable when the rules being applied tend to be attractive ones. Sometimes, despite the clear language of the rule, it may be possible for courts to make exceptions by creating contextual requirements for the application of an unattractive rule. A certain degree of selective enforcement is defensible given the authoritarian effects that will be avoided as a result of a completely neutral application of the referee role. Selective enforcement, however, would depend on the judges' ability to legitimately carve out exceptions despite the clear language. Furthermore, the risk of being selective is that the court might be seen as politically biased and ignoring the demands of the law. Therefore, there is a limit as to how selective courts can be if they want to preserve their image of impartiality and minimize the risks of political backlash. True to the spirt of a referee, this role would inevitably require a constitutional court to sometimes enforce rules with authoritarian effects.

Even if so, the net effect of the referee role is still likely democratic in most hybrid regimes. Whether this role ultimately leads to democracy-enhancing effects depends on whom this role impacts the most. The answer here is rule-defiant actors, most notably the incumbent and elites in a hybrid regime. As mentioned before, these actors are able to act with impunity because of their electoral and political dominance. The fact that a rule is created by an undemocratic process does not mean that a rule is inherently unattractive. In fact, in an attempt to free-ride on the reputation of liberal democracies, hybrid regimes

[61] This is a provision reproduced in many guidelines or codes of conduct for sports referee.

oftentimes import constitutional provisions and political rules from other democracies.[62] A referee role will revive many constitutional breaks and constrain authoritarian aggrandizement.

b. Interpretative role

The first role explains how a constitutional court should approach clear directives. In contrast, the interpretative role to be discussed here is applicable when a court enjoys a greater degree of discretion.

This role requires courts to adopt an interpretation or reason that is more closely aligned with constitutional democratic values whenever legal discretion permits. While it would rarely be sensible to enforce democracy as a freestanding principle, judges should use democracy to *guide* their interpretation of the constitution and law. A broad conception of interpretation is adopted here, as I am referring not only to how constitutional provisions should be read (such as widening the ambit of a rights provision), but also more generally to how judicial discretion should be exercised (such as giving more weight to liberal democratic rights).

This role is consistent with Ely's democracy-enhancing goal, but goes beyond the process theory as it is not limited to the process rights that he refers to. This interpretative role is an abstract approach that has implications on how different constitutional doctrines should be applied. The role, it will be shown, guides how judges should choose between competing jurisprudential ideas, how the proportionality doctrine should be applied, and how judges should consider the quality of the legislative debate in determining questions

[62] See Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (OUP 2021).

of constitutionality. These are not the only examples of giving effect to the interpretative role, but they illustrate the different possibilities of folding democratic norms into existing jurisprudential techniques.

i. Discretion and value judgment

Most problems presented before a constitutional court involve interpretation, either constitutional and/or statutory. This can happen in a number of ways. The text of the law, especially constitutions, are frequently open-textured and indeterminate. Relying on the text alone or even precedents may not be sufficient to control a legal outcome.[63] A constitutional text that protects freedom of speech, for instance, does not tell you whether pornography or appropriation art are protected speech under the constitution. We may also need social and/or moral facts to answer the question. The open-textured nature of the law is not necessarily a defect. Relying on legal concepts such as "fairness", "reasonableness" and "necessity", the language of a legal provision or doctrine invites discretion in order to adapt to different social circumstances. Partly because of how laws are usually drafted in such a manner in a public law context, a legal issue can attract closely balanced legal arguments but with diverging, and sometimes irreconcilable, conclusions.

A key assumption here is that the law, particularly constitutional law, accommodates reasonable disagreements in many instances. This is attributable to, in part, the nature of legal language, but, to a larger extent, the fact that many constitutional cases involve moral and/or policy considerations. It should be emphasized that the assumption here is not that law is simply politics or the result of the personal preferences of the judges.

[63] This assumption is shared and defended by many. Ronald Dworkin's thesis in *Law's Empire*, for example, implies that judges enjoy a lot of discretion especially in what he calls "hard cases".

The attitudinal model of law once very popular among political scientists obscures the legal dimension of a constitutional court and fails to account for the interactions and deliberations within the courtroom.[64] Nevertheless, the law is usually not a mathematical equation that renders unequivocal right or wrong answers. The standards of the legal community impose normative limitations on what kinds of legal methodologies are acceptable. Within the parameters of the law though, broadly speaking, there can be a number of legal arguments and legal outcomes in a given case that are considered legally persuasive or at least reasonable under accepted standards of legal argumentation.

ii. Adopting a democracy-enhancing route

The interpretative role does not dismiss the importance of the law, but relies on a characteristic of law that is especially common in constitutional law. In these instances, the ultimate decision of a court must involve a degree of value judgment. Judges need to choose among competing outcomes consciously or subconsciously based on the norms inherent in the different legally plausible arguments available before them.

An example of how a constitutional right can give rise to almost opposing lines of jurisprudence depending on judicial interpretation is the difference in judicial treatment of defamation against public officials or public institutions in Hong Kong and Singapore. While both courts operate in hybrid regimes, those in Hong Kong adopted a path that is much more consistent with liberal democratic values than their counterparts. According to the first landmark case after the handover *Ng Ka Ling & Ors v. Director of Immigration*,[65] the Court of Final Appeal in Hong Kong has established the approach to give rights-

[64] See e.g. Jeffrey Segal and Albert Cover, 'Ideological Values and the Votes of US Supreme Court Justices' (1989) 83 *American Political Science Review* 557.
[65] [1999] 1 HKLRD 315.

protective provisions a generous interpretation.[66] This is by no means empty rhetoric. In *Cheng Albert v Tse Wai Chun Paul*,[67] the Court of Final Appeal decided that the defamation defense of fair comment can only be defeated if the defendant did not genuinely hold the view he or she expressed. That is, departing from the common law position at the time, the court ruled that the motive of the speaker, however improper it may be, became no longer relevant. Reiterating its rights-protective interpretative approach, the court held that "[t]he Courts should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigour."[68] In striking a balance between freedom of expression and protecting private reputation, the Hong Kong courts gave priority to the prior. In recent years, the defense of fair comment has become especially valuable as we are witnessing an increased number of defamation claims (or threat thereof) launched by the incumbent and its allies against the media and dissidents. As at the time of writing, none of these defamation claims have eventuated or succeeded, most probably because of how difficult it is for a defamation claim to succeed in court as a result of the *Cheng* case.

In contrast is the Singaporean approach. Scholars observe that defamation suits are routinely weaponized by the authorities to silence critics and censor opposition.[69] Far from following the position in Hong Kong, the Singaporean courts have adopted a much more speech-restrictive position. For example, higher damages are awarded to public figures who are defamed. In justifying this position, a judge notes, "[t]he greater the reputation of the person defamed, the greater the damage award that will be made—on the basis that these persons are vulnerable in so far as they are well known… and have a wider circle of

[66] Ibid para 77.
[67] [2000] 3 HKLRD 418.
[68] Ibid para 3.
[69] See e.g. Cameron Sim, 'The Singapore Chill: Political defamation and the normalization of a statist rule of law' (2011) 20 *Pacific Rim Law & Policy Journal* 319; James Gomez, 'Restricting Free Speech: The impact on opposition parties in Singapore' (2006) 23 *The Copenhagen Journal of Asian Studies* 105.

social and business contacts."[70] One commentator finds at the time that the incumbent party in Singapore had never lost a defamation suit.[71] Such defamation suits are not only brought against individuals, but also the press. Foreign press and online columnists are especially targeted groups.[72] As one critic observes, "the Singapore judiciary has hardened its position in rejecting the arguments that defamation actions and contempt of court committals could constitute unlawful interference with the fundamental right of free speech…".[73] While the Hong Kong courts have effectively disarmed the authoritarian in this respect, the Singaporean courts have chosen a path that tilts the balance towards the authoritarian in the name of protecting private reputation, as scholars and commentators have noted how defamation laws have significant chilling effects on the political community of Singapore.

Another rights-protective interpretative example can be found in Uganda, where the Supreme Court took a particularly bold move in 2004 by ruling unconstitutional a law that criminalizes "false news", or referred to more commonly now as fake news.[74] With the rise of social media and the difficulty in detecting false or misleading contents, fake news has become a problem faced by states around the world. Authoritarians have however reserved the power to determine what is "fake" or not to themselves. These laws have been abused to silence critics and censor the press. In Uganda, fake news was broadly defined by legislation as "any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace", with a maximum penalty of two years for publishing such contents. The law was challenged in court and eventually struck down.

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[70] *Lee Kuan Yew v. Vinocur & Others* [1995] 3 Sing LR 477, 485–86.
[71] As quoted in Cassandra Chan, 'Breaking Singapore's Regrettable Tradition of Chilling Free Speech with Defamation Laws' (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 315, 318.
[72] Tsun Hang Tey, 'Confining the Freedom of the Press in Singapore: A pragmatic press for nation-building' (2008) 30 *Human Rights Quarterly* 876, 898.
[73] Ibid.
[74] *Onyango-Obbo and Mwenda v Attorney General* [2004] UGSC 81.

The Supreme Court was well-aware of the problems caused by fake news, but the court was more skeptical about leaving "unfettered discretion" to the authorities. The judges also repeatedly emphasized the importance of freedom of expression and freedom of press, and reminded the government of its constitutional commitments as a "free and democratic society".

These cases illustrate the interpretative choices typically offered to judges in constitutional cases, as well as the choices they must make in light of their own assessments of what morality requires. While these courts operate in environments with similar legal traditions and political constraints, the Hong Kong and Ugandan courts have demonstrated the possibility of finding and adopting jurisprudential routes that correspond with constitutional democratic norms more closely.

There might be concerns about what a democratically friendly interpretation is in practice. There are different understandings of democracy, which might affect on a more fine-grained level which democracy-enhancing route should be adopted. But consistent with my approach in the first chapter, a thin conception of democracy is already sufficient to activate this approach. In other words, there may be many interpretations in each case that satisfy the requirements of this role. More importantly, the choices available to a hybrid regime constitutional court are rarely two closely democratic routes, but one that is quite clearly authoritarian in character as defended by the incumbent, and one that is the challengers' route that mitigates the anti-democratic tendency of the law or policy in question.

iii. Proportionality doctrine

The interpretative role affects how doctrines that structure judicial discretion should be applied. Take the proportionality test as an example. The proportionality test has been arguably the most prominent doctrine in constitutional jurisprudence in recent decades.[75] Replacing ad hoc balancing exercises, the proportionality test offers a systematic framework that allows courts to assess the extent to which a derogation of rights is constitutional, or, to use the terminology of the test, proportionate.[76] Providing an "analytical structure",[77] the doctrine has allowed courts to adjudicate rights cases more systemically, effectively and transparently. There is an ongoing, robust debate as to how the test and the application of it can be perfected. A common criticism, or perhaps observation, is that even with the proportionality test, there remains a wide space for judicial discretion.[78] The language and the different stages of the proportionality test provide the "discursive frame for norm-based argumentation that enables the litigating parties and the judge to bridge the domain of law and the domain of interest-based conflict".[79] A function of these legal frames is to constrain judicial discretion, but the test remains sufficiently malleable to accommodate competing arguments.

The test helps judges identify the relevant goals and interests in conflict and points towards considerations that should be given weight to. It remains the task of the judge to apply the framework and fill in the gaps, however. The process of filling in the gaps involves considerable discretion. To what extent is an aim legitimate? What does it mean for a policy to be a proportionate response to such an aim? How should judges factor in alternative options in assessing proportionality? These are questions that invite value

[75] See Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A comparative and global approach* (OUP 2019).
[76] For normative justifications for the proportionality test, see Paul Craig 'Proportionality, Rationality and Review' (2010) 2 *New Zealand Law Review* 265, 271-3.
[77] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The point of rights-based proportionality review' (2010) 4 *Law & Ethics of Human Rights* 142, 147.
[78] Finnis (n 8) 20-3.
[79] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal Transnational Law* 72, 86-7 note 33.

judgment. My intention here is not to critique the test, but instead to show how the test offers room to prioritize constitutional democratic norms.

For one, the intensity of review when applying the proportionality test should be turned up when constitutional democratic norms are threatened. That is, because constitutional democratic norms are particularly weak and vulnerable in a hybrid regime, there is a necessity for the constitutional court to be extra vigilant in adjudicating cases that concern these rights. A heightened scrutiny increases the threshold for deference to the government and requires closer inspection of the justifications relied upon by the government in order to make sure the rights in question are given extra protection.[80] Likewise, courts should give extra weight to the rights that are missing or weak in a hybrid regime when engaging in balancing exercises, such as the right to political participation, the right to polity equality, the right to freedom of expression and the right to freedom of assembly.

iv. Reducing the presumption of constitutionality

An even more ambitious technique that is similar in spirit would be to reduce the presumption of constitutionality or validity as applied to all laws and policies being challenged in a hybrid regime.[81] Courts normally presume that the law made by the democratic process is constitutional. This presumption, which is manifested in different ways in different jurisdictions, comes out of separation of powers, whereby the judiciary should respect the legislative function of the political process and the will of the people. Nevertheless, the presumption lacks bite in a hybrid regime as its political process does

[80] Cora Chan, 'Deference, Expertise and Information-gathering Powers' (2013) 33 *Legal Studies* 598.
[81] For a similar suggestion, see Roberto Gargarella, 'In Search of a Democratic Justice – What Courts Should not Do: Argentina, 1983–2002' (2003) 10 *Democratization* 181, 184.

not enjoy the same degree of democratic legitimacy. This does not mean that all laws should be presumed unconstitutional, but that the reduction in the presumption supports a higher degree of scrutiny generally. In practical terms, this might mean, for example, that a government should be required to adduce additional evidence to prove that the adoption of the policy in question is justified and to make comparative assessments between alternatives, instead of the court merely accepting the government's assertion of competency in policy-making areas and any kind of empty rhetoric.

v. Semi-procedural review

Another way of putting the interpretative role into practice is to use the quality of the legislative debate or the consultative process as a ground to adjust the level of deference or even as an independent reason to strike down laws. The superior democratic legitimacy of the political branches is commonly cited as a reason for judicial deference. There has been much academic discussion regarding how and the extent to which this factor should affect the degree of judicial scrutiny.[82] These debates have theoretical implications to a hybrid regime as many laws and policies being challenged are lacking the same democratic pedigree and democratic approval we assume exist in liberal democracies. The argument here is that poor legislative deliberation or a failure to engage with those impacted by a decision or a law should result in a more assertive constitutional adjudicative approach. Ittai Bar Siman Tov calls this semi-procedural judicial review.[83] It is semi-procedural because it is substantive in nature (as a court is determining the constitutionality of a law

[82] See e.g. Chan (n 80); Alison Young, 'In Defence of Due Deference' (2009) 72 *The Modern Law Review* 554; 183-90; Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008).
[83] Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

based on its substance), but the examination of the legislative and consultative process (that is, the procedural look) completements its substantive judgment. Procedural defects are taken as indicative of a substantive flaw or unconstitutional motivation.

Scholars are still considering whether the quality of the legislative debate or consultative process should be used as a separate doctrine, or incorporated into the proportionality doctrine, with the latter seems to be the more popular option at the moment. Nevertheless, this form of review is not as novel as it sounds, as the European Court of Human Rights, as well as constitutional courts in Germany, Belgium, Israel, South Africa and Colombia for instance, have all, through different doctrinal means, relied on the quality of the legislative debate or consultative process to intervene and strike down laws.[84]

The most notable case in this area is arguably *Hirst (No 2)*, where the Grand Chamber found that the UK government's "general, automatic and indiscriminate" ban on prisoners' voting violated the European Convention on Human Rights' provision on free elections.[85] Arriving at its decision, the Grand Chamber noted that there was "no evidence that Parliament [had] ever sought to weigh the competing interests or assess the proportionality of a blanket ban on the right of a convicted prisoner to vote".[86] Another exemplar is the South African case *Doctors for Life*.[87] The South African Constitutional Court decided that the government has a duty to facilitate public involvement in the law-making process. Determining whether the government had acted reasonably to discharge this duty, the court looked at the nature and importance of the law in question, and the

[84] Ibid; Liora Lazarus and Natasha Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the doctrine of due deference' in Murray Hunt, Hayley Hooper and Paul Yowell (eds) *Parliament and Human Rights: Redressing the Democratic Deficit* (OUP 2014).
[85] *Hirst v. The United Kingdom (No. 2)* (2006) 42 EHRR 41, para 82.
[86] Ibid para 79.
[87] *Doctors for Life International v. Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

impact it had on the public.[88] Practical concerns such as time or money saving were not excuses accepted by the court.[89] "What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process", the court writes.[90] A similar approach can be found in the Colombian constitutional jurisprudence, where a "minimal public deliberation" is required in order to justify deference to the government.[91] A lack of engagement with the interests of the rights-holders, as found in the congressional record, had been used by the Colombian Constitutional Court as a ground to strike down the law in question.[92]

The political branches in hybrid regimes are not always rubberstamps, but there are good reasons to question their decision-making processes because democratic accountability is weak. Semi-procedural review seeks to promote deliberative and responsive decision-making. Regardless of the precise doctrinal vocabulary used, the approaches adopted by the courts surveyed ask similar questions, including: whether the authorities have thoroughly examined alternative choices, whether sufficient time and effort have been spent by lawmakers on reviewing the relevant options, whether the rights-holders have been represented and consulted, whether their views have been engaged, and to what extent are those impacted given an opportunity to participate. These questions are informed by democratic principles such as democratic participation, democratic deliberation and democratic representation. Courts are developing ways to improve this approach, such as by proposing minimum standards and experimenting on more dialogic remedies that seek to work along with the political branches. Bar-Siman-Tov has suggested that courts should focus on ensuring "a minimal level of deliberation" and the

[88] Ibid para 128.
[89] Ibid.
[90] Ibid para 129.
[91] David Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319, 363.
[92] Ibid 363-364.

"possibility for participation".[93] The ultimate goal is not to replace the judgment of the political branches, but to increase the transparency of the political process and smoke out substantive flaws and dubious intentions.

There are undeniably costs attached to semi-procedural review. It might increase the complexity of cases, and judges will have to spend a longer time in examining the legislative materials. Some may be worried about the lack of expertise of a court. However, courts are accustomed to examining and referring to legislative materials as they are routinely asked to ascertain the legislative intent of the law. Furthermore, there is a growing body of comparative jurisprudence for courts to learn from. Courts already have the analytical tools to apply and hone this technique. Echoing Liora Lazarus and Natasha Simonsen, the democratic gains in introducing the quality of democratic deliberation as an evaluative criterion, in my view, outweighs the implementation considerations that others might have.[94] This is especially the case in a hybrid regime where political rights are weakly protected and its political process deliberately undermines representative and deliberative values.

c. Participatory role

The global rise in judicial power has brought about new opportunities for individuals to participate in politics through the legal process. These opportunities, as Rachel Cichowski explains, do not necessarily diminish democracy as the legal process does not seek to replace the traditional avenues of political participation, such as voting, lobbying and protesting.[95] Instead, the expansion of judicial powers opens an alternative means for

[93] Bar-Siman-Tov (n 82) 297.
[94] Lazarus and Simonsen (n 84) 401.
[95] Rachel Cichowski, 'Courts, Rights, and Democratic Participation' (2006) 39 *Comparative Political Studies* 50.

political participation and to channel disagreements. The legal mobilization literature generally shows how activists and civil society organizations in all kinds of regime types have made use of domestic courts and supranational ones to express their opinions and shape policy outcomes.[96]

The general point about courts as complementary participatory channels lends particular credence to a hybrid regime. A central problem of a hybrid regime is the arbitrary clogging of political participatory channels and systemic disenfranchisement. Social groups such as the opposition and dissidents face significantly higher costs when participating in politics because of their ideology, ideas and political background. Voices that seek to challenge the status quo are suppressed, muted or even excluded from the political market. Certain views and interests are, as a result, not properly represented or never represented in the political arenas. A hybrid regime may paint a picture of public contestation with elections, but the picture is a façade as the political contest rests on unfair terms. While the incumbent and its henchmen have privileged access to resources, networks and positions of power, challengers are handicapped or even frozen out of the political process.

The participatory role contributes to democracy by providing additional participatory opportunities to those who are disenfranchised in a hybrid regime. The argument is not primarily concerned with relying on courts to directly change the outcomes of certain laws and policies. Rather, a court, as a participatory channel, is intrinsically valuable as it seeks to expand the space for public participation and breathe life into the voices that are left out in the political market of a hybrid regime.[97] This participatory

[96] See e.g., Waikeung Tam, *Legal Mobilization under Authoritarianism: The case of post-colonial Hong Kong* (CUP 2012); Freek Van der Vet, '"When They Come for You": Legal mobilization in new authoritarian Russia' (2018) 52 *Law & Society Review* 301; Lynette Chua, 'Legal Mobilization and Authoritarianism' (2019) 15 *Annual Review of Law and Social Science* 355.
[97] Rosanvallon (n 41) 145. See also Aileen Kavanagh, 'Participation and Judicial Review: A reply to Jeremy Waldron' (2003) 25 *Law and Philosophy* 451.

potential of a court is "grounded in procedural features that are essential characteristics of judicial institutions per se".[98] The adjudicative nature of the legal process, or more precisely the right to hearing and the right to grievance, can be thought of as a novel way of enhancing the right to political participation. The legal process does not promise a claimant success, but it does guarantee his or her right to assert a legal claim, and the opportunity to make his or her case using legal reasoning, legal justifications and evidence.

Of relevance is also the expressive function that comes with the legal process. Legal proceedings and judgments are often public in nature. The interactions within the courtroom, including what is said and argued by the claimant, are picked up by the press and can carry weight in the public discourse. Judicial decisions, especially in common law decisions, also explicitly set out the factual accounts and reasoning offered by the parties, providing formal documentations of the different narratives.

By taking advantage of the procedural features of the legal process and its public nature, those persecuted and silenced in a hybrid regime can use courts as a platform to make their voices heard. A claimant may face all sorts of challenges if he or she makes the same expression in other political channels. In fact, opposition and dissidents are often censored or jailed *because* of their political expressions. The typical avenues for political participation may simply be unavailable to certain social groups. Seen under this light, constitutional courts, or courts in general, provide a lower risk avenue for these groups to participate in politics, as the legal process is a channel that is formally sanctioned by the state. The expressive function of a court in this regard may not be as good as a well-functioning legislature, but is nonetheless desirable if a well-functioning legislature is not present.

[98] Alon Harel, *Why Law Matters* (OUP 2014) 192.

i. A second-best participatory channel

The legal process is limited in many ways as a participatory channel. To activate the legal process, one must become a claimant by framing the grievance as a right and finding the appropriate cause of action. The political message may be distorted or diluted as a result of being reformulated as a legal claim. The claimant may also need the assistance of lawyers to translate a political claim into a legal one. Aside from the expertise gap, there is also a financial barrier. In many jurisdictions, litigation can be costly. On top of lawyers' fees and the costs of preparing a case, one might have to also pay for the legal costs of the adversary (especially in common law jurisdictions). Making oneself heard through the legal process can consequently be an expensive endeavor, and only those who can overcome these barriers can participate in the legal process. Some might accordingly argue that the legal process is self-selective as it only represents the voices of the wealthy. Finally, due to backlog and high caseload, the legal process in some jurisdictions can be very slow and may not be as flexible as the more traditional participatory channels in adapting to changing circumstances.

Consistent with the theme of this chapter, the argument here is a second-best one. As I made clear in the beginning, the idea here is not for the legal process to replace or replicate the traditional avenues of participation, but to complement them. And this complementary effect is especially valuable in a hybrid regime given the lack of participatory opportunities to begin with. As mentioned, for some constituents, the participatory role is a lot more accessible than the political branches, providing a rare channel for these social groups to express claims that compete with the regime's. While the legal process is not without its challenges, the hostility posed by the state in the political channels can be absent in the legal process. The court is not a democratic forum, but a

court can achieve some of the participatory values that is typically offered by the political branches. A claimant enjoys a right to participate in the legal process, and he or she can use the legal process in ways that resemble a formal political channel. The legal process reveals and/or amplifies expressions that are left out in the political process. Assuming that the claims are framed properly in court, the state is forced to acknowledge the existence of different political ideologies and kinds of reasoning, as well as to address them with the level of respect they deserve by defending against these claims with accepted modes of legal argumentation and facts.

This role, as I emphasize again, is not dependent on the substantive outcome, but relies instead on the potential of the legal process to descriptively represent different voices.[99] The law might ultimately be on the state's side, but at the very least, the legal process can help institute expressions that would have otherwise been ignored or trivialized by the incumbent in the political arenas. The monopolization on "truth" is one of the most effective ways to maintain authoritarian control. Courts counter this Orwellian nightmare by allowing the people to challenge the claims made by the state. The market of ideas theory posits that the "truth" will reveal itself so long as voices within society are allowed to compete freely. The "truth" is not determined by a single arbiter like the court, but rather by the political market, that is the people. Courts facilitates the revelation of the "truth" by making the lost voices known to the public as well as respecting these voices through formal recognition. These voices, institutionalized by the adjudicative process, may destabilize the dominant narrative so carefully managed by the regime. The court enriches the democratic space by making views that are suppressed or hidden by authoritarian known to the broader public.

[99] This is not the same as Pitkin's concept of "descriptive representation", which refers to representatives who share similar attributes with their representees. See Pitkin (n 31) Chapter 4. Representation is descriptive here in the sense that court can bring into public existence voices that have existed all along but are suppressed.

ii. Overcoming barriers

Furthermore, the limitations suggested are not fatal to the participatory role. The fact that a political claim needs to be translated into a legal claim is something that can and is often overcome by litigants in authoritarian regimes, as evidenced how legal mobilization movements are prevalent in both common law (such as Hong Kong, Pakistan, and Uganda) [100] and civil law (such as Russia, Ukraine and Turkey) authoritarian jurisdictions.[101] Many lawyers in these jurisdictions are willing to take on public interest cases at a significantly lower cost or even on a pro bono basis. It is not uncommon to find lawyers leading opposition movements, devising both political and legal strategies to challenge the incumbent. Creative solutions have also been devised to help raise funds for litigations. Aside from the more traditional methods such as forming political parties and lobbying private donors, opposition in jurisdictions such as Russia, Ukraine and Hong Kong have experimented innovatively on online crowdfunding to finance political campaigns as well as defense and public interest litigations.[102]

By controlling the fluidity of legal traffic, courts have the tools to mitigate the aforementioned challenges as well. Access to justice rules and constitutional rights in general are judicially enforced and tend to be malleable. A generous interpretation may well expand this alternative space for public participation. Article 184(3) of the Pakistani

[100] Tam (n 96); John Mubangizi, 'Strategic Litigation in South Africa and Uganda: Shared perspectives and comparative lessons' (2020) *African Journal of Legal Studies* 1; Sahar Shafqat, 'Civil Society and the Lawyers' Movement of Pakistan' (2018) 43 *Law & Social Inquiry* 889.
[101] See Van der Vet (n 96); Sophia Wilson, 'Cause Lawyering in Revolutionary Ukraine' (2017) 5 *Journal of Law and Courts* 267; Ceren Belge, 'Friends of the Court: the Republican alliance and selective activism of the Constitutional Court of Turkey' (2006) 40 *Law & Society Review* 653.
[102] Alexander Sokolov, 'Russian Political Crowdfunding' (2015) 23 *Demokratizatsiya: The Journal of Post-Soviet Democratization* 117; Natalia Khoma, 'Technologies of Political (Socio-political) Crowdsourcing and Crowdfunding: World experience and steps towards implementation in Ukraine' (2015) 1 *Toruńskie Studia Międzynarodowe* 149; Julius Yam, 'Political Crowdfunding of Rights' (2020) 50 *Hong Kong Law Journal* 395.

constitution provides the Supreme Court with original jurisdiction to take up cases of public importance and related to the enforcement of fundamental rights. This provision offers considerable room for legal interpretation. The power of original jurisdiction, or also known as *suo moto* actions, has been broadly interpreted especially during the Chaudhry court era. Chaudhry's more progressive use of *suo moto* actions provided "direct" and "faster" access to justice to "the most underprivileged segments of society".[103]

The Ugandan courts, in contrast, adopted a more cautious and gradual approach in expanding the accessibility of the courts. The infamous Rule 4 of the Constitutional Court Rules (1996) provided that a petition must be filed within 30 days of the alleged constitutional breach. Important constitutional challenges in the earlier days had been time-barred by the 30-day rule.[104] The justices themselves noticed the "irony" that even applicants involved in a contractual breach or a tort action has "far more time to bring [an] action" than in a constitutional breach.[105] In around half a decade, the courts have fixed the problem in an incremental fashion, by first construing that the 30-day begins to run after the claimant perceives of the alleged breach,[106] to finally declaring that the rule violates the right of access to the constitutional court.[107]

The attitude of the Hong Kong courts are similarly liberal when it comes to legal access rights. In Hong Kong, to establish standing in judicial review, one must demonstrate "sufficient interest" in the disputed matter. Courts generally give this requirement a broad interpretation: an applicant need not necessarily be the aggrieved person directly affected by the policy or decision to qualify for standing, and in the absence of an obvious or direct

[103] Qazi (n 47) 304.
[104] See e.g. *James Rwanyarale and Anor v. Attorney General* [1997] UGCC 1; *Ismail Serugo v Kampala City Council and Anor* [1998] UGCC 6.
[105] *Uganda Association of Women Lawyers and Ors v. Attorney General* [2004] UGSC 1.
[106] See e.g. *Joyce Nakacwa v Attorney General and Ors* [2002] UGCC 1.
[107] *Uganda Association of Women Lawyers* (n 105).

interest, courts have also granted standing when the proper context arises.[108] Relaxing access norms invites a broader range of individuals and groups to make use of the legal process. A less rigid understanding of rights reduces the difficulty of translating a political expression to a judicially enforceable claim.

d. Quasi-representative role

The quasi-representative role seeks to promote political representation by applying legal tests favorable to litigants suffering from authoritarian bias or neglect.[109] The kind of political representation I am referring to here approximates to Hanna Pitkin's account of "substantive representation", which means acting in the interest of those represented.[110] But of course, the court is not exactly a political representative as it lacks the formal mandate (such as the act of voting) that connects the representee with the representative.

I call this role quasi-representative because, first, this role supports political representation of those politically disadvantaged in a hybrid regime. Not only should a court remove barriers of political participation by acting as an alternative political participatory channel (as required under the participatory role), but also the quasi-representative role requires tilting the playing field towards vulnerable litigants. Second, because of how the role is designed, the quasi-representative role may sometimes generate surprisingly majoritarian or democratically responsive judicial decision-making patterns.

The quasi-representative role and the interpretative role share overlapping features in practice, as both require courts to use democratic values to guide their applications of

[108] Karen Kong, 'Public Interest Litigation in Hong Kong: A new hope for social transformation?' (2009) 28 *Civil Justice Quarterly* 341.
[109] The test to be proposed draws on an argument by Jeff King in *Judging Social Rights*, which will be discussed in detail later.
[110] Pitkin (n 31) 209.

judicial doctrines. A crucial difference however is that the quasi-representative role has a distinct focus on the status of the litigants.

The quasi-representative role builds on Ely's process-based theory and Jeff King's refinement of Ely's theory. This section begins by discussing the two.

i. Representation-reinforcing: Ely

Ely identifies minority discrimination as one of the most notable forms of political malfunction occurring at the time in the United States. He spends one whole chapter to explain how his process theory can facilitate the representation of minorities. He explains that political malfunctions can occur because of concentration of powers by the majority groups. In these instances, the minority groups cannot truly protect themselves even if they are guaranteed an equal vote.[111] His proposal is to focus on unconstitutional motives. That is, laws that are passed with illicit motives or impermissible reasons should be prohibited. His concern is not with the substantive benefits brought upon by a law or policy, but the reasons for depriving a certain group of their entitlements.[112] He acknowledges the forensic difficulties in finding illegitimate motives (such as political representatives may not be open about their motivations), but argues that motives can be inferred from impact and pattern.[113]

A main challenge under Ely's approach lies in correctly identifying the particular social groups that are worthy of extra judicial protection. Unconstitutional motives, he argues, can be more easily ascertained by applying the doctrine of suspect classifications.[114] What this means is that the government will bear a higher burden of

[111] Ely (n 37) 135.
[112] Ibid 145.
[113] Ibid 136-145.
[114] Ibid 145.

proof or be subjected to a more rigorous scrutiny if the law or policy in question is directed against a suspect class or group. Common standards for identification at the time included, for instance, the discrete and insular minority approach, the historical discrimination suffered by the group, and the immutability of the group's defining trait. Arguing that those standards are insufficient, he identifies "stereotyping" as more on point.[115] Not all forms of stereotyping are impermissible, as stereotyping can simply mean generalization. The kind of stereotyping he has in mind is one that results in a significantly higher chance of legislative misapprehension.[116] This kind of stereotyping is more likely when the stereotyping is one that "serves the interests of the decision-makers".[117]

ii. Majoritarian bias or neglect: King

King has sought to refine Ely's approach by proposing the "particularly vulnerable to majoritarian bias or neglect" test.[118] He argues that the unconstitutional motivation standard sets too high of a bar, and that Ely fails to address subtler instances of discrimination such as neglect.[119] To address these concerns, he suggests that strong judicial restraint would be inappropriate when the claimant is from a group that is particularly vulnerable to majoritarian bias or neglect. A group is a vulnerable one if it is "at substantial risk of bias or neglect".[120] This naturally excludes minority groups such as corporations which might be objects of majoritarian bias but are not subjected to the "harm" of bias. King departs from the unconstitutional motive requirement and relies on majoritarian bias instead. This is a broad notion that describes "a form of proactive

[115] Ibid 155-7.
[116] Ibid 157.
[117] Ibid 158.
[118] King (n 59) 181.
[119] Ibid 180.
[120] Ibid 182.

hostility towards the group, or of disadvantage created by unfair preference for the interests of the majority." [121] And by adding majoritarian neglect, King accommodates the possibility of harm caused not by proactive prejudice but by an inertia to disregard as result of the majority's position.

King is aware of the challenges in identifying the group in court but argues that they can attended to. Courts today have ready access to a wide range of materials to help identification, such as government reports, social science studies and opinions of international and civil society organizations.[122] He also accepts that proving majoritarian bias involves some level of substantive discussion, but his argument is a circumscribed one that focuses on "group or status-based disadvantage".[123] There might be errors when applying the test, but he argues that with an appropriate degree of restraint, the error costs can be kept low while reaping the modest benefits offered by courts.

iii. Quasi-representative role: incumbent bias or neglect

While King was dealing with the adjudication of social rights in a democracy, his approach can be tweaked in ways to reinforce political representation in a hybrid regime.

Building on King's approach, the argument here is that: (1) if the claimant is from a group that is particularly vulnerable to *incumbent* bias or neglect, and (2) if that bias or neglect can be linked to the law or policy in question, (3) legal tests that are more favorable to the litigants should be adopted. This approach functions to provide extra legal protection to social groups vulnerable to authoritarian bias or neglect in a hybrid regime. As mentioned, this approach bears resemblance to some of the techniques under the

[121] Ibid 182.
[122] Ibid 183.
[123] Ibid 183.

interpretative role, but the benefits of the approach here are directed more towards disadvantaged social groups in a hybrid regime.

To see how King's test is being modified, first: the concept of majoritarian bias is of limited relevance to a hybrid regime because the hostile group is the incumbent. It is hard to classify whether an incumbent is a majority or minority group as electoral results are distorted due to unfair elections. Though it is possible or even likely that an incumbent lacks majority support, that is not always the case. Hence, the concept of majoritarian bias does not map on to the current context.

The concern is, instead, incumbent bias. We have already discussed the biases generated by a lack of electoral accountability and democratic oversight. It follows that, the typical victim of incumbent bias is not necessarily minority groups. Both majority groups (such as the opposition) and minority groups (such as religious groups and sexual minorities) can all be targeted by the incumbent if these groups, because of their ideologies or organizational capacity, pose a threat to the incumbent's power.

Neglect is equally an issue in a hybrid regime. Elections are used by authoritarian incumbents to have a better grasp of public opinion and social sentiment, but elections are poor information-gathering devices if they are unfair and self-selective. As a result of a lack of electoral connection to its people, the incumbent may be blindsided by or ignorant to what is happening in society and the views of the less vocal social groups. Unlike the bias situation, neglect here is an unintentional disease sometimes generated by unfair elections.

Proving (risk of) harm caused by bias or neglect is probably easier in a hybrid regime due to the severity of the bias or neglect. In a democracy, minority groups are at least able to participate in an open political process. They might not be able to defeat majority groups with entrenched powers, but at least they can compete in the political

process. In a hybrid regime, oppressed groups have limited opportunities to participate politically. They do not have the chance to protect themselves through the same political channels in a democracy. The fact that the views of the incumbent can sometimes go unchecked and unchallenged suggests that there is an even greater chance and a potentially higher degree of legislative misapprehension in a hybrid regime.

A possible response here might be that a lack of democracy might be blamed for many things, and this might give a free-pass to the courts to yield broad judicial review powers. This scenario is not necessarily problematic though, as long as it can be justified that a court should intervene in each instance. Additionally, establishing linkage between the harm and the incumbent bias or neglect will be difficult if the incumbent has engaged in responsive law-making. It is true that some social groups may not have a say through the ballot box, but if the incumbent is willing to, there are devices that function as proxies for elections that can enable more responsive and representative law-making. Like the political branches in democracies, those in hybrid regimes can make use of consultation committees and public opinion polls to compensate for the information loss as result of a lack of free and fair elections. Expert reports and academic research would also enable better policymaking. A committed incumbent has the capacity to make good policies that are respectful of different constituents, even if he or she is not democratically elected. The fact that a disenfranchised social group is dissatisfied with a policy in this instance does not necessarily justify judicial intervention, as it might be possible that the incumbent has already proven that it had used reasonable efforts to engage with impacted constituents and accurately balanced competing interests. Good policies can coincide with a lack of democracy. Proving linkage between (risk of) harm and incumbent bias is ultimately a contextual and evidential question.

A final important difference between my approach and King's relates to the implications of our tests. Under King's approach, the government would be subjected to a higher standard of proof if majority bias or neglect is proven. My approach has wider implications. If a claimant can prove authoritarian bias or neglect and its linkage to the law or policy in question, courts should consider all sorts of ways to support them in court. This includes not only adjusting the burden of proof, but also providing greater legal protection in other areas that the court has control over such as standing, remedies, legal procedures, costs and etc. In more concrete terms, this may involve, for example, adopting a higher degree of scrutiny, according less deference to the government, a more flexible application of standing rules, issuance of stronger remedies, more leniency towards the claimant with regard to court deadlines and cost judgments that are more sympathetic to the claimant's motivations. The quasi-representative role functions to alter the power balance in favor of those who are handicapped in the political arenas.

iv. Politically representative effects?

It was mentioned that one reason as to why this role is named quasi-representative is because the approach proposed may sometimes create decision-making patterns that seem politically representative. This is due to the quasi-representative role potentially benefitting vulnerable groups in a hybrid regime who are majority groups or represent interests that enjoy majority support.

An illuminating example is the line of cases in Hong Kong relating to LGBTQ rights. In Hong Kong, the community is generally in favor of LGBTQ rights. Studies and surveys in the recent decade consistently find that the majority supports the protection of

the LGBTQ community.[124] LGBTQ rights in Hong Kong are considered more liberal than in many other Asian societies with similar social underpinnings such as China and Singapore,[125] and the Hong Kong courts, as opposed to the political branches, have been a key engine for these developments.[126] Despite popular support for the development of LGBTQ rights, the pro-incumbent parties' voter base has conservative inclinations. Because of the pro-incumbent parties' dominance in the legislature and the systemic political advantages they enjoy however, the ordinary political channels were never fertile grounds to develop LGBTQ rights. There was never an openly gay lawmaker in Hong Kong until 2012, and there is little incentive for the incumbent's allies to invest in these issues.

In contrast, the Hong Kong courts seemed to have tracked social sentiment and expanded the right to equality to include the prohibition of discrimination on the ground of sexual orientation. From decriminalizing buggery [127] and legalizing transgender marriage[128] to the recognition of marriage or civil partnership status of same-sex couples

[124] A survey conducted in 2005 found that the majority of the public was generally accepting of homosexuals, and the public tended to be in favor of using legislation to tackle lesbian, gay, bisexual, transgender, and queer (LGBTQ) discrimination issues. MVA Hong Kong Limited, *Survey on Public Attitudes towards Homosexual*, 2006, available at <https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/public_consultation/public_homosexuals_eng.pdf > (last visited 8 November 2021). Studies conducted by the University of Hong Kong in 2013 and 2017 found that there was growing support for LGBTQ rights—from 58 percent support for sexual orientation antidiscrimination law in 2013 to 69 percent in 2017 and from 38 percent support for same-sex marriage in 2013 to over 50 percent in 2017. Holning Lau et al., *Support in Hong Kong for Same-Sex Couple's Rights Grew over Four Years (2013–2017): Over Half of People in Hong Kong Support Same-Sex Marriage*, Centre for Comparative and Public Law at the University of Hong Kong, 2018.

[125] Carole Peterson, 'International Law and the Rights of Gay Men in Former British Colonies: Comparing Hong Kong and Singapore' (2016) 46 *Hong Kong Law Journal* 109.

[126] Ibid. Peterson attributes Hong Kong's relative success in protecting LGBTQ rights to the rights protective constitutional framework and the incorporation of international law jurisprudence. While undeniably important, those laws alone do not guarantee liberal outcomes. Authoritarian states that regularly violate human rights such as Libya and Egypt are parties to the International Covenant on Civil and Political Rights. James Hollyer and Peter Rosendorff also found that some authoritarian regimes actually torture more after signing conventions against torture in order to signal their dominance and power. James Hollyer and Peter Rosendorff, 'Why Do Authoritarian Regimes Sign the Convention against Torture? Signaling, domestic politics and non-compliance' (2011) 6 *Quarterly Journal of Political Science* 275.

[127] *Secretary of Justice v. Yau Yuk Lung* [2007] 3 HKRD 903.

[128] *W. v. Registrar of Marriages* [2013] 3 HKLRD 90.

for dependent visa purposes[129] and the extension of spousal benefits to same-sex married couples,[130] the signs for social change through the legal process have been very promising. The local community, international organizations, and multinational corporations have celebrated many of these decisions.[131]

I am not arguing that the Hong Kong courts have decided these cases based on public opinion. The judgments are filled with elaborate reasoning supported by case law from all around the world. What is interesting, though, is that the courts have afforded a greater degree of judicial protection to the LGBTQ community by explicitly recognizing them as a protected class. This is in stark contrast to how the incumbent has treated these groups in the political process where they were given limited representational opportunities. Most intriguing is the fact that the courts were actually more majoritarian on this issue than the political process, as sexual rights issues tend to have the backing of the majority. This represents one of many lines of cases in Hong Kong where the courts look like they have followed public opinion.[132]

A similar pattern can be found in the constitutional development of women rights in Uganda. Partly due to Uganda's colonial history and partly due to local customs, gender equality has not been reflected in many of the laws of the country.[133] Because of its "non-democratic framework", as Erica Bussey observes, "[t]he political system in Uganda is structured in such a way that there is little opportunity of full and free debate about any controversial political issue".[134] As a result, the "only place" where "issues of national

[129] *Q. T. v. Director of Immigration* [2018] 4 HKC 403.
[130] *Leung Chun Kwong v. Secretary for Civil Service* [2019] 4 HKC 281.
[131] See e.g. Mike Ives, 'Gay Official Wins Court Battle for Spousal Benefits in Hong Kong' *New York Times* (6 June 2019).
[132] Eric Ip, 'The Democratic Foundations of Judicial Review under Authoritarianism: Theory and evidence from Hong Kong' (2014) 12 *International Journal of Constitutional Law* 330.
[133] See Manisuli Ssenyonjo, 'Women's Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the role of Uganda's Constitutional Court' (2007) 21 *International Journal of Law, Policy and the Family* 341.
[134] Bussey (n 57) 22.

importance" can be debated is the courts.[135] Accordingly, women rights organizations such as Uganda Association of Women Lawyers and Law and Advocacy for Women in Uganda have taken advantage of the legal process to fight for gender equality.[136] Relying on the broadly framed constitutional provisions, the Constitutional Court and the Supreme Court of Uganda have struck down legislations that unfairly treated women on issues of divorce, succession and adultery, as well as ruled the practice of female genital mutilation and the government's omission to provide basic maternal healthcare as unconstitutional.[137] These cases, again, have striking representational overtones as they are reflective of the fundamental rights and interests of the entire female population of the country. The quasi-representative role does not require courts to follow public opinion, but it may create an image of a political representative court because of the extra legal protection afforded to vulnerable groups who are sometimes in fact representative of majority interests.

e. Educative role

Finally, the educative role seeks to strengthen the constitutional democratic culture of a hybrid regime. This role focuses exclusively on the indirect or "extralegal effects"[138] generated by a constitutional court. Sociolegal scholars have long identified the potential of courts beyond the courtroom.[139] These indirect effects have been called many different

[135] Ibid.
[136] Mubangizi (n 100).
[137] See Ssenyonjo (n 133); Joseph Oloka-Onyango, *When Courts do Politics: Public interest law and litigation in East Africa* (Cambridge Scholars Publishing 2017) 127-130; *Center for Health, Human Rights and Development (CEHURD) & 3 Ors v Attorney General* [2020] UGCC 12.
[138] Dieter Grimm, 'Integration by Constitution' (2005) 3 *International Journal of Constitutional Law* 193.
[139] See Michael McCann, 'Causal Versus Constitutive Explanations (or, On the Difficulty of Being so Positive…)' (1996) 21 *Law & Social Inquiry* 457; Marc Galanter, 'The Radiating Effects of Courts' in Keith Boyum and Lynn Mather (eds), *Empirical Theories about Courts* (New York: Longmans 1983); Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law & Social Inquiry* 975.

names, such as radiating effects,[140] educational effects[141], ripple effects[142] and catalytic effects.[143] They highlight the constitutive power of a court, that is its ability to shape public meanings.[144] The constitutive power of a constitutional court is derived from the law's expressive nature. The law – be it constitutions, legislations, the legal process or legal decisions – relies on its expressiveness for its many functions: from coordinating behavior in society to expressing an ideology on behalf of the state.[145] Legal and political changes are a function of the many competing claims constantly made by constitutional and political actors. A constitutional court is one of these actors. It shapes identities, rights, narratives of social events and constitutional culture more broadly through its decisions, language and the adjudicative process. With the help of social media and the internet, the constitutive power of a court can travel further and penetrate deeper than ever before.

The educative role is made possible because of the constitutive power of a court. A court can play the educative role through the messages it sends, as well as by acting as a medium through which other parties can send messages. The latter version of the educative role is similar in practice to the participatory role, though the focus of the participatory role is on political participation as opposed to the social effects the court creates. The rest of this part explores the wide range of educative effects courts can produce, and underscores a few principles that would guide how judges should apply the educative role.

As argued above, a goal of the referee role is to bolster rule-of-law values. One of the ways the referee role can achieve this is through *demonstrating* that the law matters.

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[140] Galanter (n 139).
[141] Sadurski (n 13) 286.
[142] Celeste Arrington, 'The Mechanisms behind Litigation's "Radiating Effects": Historical grievances against Japan' (2019) 53 *Law & Society Review* 6, 7.
[143] Tamir Moustafa, *Constituting Religion* (CUP 2018) Chapter 1.
[144] Ibid; McCann (n 139).
[145] Richard McAdams, *The Expressive Powers of Law* (HUP 2015).

The educative effect here derives from the visible aspect of the referee role. Using the well-known maxim, justice needs to be seen to be done. Public display of abuses and impunity creates an impression that powers-to-be can always get away with it. The referee role has a secondary effect of showing to the public that rule of law as an ideal is achievable and is to be taken seriously. The indirect impact of a referee role is to socialize the people and the incumbent into rule-of-law norms.

The words chosen and reasoning adopted by a constitutional court define the language used in the constitutional landscape. Judges need to be aware of the potential power of rhetoric, and to adjust their language in ways that promote a more attractive understanding of the constitution and rights. As Alec Stone Sweet notes, within the cycle of judicialization of politics, "legislators absorb the behaviour norms of constitutional adjudication, and the grammar and vocabulary of constitutional law, into those repertoires of reasoning and action that constitute political agency."[146] Similarly, Sadurski argues that judicial review has the effect of "promot[ing] the 'right' understanding of constitutional rights among the legislators and the general public."[147] Political actors' adoption of a set of constitutional language might lead to their internalization of constitutional norms. The rhetoric of the court structures the behavior of the incumbent and might trigger a cognitive shift in how those in power should understand their responsibilities as political representatives.

Constitutional courts should also supply discursive frameworks and communicative resources to democracy activists and other allies outside the courtroom. Through their experience with the adjudicative process and by observing judgments, opposition and dissidents might learn to transform the grievances into rights-claims and

[146] Alec Stone Sweet, *Governing with Judges: Constitutional politics in Europe* (OUP 2000) 202.
[147] Sadurski (n 13) 286.

entitlements. This change of frame – from a narrow political demand to a generalizable right – can potentially legitimate their claims, widen the appeal of the political message and increase its relevance.[148] Protestors from Hong Kong have relied on concepts found in the city's mini constitution, international conventions and judicial decisions to frame their demands and appeal to the international community. This kind of educative effect does not necessarily depend on the final outcome a judicial decision. Case-studies have shown how the mere granting of standing could already provide credibility and legitimation to political claims.[149] In Pakistan, while the anti-corruption cases were not always obeyed, they were, as Moeen Cheema observes, "reported with considerable excitement in the domestic press" and had "weaved a narrative of endemic corruption and crony capitalism" that "belied the [incumbent's] claim of good governance".[150]

The court and its decisions might act as focal points to destabilize the authoritarian as well. Coordination by the opposition is intentionally made difficult by the incumbent through different political tactics, such as banning political parties and imposing harsh conditions for public gatherings. The legal process, as noted earlier, is public in nature, and important court cases frequently attract media attention. By ruling against the government, a decision signals to the public about constitutional violations and its contents have the potential of mobilizing the public against the incumbent.[151] Legal defeats might also spark public outrage against authoritarian policies.[152] For instance, even though the Constitutional Court of Uganda had struck out an initial application challenging the government's failure to provide adequate maternal healthcare, the Museveni government

[148] Arrington (n 142) 21-22.
[149] Arrington (n 142) 22.
[150] Moeen Cheema, 'Two Steps Forward One Step Back: The non-linear expansion of judicial power in Pakistan' (2018) 16 *International Journal of Constitutional Law* 503, 517.
[151] David Law, 'A Theory of Judicial Power and Judicial Review' (2008) 97 *Georgetown Law Journal* 723.
[152] See Douglas NeJaime, 'Winning Through Losing' (2010) 96 *Iowa Law Review* 941.

decided shortly after to improve hospital conditions and emergency services, possibly because it had to appease growing dissatisfaction of its public healthcare system.[153] Focal points can also be created by other events of the legal proceedings. Even court dates, as Celeste Arrington observes in the context of Japan, "entail an element of public performance and institutionalized ritual that provides moments to rally supporters and media attention".[154]

A constitutional court might also act as a platform or vessel for messages to travel through, and a constitutional court can control the reach these messages. Politicians in Israel, for example, have used legal proceedings to gain media exposure and change popular discourse even though they are aware that they are likely to lose in court.[155] The educative role entails amplifying the attractive aspects of those messages, which might mean adopting the challengers' concerns, putting greater emphasis on rights-protective elements and exposing gaps in the laws.

i. Principles in applying the educative role

Based on the examples given, there are some lessons about how a constitutional court can play this educative role effectively. First and foremost, it needs to be aware of and sensitive to its audiences. As Mark Galanter observes,

> "[the outward influences of a court] cannot be ascertained by attending only to the messages propounded by the courts. It depends on the

[153] Oloka-Onyango (n 137) 267. The case was dismissed based on the political question doctrine. Upon appeal, the Supreme Court decided that the courts do have jurisdiction. And subsequently, the constitutional court decided the omission was unconstitutional.
[154] Arrington (n 142) 25.
[155] Yoav Dotan and Menachem Hofnung, 'Legal Defeats—Political Wins: Why do elected representatives go to court?' (2005) 38 *Comparative Political Studies* 75.

> resources and capacities of their various audiences and on the normative orderings indigenous to the various social locations where messages from the courts impinge."[156]

Given this role's emphasis is on its expressive nature and the communicative resources it offers, a constitutional court needs to anticipate who will be reading the judgment, as well as their motivations and potential response. More about the importance of maintaining a sensitivity to the courts' audiences will be discussed in the next chapters.

Second, a constitutional court must pay close attention to the language it uses. Legal decisions that are crafted in overly technical or open-ended ways invite competing interpretations. Political actors seeking distortion may claim a different understanding. A court cannot simply reissue another decision to clarify what it meant. If there is a clear message or tone that a court wants to convey, it should try to contextualize its message and minimize room for distortion.

Third and most importantly, a constitutional court needs allies outside the courtroom to facilitate its educative role. Galanter's observation cited above reveals a limitation inherent of this role. The creation of meaning is a dynamic process, and courts cannot determine public meaning on their own, but at most shape and influence its formation. A court can minimize distortion through savvy writings, but how a court's behavior and decisions are interpreted are ultimately left to the audiences external to the courtroom. In most cases, decisions do not travel to their audiences directly though. More commonly, "sophisticated intermediaries"[157] such as the press, professional organizations and the academy interpret the decisions and provide a more laymen friendly narrative.

[156] Galanter (n 139) 118.
[157] Law (n 151) 751.

These intermediaries help "translate" the law and amplify the decision. It then becomes important for the court to establish a friendly relationship with these intermediaries. These intermediaries directly affect a constitutional court's constitutive power. They are not simply transmission vessels, but powerful middlemen that can apply interpretive frames to induce certain kinds of social behavior. The state may seek to undermine the court and its allies by co-opting media outlets, but a court can also enhance freedom of information and other organizational rights to counter against authoritarian intermediaries. A court needs trusted mediums, and trusted mediums need the constitutional protection of the court. A symbiotic relationship between the courts and its intermediaries is essential to an effective implementation of the educative role. In the penultimate chapter, we will look more closely at the ways in building relationships with allies outside the courtroom.

Last but not least, similar to what was argued under the participatory role, it is important for a court to remain accessible. The reason here is not because of the intrinsic value accorded by this alternative participatory channel. Instead, a court must be accessible so that political allies can rely on the legal process to disseminate their messages. Some of the educative effects mentioned cannot be made possible if the legal process is too restrictive. A court can also set its own agenda in this regard by exercising its discretionary power regarding which kinds of cases get through and when to hear them.

4. Institutional Competence

So far, it has been argued that a constitutional court should protect and promote democratic values in a hybrid regime. The five roles discussed set out different ways for courts to achieve that goal. The roles sometimes also cover pathologies associated with unfair elections and a lack of democratic oversight.

Democratic theory is used to justify these roles, but there is also a question of institutional legitimacy. The roles are perhaps demanding more than what a constitutional court in a democracy is normally expected of, and hence institutional competency concerns might be magnified. Constitutional lawyers may question whether a constitutional court has the capacity to perform the democratic roles and the extent to which those roles are limited by competency concerns.

While acknowledging the institutional limitations of a constitutional court, this part maintains that the democratic roles are defensible for three reasons. First, institutional competency concerns are not absolute arguments and must be assessed on case-by-case and role-by-role bases. Second, the democratic roles are not an excessive stretch of a constitutional court. Third and most importantly, some level of departure from competency considerations is warranted given a hybrid regime's lack of democracy and its associated malfunctions. Questions of institutional competency are relative and depend on the extent to which the political branches are functioning according to their intended goals. A mature democracy with well-functioning political institutions calls for a more deferential constitutional court due to the democratic objections discussed. Exceptional circumstances such as when the constitution is thrown into dispute or undergoing transition might require a more creative and activist court, as a court may have "no option" but to transcend the law to save the constitutional order.[158] Similarly, what will be argued here is that some of the risks associated with pushing the normative boundaries imposed by competency considerations are worth bearing because of the democratic benefits it might yield.

Institutional competency describes the idea that authority is allocated according to the institution's likelihood in reaching good outcomes.[159] Is a question apt for the court

[158] See N. W. Barber, and Adrian Vermeule. 'The Exceptional Role of Courts in the Constitutional Order' (2016) 92 *Notre Dame Law Review* 817.
[159] King (n 59) 130. See also Kavanagh (n 82).

given its institutional qualities? A court is considered legitimately exercising its power if it has the necessary capacity to do so.[160] Judges are professionally trained in the law. The adjudicative process provides opportunities for the parties to offer reasoned arguments. Judges, after hearing the relevant arguments, come up with a decision based on pre-existing legal and constitutional norms and accepted modes of reasoning.

Different questions call for different standards for decision-making. It is often argued that a court is not best equipped to deal with polycentric questions given their complexity and potential to disrupt relations far beyond the suit.[161] The focused nature of adjudication does not allow courts to address the more layered issues involved. There are also disputes beyond the expertise of the professionally trained judges; questions of morality or pure preferences might be best left to the mass for public deliberation and voting, while social distribution problems will benefit from technocratic expertise that judges lack.[162] Judges may also be missing the necessary information to arrive at a proper decision since the adjudicative process is limited to the evidence and arguments provided by the litigating parties. Facing empirical uncertainty, judges are incapable of evaluating the precise effects of its decisions with the possibility of creating unintended adverse effects.[163] Conversely, a legislature, with its ability to consult people and cater for a multitude of interests, is designed for policy-making.[164] Presumably, even legislatures in hybrid regimes can gather more information and have access to better political solutions than the courts. Whether hybrid regime political branches actually use their institutional competence for the better of society or for authoritarian entrenchment is another issue for

[160] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) 292.
[161] Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.
[162] Donald Horowitz, *Courts and Social Policy* (Brookings Institution Press 2010).
[163] Adrian Vermeule, *Judging Under Uncertainty: an institutional theory of legal interpretation* (HUP 2006). See also Yowell (n 7).
[164] N.W. Barber, *The Principles of Constitutionalism* (OUP 2018) Chapter 3.

now. As discussed, institutional competence is not necessarily related to regime-type, and the same limitations exist in courts in hybrid regimes. Transgressing the institutional boundaries increases the chances of arriving at wrong decisions. A court can never act like an elected institution because judges are typically unelected and lacks some of the institutional advantages of the other branches.

Some may treat competency challenges as general and decisive arguments. However, they are only possible *weights* against the democratic roles. Expertise and information gathering capacity, for instance, must be proven on an issue-by-issue basis, and not generally assumed by virtue of the political branches' position or the subject matter involved.[165] Not every constitutional case poses the same kinds of obstacles to a constitutional court. The fact that a case may have far-reaching and uncertain impacts, for example, does not necessarily automatically justify judicial restraint. Judges lay down legal principles, and it is a collateral effect of this duty that these principles will affect many people and relationships beyond the litigants.[166]

More importantly, the strength of those arguments must be tested against each of the democratic roles suggested individually. A closer examination of each role shows that the competency concerns are not as pronounced as some might assume.

Among the five roles described, the referee role and the participatory role confront capacity questions the least. The referee role relies on the inherent expertise of courts in adjudication and procedural justice. The rule-based nature of the referee role sets out clear limits for the extent of judicial intervention. The participatory role goes a bit further. It begins to blur the lines between law and politics by allowing political claims to be expressed through the legal process. While the participatory role calls for a generous

[165] Chan (n 80).
[166] King (n 59) 193.

interpretation of access rules and constitutional rights, it does not suggest that all political claims should be allowed in the courtroom. As argued above, those seeking to use the constitutional court as a participatory channel must translate a political claim into a legal claim first by reframing their political demands using legal language and by complying with the relevant rules of legal access. Satisfying these criteria is not necessarily challenging, but access rules limit the scope of the participatory role. The participatory role also does not depend on substantive outcomes. Its benefits are procedural in nature, providing those who are frozen out of the political process opportunities to express their views.

While the interpretative and quasi-representative roles have a heavy substantive dimension, they rely on and are limited by what King calls the "basic interpretative approach" of a court. The "basic interpretative approach" is to check on the "acceptability of the justifications put forward for interferences with or denials of interests in question."[167] The interpretive role does not give a constitutional court a free pass to actively fix every political problem in a hybrid regime. The role is conditioned by the principles that structure the adjudicative process, standards of the legal community and the sorts of arguments launched by the litigants. The process of reaching decisions under the basic interpretative approach is what defines the legal dimension of a constitutional court and distinguishes the interpretative role fundamentally from the political roles of the legislature and the executive branches. The authoritarian effects of what is being challenged help determine the strengths of the government's defense and the plausibility of its premises. The interpretative role has political effects, but the manner in which decisions are reached under the interpretative role is still largely consistent with how a constitutional court normally decides.

[167] Ibid 97.

Similarly, the court is not asked to track public opinion under the quasi-representative role, but to afford extra judicial protection to certain kinds of social groups. The basic interpretative approach is retained. Relying on Ely and King, I have proposed a workable standard to identify these groups and the necessary elements to activate this role. To address questions of competency, a court can be assisted by all kinds of extrinsic materials to trace the impacts of incumbent bias or neglect.

The educative role highlights the social effects created by a court, some of which are perhaps considered secondary in nature, but those effects are derived from the adjudicative process. In fact, the educative role is similar in function to the traditional watchdog role of a constitutional court (through the signaling effects it creates), complemented by a higher degree of democratic sensitivity when crafting the contents of the judgments. Some might be concerned about the far-reaching social effects this role might have. It is the duty of a constitutional court to lay down fundamental principles that govern society. The fact that the effects it creates are far-reaching is not necessarily a problem, as I have pointed out already. The real question is whether the messages the court sends are legitimate, and the activities carried out under the educative role– such as the adoption of rights-based language, spotlighting constitutional transgressions, and making democratically attractive parts of the judgment accessible – are justifiable under democratic theory.

Perhaps the real discomfort lies in the fact that the interpretative role, the quasi-representative role, and the educative role require judges to consider democratic norms during constitutional adjudication. I have four responses to this. First, democracy is constitutionally good and there is no shame in the judicial advancement of democratic values. Second, a thin conception of democracy can already activate these roles. Third, the courts are not asked to develop and put forth its own theory of democracy, but to focus on

the elements that would promote democratic values during constitutional adjudication. Lastly, I have relied on familiar aspects of the adjudicative process and offered specific guidelines under each role to structure their application.

Finally and perhaps most importantly, these roles are justifiable from a comparative institutional perspective because they are targeting problems found in hybrid regimes as a result of how their political branches are structured. Comparative institutional analysis assesses institutions based on *relative* institutional competence.[168] Neil Komesar explains how comparative institutional approaches should be applied to the study of law.[169] Different institutions, as he notes, are "alternative mechanisms by which societies carry out their goals."[170] In deciding how to allocate authority, comparative institutional competence cannot be avoided. Each institution presents different sets of strengths and flaws, and there can be multiple institutional choices in reaching a particular goal. Institutions should always be assessed relatively across a consistent standard. The fact that an institution seems to be performing suboptimally does not necessarily suggest that an alternative institution must be superior. However, it may be a strong reason to consider alternatives. Komesar reminds us that, "we must confront the reality that the best choices will be highly imperfect and that the relative merits of institutions will vary across different settings."[171]

A constitutional court is an imperfect solution to the political problems of a hybrid regime, but there are also limited alternatives in a hybrid regime. Elections are rigged; space for public mobilization is restricted; and the media is subjected to a substantial level

[168] See Daniel H. Cole, 'The Varieties of Comparative Institutional Analysis' (2013) *Wisconsin Law Review* 383.
[169] Neil K. Komesar, *Imperfect Alternatives: Choosing institutions in law, economics, and public policy* (University of Chicago Press 1994); Neil K. Komesar, *Law's Limits: Rule of Law and the Supply and Demand of Rights* (CUP, 2001).
[170] Ibid *Law's Limit*, 31.
[171] Ibid 189.

of state control. As noted previously, the competency concerns relating to stretching the role of a constitutional court are only weights. They must be weighed against the potential gains of the democratic roles and considered in light of alternatives. Considering the lack of alternatives *and* if a sufficient level of judicial autonomy can be guaranteed, a constitutional court can and should act as a second-best solution to the democratic failures suffered in a hybrid regime. The very reason for arguing for those roles is that the political branches in a hybrid regime tend to be unable to fulfil many of its intended functions. The utility of the referee role, for instance, rests on the rule-breaking tendency of an authoritarian; the participatory role and the quasi-representative role seek to supplement the lack of participatory opportunities and reinforce political representation; and, the interpretative role and the educative role help restore and protect democratic norms on a more general level. True to the comparative institutional spirit, the democratic roles are only a temporary remedy, as opposed to a permanent fix. Holding the court constant, if for whatever reasons the political branches begin to improve and reform or if the political process is capable of self-correction, the competency considerations should be given more weight and the constitutional court should start taking a back seat.

5. Conclusion

In the first half of the chapter, we considered the extent to which democratic objections against judicial review apply to a hybrid regime. The chapter shows that the democratic objections do not hinder our pursuit of democracy-enhancing judicial roles as the conditions for them to apply to a hybrid regime are missing or weakened. The considerations raised by those objections pave the way for us to consider how a constitutional court can and should support democratic ideals in a hybrid regime.

Five democracy-enhancing roles were discussed. Each role highlights a different aspect of a constitutional court and contributes to democracy in a different way. The referee role seeks to preserve rule-of-law values by enforcing rules impartially; the interpretative role requires exercising judicial discretion in ways that are consistent with democratic values; the participatory role asks the court to act as an alternative political participatory channel; the quasi-representative role promotes political representation by protecting disadvantaged groups in a hybrid regime; and the educative role reinforces the democratic culture of a hybrid regime through judicial rhetoric and the court's expression functions.

While acknowledging some of the limitations of a constitutional court in playing these roles, the chapter has argued that a constitutional court is an attractive second-best solution to the democratic deficit of a hybrid regime considering the lack of viable alternatives and the positive impacts produced by those roles. The chapter has also considered ways of addressing competency issues with regard to each of the democratic roles. Those concerns are answerable and, to some extent, already factored into the roles.

Another consideration at play is their feasibility. An assumption here is that a constitutional court must enjoy a sufficient degree of judicial autonomy. This, as the previous chapters have shown, is a realistic possibility. However, there is the question of whether these democratic roles are sustainable, and how might the authoritarian climate of a hybrid regime affect the application of the democratic roles. These issues will be taken up in the coming chapters.

CHAPTER FIVE

THE LEGITIMACY PARADOX

1. Introduction

In the previous chapter, we have explored ways in which a constitutional court can and should contribute to democratic values in a hybrid regime. Towards the end of the chapter, I have also pointed out the extent to which questions of competency might limit the democracy-enhancing roles of a constitutional court. While democratic theory may offer justifications for the roles suggested, we must also deal with another question of whether it is *feasible* for a constitutional court to play those roles under the political climate of a hybrid regime. Empirical evidence, as showed in Chapter Three, generally shows that constitutional courts in hybrid regimes enjoy some degree of judicial autonomy. Those findings give us *prima facie* reasons to believe that the democratic roles are possible. The aim of this chapter is to take a closer look at how the hybridity of a hybrid regime impacts the conditions under which a constitutional court exercises its powers and applies the roles. This issue is explored through the lens of perceived legitimacy.

This chapter argues that courts in hybrid regimes face a legitimacy paradox: an activist court risks attracting backlash from the authoritarian, whereas a deferential court may undermine the trust of a democracy-supporting population. The paradox is grown out of the competing ideologies of a hybrid regime mentioned in Chapter Two. Consequently, the way the judiciary navigates politically salient cases will have huge effects on its institutional health. As it will explained later in the chapter, the nature of the dilemma is philosophical, but this problem has practical implications to courts.

One of the earlier scholars to notice the legitimacy paradox is Martin Shapiro.[1] Relying on sociological theories of judicial legitimacy and a relational framework, the chapter seeks to develop and unpack the legitimacy paradox in a hybrid regime. A court must be able to navigate the legitimacy paradox to play the democratic roles effectively and sustainably. Guidelines regarding how the challenges posed by the paradox can be addressed will be discussed in the next chapters. The purpose of this chapter is to first identify and understand the paradox and the challenges it brings.

Legitimacy is spoken in either sociological terms or philosophical terms, and this chapter focuses on the sociological conception of judicial legitimacy, or what I refer to here as "perceived legitimacy". In the words of David Beetham, the topic of legitimacy is curiously "suspended between two separate bodies of literature."[2] Social scientists' focus is on the descriptive and empirical dimension of legitimacy, while political and legal theorists are interested in its moral conditions. Though not consistently framed in such a manner, the discussion in the previous chapter covered many questions relating to the normative legitimacy of a constitutional court in a hybrid regime.[3] There are some overlapping concerns between the two conceptions of legitimacy – sociological and normative – since they both relate to the broad concept of legitimacy.[4] Nevertheless, they need to be distinguished, especially since there is a tendency in our daily usage to confuse

[1] I borrow the term from Shapiro. See Martin Shapiro, 'Courts in Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008) 334-335.
[2] David Beetham, *The Legitimation of Power* (Palgrave Macmillan 1991) 7.
[3] In particular, it engaged questions of democratic legitimacy and institutional legitimacy of a constitutional court.
[4] They are not contrary conceptions of legitimacy as well. They approach the topic from different angles and can sometimes inform one another. Perceived legitimacy is conceptually parasitic on normative legitimacy. Perceived legitimacy describes people's belief of legitimacy. We must at least be aware of what people's normative views of legitimacy are in order to describe this social fact. Perceived legitimacy can also be a feedback to normative legitimacy. A widely held perception that a court is legitimate suggests that the court at least manages to coordinate society effectively. This perception gives us a reason to see it as actually legitimate. A helpful account of normative legitimacy should have accounted for social facts.

normative legitimacy with perceived legitimacy. While normative legitimacy relates to the actual justifications of the court as an institution and its actions, perceived legitimacy describes whether people actually believe and treat a court as legitimate. Perceived legitimacy echoes with the account of legitimacy by Max Weber and what Joseph Raz terms as "de facto authority".[5] According to common understanding, the utility of perceived legitimacy is closely connected to the electoral incentives of democratically elected representatives.[6] As it will be clearer later however, the hybridity of a hybrid regime forces us to rethink how regime-type should affect how we understand the concept of perceived legitimacy.

It needs to be clarified that, while judicial power and perceived legitimacy are closely connected concepts, they remain analytically distinct. Judicial power broadly refers to the consequentiality of a court as an actor within the constitutional order.[7] A powerful court is one that has social impact, which means its decisions or opinions are obeyed and respected by the relevant parties. Power can, of course, be used in different ways, and the previous chapter has offered direction regarding how that power, if gained, should be exercised. A common function of judicial power is the formal powers enjoyed by a court. For instance, the Polish, Hungarian and Ugandan constitutional courts are endowed with the power to address legislative omissions, while the South African and Kenyan constitutional courts can issue non-binding advisory opinions in the absence of a

[5] Beetham (n 2); Joseph Raz, *The Morality of Freedom* (OUP, 1988) Chapter 2; Arie Rosen, 'The Normative Fallacy Regarding Law's Authority', in Wil Waluchow and Stefan Sciaraffa (eds) *Philosophical Foundations of the Nature of Law* (OUP, 2013) 75.
[6] See Georg Vanberg, *The Politics of Constitutional Review in Germany* (CUP 2004); Clifford James Carrubba, 'A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems' (2009) 71 *The Journal of Politics* 55; Gregory A. Caldeira and James L. Gibson, 'The Etiology of Public Support for the Supreme Court' (1992) 36 *American Journal of Political Science* 635.
[7] Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts' (2018) 29 *Duke Journal of Comparative and International Law* 1.

dispute.[8] The range of formal powers enjoyed is only part of the equation however.[9] Other factors that shape judicial power include, for example, the formal authority granted by the constitution, the extent to which the political culture is committed to rule of law norms, how political powers are distributed, and the perceived legitimacy of a court, which is the central focus of this chapter. As such, the point about maintaining perceived legitimacy is not for the sake of popularity. Although perceived legitimacy is only one factor affecting judicial power, it is a particularly salient one in a hybrid regime. More importantly, judges have some degree of control over its perceived legitimacy, as the next two chapters will demonstrate.

The rest of the chapter is divided into two parts. Part 2 lays out the conventional view of perceived legitimacy, including the mechanisms behind it and its utility. It will be pointed out that the conventional view is premised upon the political dynamics of a democracy. The conventional view needs to be modified in order to be applied to a hybrid regime.

Part 3 then takes on this task by introducing a relational angle. An audience-based framework, it will be shown, helps us identify the key audiences that are relevant to judicial legitimacy in different regime-types. The audience-based framework will then be applied to a hybrid regime to set out the legitimacy paradox. The paradox is a logical outgrowth of the irreconcilable ideologies that define a hybrid regime. The effects of the paradox are practical, as exemplified by the tensions between the expectations different political actors within a hybrid regime have of a constitutional court. It will be explained how these conflicting expectations create challenges for judicial maneuvering in a hybrid regime.

[8] See Adem Kassie Abebe and Charles Manga Fombad, 'The Advisory Jurisdiction of Constitutional Courts in Sub-Sahara Africa' (2013) 46 *George Washington International Law Review* 55.
[9] And formally strong courts are not always substantively strong.

2. Perceived Legitimacy: The Conventional View

a. The Court and the public

The sociological conception of judicial legitimacy is traditionally linked with public support, or as political scientists call it "diffuse support".[10] It refers to the people's "confidence in institutions to make, in the long run, desirable public policy."[11] Perceived legitimacy describes whether courts are believed to be and being treated as legitimate institutions. Perceived legitimacy seeks to capture a social phenomenon, instead of prescribing standards for determining what legitimacy should mean. As a result, perceived legitimacy is morally agnostic and accommodates different conceptions of normative legitimacy.

Perceived legitimacy matters as it reflects people's obedience to the decisions of the courts and affects a court's ability to command authority.[12] This is especially the case for constitutional courts. As James Gibson and his colleagues note, "since judges often make decisions contrary to the preferences of political majorities, courts, more than any other political institution, require a deep reservoir of good-will."[13] Constitutional court's inevitable involvement in politics and its potential to decide against the people and political representatives opens itself to attacks and public scrutiny. Courts lack the sword and the purse, and do not have the coercive power or resources to ensure compliance. Perceived legitimacy is an important asset of the court, as it "helps members to accept or

[10] Caldeira and Gibson (n 6).
[11] James Gibson et al., 'The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A survey-based experiment' (2011) 64 *Political Research Quarterly* 545, 546.
[12] Tom R. Tyler, *Why People Obey the Law* (Princeton University Press, 1990)..
[13] James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird. 1998, 'On the Legitimacy of National High Courts' (1998) 92 *American Political Science Review* 343.

tolerate outputs to which they are opposed or the effects of which they see as damaging their wants".[14]

Legitimacy is largely a question of degree, and the effects of a lack of legitimacy becomes particularly acute when it drops past a certain point. There is no general answer as to where that point exactly is as it depends on contextual factors, but perceived legitimacy does not necessarily mean majority support. What is required here is a "sufficient base of support" for a court to exercise its powers effectively.[15] At best, the decisions of a court that is perceived as illegitimate will be ignored by the political branches and the public; at worst, enemies of the court may take advantage of the gap to "reform" the court. On the other hand, a court that is trusted by the people will likely "stand against the winds of public opinion"[16] as well as be able to induce compliance of the political branches even when political actors find the decisions disagreeable.

Disagreement with a ruling does not necessarily suggest perceived illegitimacy. Legal discontent is different from a lack of legitimacy.[17] Judges are not extensions of their appointees or even the people. Judges are entrusted to decide what they think is best according to the constitution and the law. Courts regularly issue decisions that are found to be disagreeable by the public, legal community and academy. The fact that judges will arrive at conclusions we might not like should come as no surprise, as this is simply a facet of their duty. Notwithstanding the strict legalist school of thought, it is understood that there can be reasonable disagreements regarding legal ideas, especially in constitutional cases involving moral and policy considerations. While persistent and sharp disagreements may lead to a decline in perceived legitimacy, dissatisfaction with the outcome of a decision does not necessarily lead to a lack of confidence in the institution.

[14] Caldeira and Gibson (n 6) 637.
[15] Tom S. Clark, *The Limits of Judicial Independence* (CUP 2010) 262.
[16] Caldeira and Gibson (n 6) 635.
[17] Richard Fallon, *Law and Legitimacy in the Supreme Court* (HUP 2018) 6.

In fact, the possibility of legal disagreement underlines the utility of perceived legitimacy. Perceived legitimacy provides a "reservoir of good will".[18] A high level of perceived legitimacy suggests enduring and favorable attitudes of the court. Consequently, the people will be more forgiving of decisions by a legitimate court. Criticisms do not necessarily reduce the people's confidence in it. Having the general support of the public improves the chances of the court surviving the repercussions of its controversial decisions. Endowed with the support of the public, the court can play the "legitimacy" card to influence the regime, or to provide the motivations for other constitutional actors to accept the authority of the court.

Studies find that the reservoir of good will tends to be durable.[19] Over longer horizons, the level of public support of a court does shift though. And once a court goes reputationally bankrupt, recovery becomes especially difficult. A court's image of neutrality is compromised when the people start viewing the court with distrust and skepticism. These attitudes desacralize the court. A "wrong" decision in this instance will feed into their suspicion. This creates a tricky situation for the courts because there are bound to be decisions that some part of a polity finds disagreeable. Unlike the elected branches which can "re-establish their legitimacy every few years via electoral processes",[20] periodic cycles for replenishing perceived legitimacy are unavailable to most courts, or occur less often than the elected branches.[21] The reservoir of good will cannot be earned overnight, and once the reservoir begins to dry out, political backlashes will likely ensue. People might not only ignore the rulings of the court, but also make demands to reduce the judiciary's power. The confidence of the public is not only intrinsically

[18] David Easton, *A Systems Analysis of Political Life* (John Wiley 1965) 275.
[19] Caldeira and Gibson (n 6) 637.
[20] Vuk Radmilovic, 'Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond' (2010) 43 *Canadian Journal of Political Science* 843, 845.
[21] Some courts that are elected or with shorter tenure may have mechanisms similar in function to the political branches in replenishing legitimacy.

important to any public institution, but also instrumental to a court's ability to maintain its institutional health.

To maintain the public's support, courts must,[22] according to the conventional view, appear impartial[23] and be careful not to deviate too far from the majority will.[24] In other words, while courts must look like they are applying the law in a professional manner, they need to also be sensitive to public sentiment. Studies find that some courts are actually quite good at tracking public opinion and that some judges are highly aware of the views of the political community and signals that are indicative of public opinion.[25] Suggesting that courts are indirectly accountable to the public, these findings are perhaps at odds with the more traditional conception of the judicial role. As Tom Clark writes,

> "The irony is that in order to protect its image as a neutral, independent decision-making body, the Court must in fact pay close attention to what will be deemed acceptable by the populace and sometimes yield from any neutral perspective to avoid overstepping the bounds imposed by perceptions of what is legitimate."[26]

As uncomfortable as the conclusion might be, the conventional view described sets out a convincing case about how public opinion indirectly shapes judicial power.

b. Outside democracies?

[22] There are factors affecting diffuse support that are beyond the control of the court, such as the public's general level of confidence in the political system. A decline in the public's trust in the government may have spillover effects on the judiciary.
[23] Caldeira and Gibson (n 6); Tyler (n 13).
[24] Robert Dahl, 'Decision-making in a Democracy: The Supreme Court as a National Policy- maker' (1957) 6 *Journal of Public Law* 279.
[25] Dahl ibid; Clark (n 15) 73-75.
[26] Clark ibid 22.

The conventional view rightly captures the utility of perceived legitimacy, but the mechanisms behind the conventional view are limited to a democracy. The conventional view assumes that a nexus can be established between the public and the elected branches. Public opinion matters to courts because the people, through elections, shape the incentives and behavior of the political representatives. Or as Georg Vanberg argues, the "principal inducement" for why the political branches would respect the judiciary's decisions is the "threat of a loss of public support for elected officials who refuse to be bound by them".[27] The conventional view is predicated on the assumption that a court-supporting public would punish political actors who seek to undermine the court by voting them out of office.[28] Under this model, the potential to suffer real "electoral consequences"[29] convinces political representatives to exercise self-restraint even when the court is an assertive one that challenges their policies.

This assumption very often exists in democracies.[30] In non-democratic regimes however, the nexus between public opinion and electoral pressure is severely weakened, if not completely broken. The conventional view would most certainly be inapplicable to a pure authoritarian regime. The lack of electoral competition suggests that the public cannot discipline the incumbent in the ballot box the same way as the people in democracies do. In cases where the authoritarian is in full control of the press and information flow, the public cannot even monitor the behavior of the incumbent.[31] With a severe power imbalance, there might not be a strong enough opposition to credibly

[27] Vanberg (n 6) 14.
[28] Ibid; Carrubba (n 6).
[29] Vanberg (n 6) 14.
[30] Vanberg makes it clear that his theory is limited to advanced democracies. Ibid 20.
[31] Ibid 21.

challenge the incumbent as well.[32] When the public cannot threaten the incumbent's power, it becomes much easier for the incumbent to control its courts, even if the courts have the support of the public. The role of public opinion is hence drastically reduced in a pure authoritarian regime.[33]

For similar reasons, the conventional view cannot fully explain how public opinion contributes to judicial legitimacy in a hybrid regime. The relevance of the public in a hybrid regime is not exactly straightforward. In contrast to the people in authoritarian regimes, those in hybrid regimes enjoy some opportunities and freedom to participate and contest in elections. Unlike democracies however, hybrid regime elections are flawed and favor the incumbent. The public still seems to matter, but to a lesser extent than a democracy. The introduction of an unfairly elected government complicates the conventional model. On top of the public, should a court be sensitive to the incumbent's preferences as well? What if there are sharp disagreements between the incumbent and the public? How would the ideological and political tensions between the incumbent and a democracy-supporting population impact the approach of a hybrid regime court? The conventional view fails to answer these questions because the inducement function of the public under the model rests on a functioning democratic system with a democratically accountable government.

3. Perceived Legitimacy in a Hybrid Regime

The conventional view fits well in mature democracies where democratic norms are entrenched, and the political rules are clear and well-established. In a hybrid regime

[32] Brad Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy* (OUP 2019) 129.
[33] This does not mean the public is irrelevant. Rather, it means that the public may have to incur greater costs in order for it to have an impact.

however, elections are less competitive, and informal and authoritarian political norms play a larger role in day-to-day politics. Given some of the limitations of the conventional view outside democracies, this part develops an audience-based framework to better understand the political foundation of perceived legitimacy in a hybrid regime. The audience-based framework maintains some of the insights of the conventional view but supplements it with a relational angle.

The proposed framework resonates with a broader call for what Bjorn Dressel, Raul Sanchez-Urribarri and Alexander Stroh term as a "relational approach" in studying judicial politics.[34] An increasing number of scholars have highlighted the significance of bringing into attention relational networks involving judges to studying judicial patterns outside mature democracies. It is not enough to only learn about the formal rules and institutional structure when studying courts in authoritarian contexts. "[F]ormal practices are interwoven with informal ones and that day-to-day personal interactions are central to all parts of a polity, including the judiciary",[35] as Dressel and his colleagues observe. Given the prominence of authoritarian politics in hybrid regime constitutional law, one must be especially sensitive to the ongoing power relations outside the courtroom in order to have a better picture of how judicial power is developed. The proposed audience-based framework can help us pick out the relevant audiences that shape judicial power in a hybrid regime and explore how and why these stakeholders matter. This part will begin by developing the audience-based framework. Next, the framework will be applied to understand the legitimacy paradox faced by a hybrid regime constitutional court, as well as the challenges of navigating the dilemma.

[34] Björn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, 'The Informal Dimension of Judicial Politics: A relational perspective' (2017) 13 *Annual Review of Law and Social Science* 413.
[35] Björn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, 'Courts and Informal Networks: Towards a relational perspective on judicial politics outside Western democracies' (2018) 39 *International Political Science Review* 573, 575.

a. An audience-based framework

Perceived legitimacy is something that needs to be demonstrated. The emphasis is on "perceived": a court must be able to show its qualities. More importantly, perceived legitimacy is fundamentally a relational concept. The qualities of a court must be demonstrated *to* (e.g. be seen, be felt, or be heard by) someone in order for those qualities to have legitimizing effects. Perceived legitimacy is, as Nienke Grossman calls it, "agent relative",[36] and depends on whom the legitimation is addressing.[37]

It seems increasingly clear that judges are aware of those who pay attention to their actions, i.e. audiences, and that the regard of these audiences directly or indirectly shape judicial norms and preferences. As mentioned above, there is a line of research that looks at how the decision-making patterns of courts sometimes actually follow public opinion. These works examine public attitudes by treating the public as a monolith. Many judges are sensitive to a variety of social groups, however, and their attentiveness to actors outside the courtroom can a lot more nuanced. A survey on judges from common law apex courts reveal that judges do regard audiences aside from the litigants (such as government agencies and the international community) as their judgments' audiences.[38] More importantly, the results of the survey indicate that some judges are consciously responsive to their audiences' attitudes when writing their judgments.[39]

[36] Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review* 61, 80.
[37] Beetham (n 2) 11.
[38] Brian Flanagan and Sinead Ahern, 'Judicial Decision-making and Transnational Law: A survey of common law Supreme Court Judges' (2011) 60 *International & Comparative Law Quarterly* 1, 15.
[39] Ibid.

These findings fit well with Lawrence Baum's audience-based theory of judicial behavior developed more than a decade ago.[40] Baum's hypothesis is that judges value their audiences' regard of them and are motivated to decide in ways to seek their audiences' approval. A lower court judge might, for example, try to please his or her seniors by writing judgements in a certain way so as to increase the chances of a promotion; or judges who hope to leave a legacy in an area of law might be particularly sensitive to the opinions of the legal academy. His theory has been developed and applied recently to explain varying levels of judicial assertiveness against different authoritarians in Pakistan.[41]

The works outlined above rely on an audience-based approach to partially explain how judges *actually decide* in real life. An audience-based approach can also be used to theoretically explain the political foundation of perceived legitimacy of a court. An audience-based approach can complement the conventional view of judicial legitimacy by disentangling the roles of the different kinds of audiences faced by a court. With various audiences creating different expectations, the audience-based approach can help us trace whose perception would matter to the court and how linkages to certain audiences would affect how a court *should* decide.

A court faces various audiences, including but not limited to the public, the government, lawyers, the legal academy and the business sector. Not every audience's perception contributes equally to the legitimacy of a court. For instance, in polities with outspoken academics whose opinions can sway public opinion, academia becomes an audience that the court should be sensitive to if judges want their decisions to have social penetration. In highly internationalized jurisdictions or states under the support of

[40] Lawrence Baum, *Judges and their Audiences* (Princeton University Press 2009). Similar in spirit, Nuno Garoupa and Tom Ginsburg argue how judges are responsive to reputational mechanisms and that these internal and external mechanisms can explain judicial behaviour. See Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: Comparative Theory* (The University of Chicago Press 2015).
[41] Yasser Kureshi, 'When Judges Defy Dictators: An Audience-Based Framework to Explain the Emergence of Judicial Assertiveness against Authoritarian Regimes' (2021) 53 *Comparative Politics* 233.

international aid, courts may also need to consider the regard of foreign states and the international community as the functioning of the judiciary in these states are directly or indirectly shaped by foreign actors.

For those audiences that matter, they may react to the court and its decisions differently, and their propensity to react in ways that might support or undermine the institutional health of the court is another point of consideration. Hence, it is important to understand the motivations, ideology and institutional characteristics of those audiences that count. For example, a legitimate court's decision will be respected by its citizens even if some of them find the decision disagreeable. As the court loses the support of the general public, the people's tolerance level might be reduced and start protesting against the court. To take another example: foreign businesses that view a court as legitimate supports the reputation of a court by pushing the legal system higher up rule-of-law rankings and free economy indices. Such a court's decisions might be celebrated as reflective of the polity's commitment to rule-of-law values. As the court loses the trust of these audiences though, we might also see companies retreating from the jurisdiction and diminishing their investment in the polity. The budget and composition of the judiciary might as a result be affected. In more extreme circumstances, the home countries of foreign investors might even call out on the judges if the court is behaving in an allegedly biased manner. In short, some audiences and their relationships with the court matter more than others.

Who decides which audience should matter more to a court? The relative salience of audiences is determined by the political configuration of the polity, and courts do not get to choose their audiences. Judges can play to the different audiences for their own benefit, but the kinds of audiences faced by a court and how they matter is largely given by the institutional environment it is in. Accordingly, applying the audience-based framework in a way that is sensitive to regime-type politics may help us better understand

the political foundation of perceived legitimacy. Regime-type has a major role to play in determining which audiences matter. Let us apply the audience-based framework to compare the political foundations of perceived legitimacy in democracies and pure authoritarian regimes. The utility of the framework will be further illustrated when it is extended to a hybrid regime later.

In democracies, a main reason as to why the regard of the public matters is because of electoral pressure. As explained above, public support, through electoral pressure, acts as a buffer between courts and the elected branches. A court that enjoys public support can induce the elected branches to comply with its decisions even when the elected representatives find the decisions repugnant. Politicians need to think twice before sanctioning a popular court if they or their parties want to get re-elected. The conventional view of perceived legitimacy outlined builds on the electoral logic in democracies. Using the audience-based framework, the public is *the* key audience in a democracy because a democracy is designed to align the views of the representatives with their constituencies. Public support of the court is crucial because it can be effectively translated into electoral pressure to threaten the government. Democratic representatives can of course try to mold the opinion of their constituencies, but it is risky to deviate too far from the people's will given electoral accountability. The independent views of the representatives matter to a much lesser extent when they are normatively bound by the preferences and interests of the people.

On the other hand, political power is centralized in a pure authoritarian regime. A court is institutionally embedded in the authoritarian's structure here. The general public's view of the court is of no direct relevance not because public opinion is morally insignificant, but because the incumbent and its allies are the main audiences under this political configuration. Perceived legitimacy here is mainly measured from the

authoritarian's angle. The extent to which courts are legitimate depends on how successful and faithful courts are in implementing the authoritarian will. An important, if not the main, goal of authoritarians is to maintain political control, and courts are expected to help bring about this goal.[42] Courts help authoritarians establish social control, legitimize controversial decisions and manage lower level administrative agents.[43] Rule-of-law principles such as procedural justice are barriers to achieving authoritarian goals expediently. Incompetent, disobedient or overreaching courts are illegitimate and put themselves at risk. The interests of other audiences such as the public or international community matter only if there are instrumental reasons for the authoritarian to consider them. Authoritarian regimes that are committed to developing their economy, for example, may care about what the business sector has to say. Public mobilizations that can potentially destabilize the regime can also be a reason to comply with an unfavorable decision. The interests of audiences besides the authoritarian's may sometimes be given weight to, but their interests will always remain secondary to the authoritarian's.

The audience-based framework can be developed and applied in ways that are more sensitive to the peculiarities of a specific polity.[44] The brief illustration above seeks to show how an audience-based framework can help us understand how regime-type impacts our understanding of perceived legitimacy in different contexts. The relational aspect of perceived legitimacy becomes especially apparent in divided societies such as a hybrid regime, as the deeply embedded ideological differences accentuate the tensions generated by the contrary expectations of the key audiences in a hybrid regime.

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[42] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transaction Publishers 2005) 29-52.
[43] Tamir Moustafa and Tom Ginsburg, 'Introduction: The functions of courts in authoritarian politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The politics of courts in authoritarian regimes* (CUP, 2008) 4-11.
[44] The audience-based framework will be further developed in Chapter 7 to understand the potential of the social role of judges.

b. The paradox: rival stories of judicial legitimacy

The key to understanding the nature of perceived legitimacy in hybrid regimes is to first identify two stories of judicial legitimacy that are necessarily present in a hybrid regime. As pointed out in Chapter Two, a hybrid regime is defined by two incompatible constitutional ideologies – democracy and guardianship. We also saw how this ideological conflict is manifested in many aspects of a hybrid regime, from the structure of its legal system to political dynamics. Another logical outgrowth of the hybridity of these two incompatible ideologies is the rivalling stories of judicial legitimacy told in a hybrid regime. These stories describe what is expected of courts in hybrid regimes.

On one hand, we have the democratic story that views a constitutional court as the "necessary completion of constitutionalism".[45] This is essentially the liberal democratic story of courts many of us are accustomed to. Supporters of this story "appreciate the benefit of checks and balances in a system of government."[46] According to this view, courts should be independent and principled arbiters, guardians of constitutional rights, the bulwark against authoritarian encroachment and sometimes even the engine for constitutional change.[47] Judges are the personification of justice. A "good" constitutional court in a hybrid regime is believed to be one that is committed to the fight against authoritarianism and for rule-of-law and liberal democratic values. A more progressive version of the liberal democratic story might even expect an activist court to abandon their

[45] Dieter Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) 4 *NUJS Law Review* 15, 17.
[46] Carrubba (n 6) 65
[47] See Tom G. Daly, The Alchemists: Questioning our faith in courts as democracy-Builders (CUP, 2017).

fidelity to the law and decide cases in ways that transcend the four corners of the law when the legal context is an unjust one.[48]

In contrast is the authoritarian story, which we have already seen when explaining how the audience-based framework applies to a pure authoritarian regime. A constitutional court is subordinate to and simply another arm of the ruler according to this view. It is one of many channels for the authoritarian to exert its powers. President Museveni's famous rhetorical assault against the Ugandan courts captures the authoritarian vision of the role of courts: "[the] major work for the Judges is to settle chicken and goat theft cases but not determining the country's destiny."[49] The extent to which a court is legitimate depends on the court's ability to fulfil the missions set by the ruler.[50] This story suggests that a constitutional court needs to be loyal and effective in bringing about the incumbent's objectives. It is a constitutional court's task to be as puppet-like as possible and to fit the law into the preferences of the authoritarian.

What I have described are stylized forms of two rivalling stories of judicial legitimacy told in a hybrid regime. The democratic story sees the court as a constraint on arbitrary power and crucial to the protection of rights, while the court is only a tool of the ruler according to the other side. The stories I described are also archetypal as how they are actually told depend on the socio-political context and culture. Authoritarians have, for instance, asserted their authority over judges in the name of populism (e.g. Hungary), nationalism (e.g. Mainland China and Hong Kong) and the divine right to rule (e.g. Thailand). Similarly, the democratic story can be justified by the specific texts in a constitution as well as the historical struggles experienced by a country. Because these stories are social claims, the fact that they might be flawed or incoherent is largely

[48] Jeffrey Brand-Ballard, *Limits of Legality: the ethics of lawless judging* (OUP, 2010).
[49] As quoted in Rachel Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African courts* (Routledge 2013) 147.
[50] Nonet and Selznick (n 42) 29-52.

irrelevant for our purpose, as long as the stories resonate with the political communities in a hybrid regime. Despite the many variations in telling these stories, what is shared among hybrid regimes is the existence of these two strands of narratives about what courts should and should not do, with one narrative corresponding to democratic values, and the other side, guardianship principles.

From a philosophical perspective, there is no way for the two stories to be reconciled. They are derivates of two opposing sets of political ideologies. It is not only difficult to marry the two stories, but theoretically impossible. Many of the judicial qualities expected of the two stories are contradictory. For example: independent versus subservient, principle-based versus outcome-oriented, and constitutionalism versus arbitrariness. For this reason, the legitimacy challenge faced by courts in hybrid regimes is best described as a paradox. The fact that a court is the subject of a legitimacy paradox should not come as a surprise, as this is another manifestation of the hybridity of a hybrid regime.

c. The democratic and authoritarian constituencies

The ideological conflict that underlies the legitimacy foundation of courts in hybrid regimes is not only philosophically interesting, but also affects how a court should position itself because of the diverging expectations emerging from the two rivalling stories of legitimacy. What distinguishes a hybrid regime from a democracy and a pure authoritarian regime here is the fact that there are necessarily two sets of audiences telling two conflicting stories of legitimacy in a hybrid regime, *and* that both sets of audiences are crucial to the legitimacy of a constitutional court. Let us call the set of audiences

subscribing to the democratic story the democratic constituency, and the other the authoritarian constituency.

In a pure authoritarian regime, a democratic constituency might exist, but as pointed out before, that constituency does not have a material role to play when the public or the opposition cannot effectively discipline the incumbent. In a democracy, even if there is an authoritarian constituency, their stories would have negligible impact within the constitutional discourse because democratic norms are deeply entrenched.

In a hybrid regime, the voice of the authoritarian constituency needs to be heard because of their political dominance. The incumbent and the elites call the shots and determine the institutional structure of its judiciary. Dissatisfied with a constitutional court's performance, the authoritarian constituency can reverse its decisions or even pack the court. The survival of the constitutional court depends to a large extent on the regard of the authoritarian constituency given the disproportionate amount of political power it enjoys.

It is true that the authoritarian constituency and the democratic constituency are not in equal footing, with the prior enjoying the upper hand due to the systematic inequalities within the system. Unlike a pure authoritarian regime however, the democratic constituency in a hybrid regime is also of critical importance as it can potentially empower a court. The two reasons for this go back to the defining characteristics of a hybrid regime. First, a hybrid regime needs to preserve its democratic appearance by ostensibly respecting democratic norms. The incumbent relies on the existence of the democratic constituency to ensure that a hybrid regime looks like a democracy. The incumbent must to a certain extent play along with the views of the democratic constituency. Otherwise, an image of democratic pluralism would not be credible. Relatedly, a hybrid regime will want the court

to have legitimacy with the public, as public legitimacy of the court bolsters the general image of the government.

Second, the democratic constituency in a hybrid regime is not entirely crippled. Peaceful change of powers is, per definition, improbable but still possible in a hybrid regime, as it happened in Pakistan and The Gambia. The possibility and the uncertainty that comes with a semi-competitive election is, as argued before, sufficient to constrain an incumbent.[51] The incumbent is forced to take seriously the demands of the democratic constituency in order to maintain its stability. Not to mention, voting is not the only way for the democratic constituency to threaten the incumbent. The democratic constituency can organize protests and resort to mass mobilization to counter the authoritarian constituency. In contrast to a pure authoritarian context, the costs of interfering with a court that enjoys the support of a democratic constituency will be much higher in a hybrid regime. In turn, a court that is backed by the democratic constituency enjoys more space to challenge the incumbent and its decisions are more likely to be respected by the authoritarian constituency.

The above explains why and how the regards of two constituencies would matter to a court in a hybrid regime. A hybrid regime's authoritarian core suggests that the expectations of the authoritarian constituency cannot be ignored because of its fundamental control over the judiciary. The democratic constituency offers hope however as its potential to counteract the authoritarian constituency would release some of the pressure exerted by the authoritarian constituency on the courts. Like the public's role under the conventional view, the democratic constituency can provide institutional cover to a hybrid regime constitutional court by threatening to undermine the stability and power of the incumbent.

[51] See Epperly (n 32).

What does this tell us about institution-building and judicial empowerment? Given the importance of the democratic constituency, it becomes particularly useful for a court to enlist the help of the democratic constituency in a hybrid regime. A common thread among successful courts in the hybrid regimes focused in this thesis is the fact that they had all enjoyed the democratic constituency's support. While the opposition has never won the majority seats in Hong Kong, they have always obtained the majority votes. The opposition had been effective in vetoing government policies by resorting to filibustering and street protest. With its impartial image and many liberal rulings, the judiciary had been consistently the most trusted public institution in Hong Kong.[52] Even under the pressure of the largest authoritarian force in the world, virtually all of the Hong Kong courts decisions, including those that are against the government, have been respected by the authority. The support of the democratic constituency has made attacks on courts politically costly.[53]

The Chaudhry court in Pakistan has gone a step further by actively mobilizing the democratic constituency. The Chaudhry court had garnered public support in its first few years of tenure through a progressive use of *suo moto* actions and its direct confrontation with the Musharraf regime.[54] In 2007, the suspension and subsequent dismissal of the Supreme Court by Musharraf sparked a nationwide protest against the government. The protest, called The Lawyers' Movement, was led by a democratic constituency comprising of the opposition, lawyers, retired judges and civil society organizations. Fully aware of the support it enjoyed, the judiciary was able to push on by refusing to take a new oath

[52] See Julius Yam, 'Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts' (2021) 46 *Law & Social Inquiry* 153. The political developments since 2019 have however taken a toll on the judiciary's reputation.
[53] See Eric C. Ip, *Hybrid Constitutionalism: The politics of constitutional review in the Chinese Special Administrative Regions* (CUP, 2019).
[54] Asher Qazi, 'Suo Motu: Choosing not to legislate, Chief Justice Chaudhry's strategic agenda' in Moeen H. Cheema and Ijaz S. Gilani (eds) *The Politics and Jurisprudence of the Chaudhry Court 2005-2013* (OUP 2015).

under the emergency law and continuing to defy the incumbent. Musharraf ultimately lost power in 2008 as a result of the backlash from his attempt to undermine a popular court. The Chaudhry court was eventually reinstated after the election.

The position of the Ugandan courts is arguably more tenuous, as Ugandan dictators have a history of attacking the institution and even killing judges. The most notable and gruesome instance is then-President Idi Amina's abduction of Chief Justice Benedicto Kiwanuka from his judicial chambers in 1972, who was reportedly tortured and murdered afterwards. Perhaps realizing the fragility of its institutional position, the Ugandan courts in the next decades have made noticeable efforts to build its image among the democratic constituency. The courts have kept a close relationship with the bar, relying on the Ugandan Law Society and other lawyers to fend off attacks against the judiciary.[55] Most interestingly, the judges have, over the years, cleverly taken advantage of its tragic past to play the "narrative of victimisation" card to win the support of the public and elites.[56]

The examples of Hong Kong, Pakistan and Uganda demonstrate the importance of a democratic constituency in a hybrid regime in maintaining judicial power. A democratic constituency cannot always immunize a constitutional court, but it provides an invaluable shield against authoritarian attacks by acting as a buffer between the authoritarian constituency and the court. In all three examples, the constitutional courts have established a close relationship with the democratic constituency by deciding in ways and creating political conditions that protect the democratic constituency and help further the democratic cause. In turn, the active support of the democratic constituency (through for instance public pressure, boycotts and mass protests) gives the constitutional courts greater room to support democratic ideals without fear of political backlash. In the next two

[55] Ellett (n 49) 193.
[56] Ibid 206.

chapters, we will discuss the ways in which judges can get institutions that can protect the court on its side as well as how judges can potentially expand the size of the democratic constituency.

What I have just described is only half of the story though. The support of the democratic constituency offers protection to a constitutional court, but that support can sometimes be a curse. A court that is too popular among the democratic constituency risks arousing the suspicion of the authoritarian constituency. It must be remembered that the two constituencies tell rivalling stories of legitimacy. In many politically salient questions, a democratic constituency's "right" is an authoritarian constituency's "wrong", and vice versa. The protection of democratic rights, for example, implicates curtailing the powers of the authoritarian constituency, while promoting authoritarian aggrandizement encroaches upon the interests of the democratic constituency. A democratic constituency is able to provide temporary cover to a court by increasing the political costs of court-curbing actions. A change of political dynamics however may present opportunities for the authoritarian to act out on the hostility accumulated throughout the years.

The Hungarian experience during the 1990s, as mentioned in Chapter Three, is a reminder of the long-term dangers of overplaying a court's hands in the face of an authoritarian constituency. The Hungarian constitutional court was widely championed as the most democratic institution in Hungary during the early years of the country's transitional days. Authoritarian populist Viktor Orbán taking office in 1998 became a major game-changer in Hungary's judicial political dynamics. The court's activist role pre-1998 had led to a long list of political enemies, and these enemies "never forgave" the court.[57] Learning from the mistakes of the past, the newly elected government coalition

[57] Kim Lane Scheppele, 'Democracy By Judiciary: Or, why courts can be more democratic than parliaments' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds) *Rethinking The Rule Of Law After Communism* (Central European University Press 2005) 53.

decided against renewing the terms of all the sitting judges, and the constitution was shortly amended to limit the court's jurisdiction. The Hong Kong courts are also beginning to suffer the side-effects of the liberal democratic approach it adopted in the first two decades after the handover. The passing of the national security law has essentially eliminated the space for meaningful opposition in Hong Kong. The COVID-19 pandemic has also made mass protest challenging, if not impossible. With the elimination of semi-competitive elections and a crackdown on civil society, Hong Kong judges have lost the shield of the democratic constituency. State-controlled media have orchestrated waves of attacks against some of the courts' decisions, and national security laws are immune from constitutional review. There has also been increasing debate about appointing loyalist judges onto the bench and removing those who are believed to be associated with the democratic constituency. The authorities have taken a renewed "interest" in some of the courts' older judgments, arguing that the courts in the past had failed to give effect to the true meaning of the city's mini constitution.[58]

Both examples go to show the risks of being only attentive to the democratic constituency in a hybrid regime. The court must also address the authoritarian constituency. In more concrete terms, this involves deferring to the government and avoid political controversies. A "particularly appealing" way to address the legitimacy paradox, as Shapiro notes, might be for courts to "stay out of politics" or to "wait and fight another day."[59] Deferential and avoidance tactics are attractive because comparative experiences have shown how vulnerable a court can be in the face of an authoritarian.

[58] Hong Kong has arguably shifted to a pure authoritarian regime, and the political backlash it is suffering now does not necessarily undermine the approach it had adopted during Hong Kong's hybrid regime era. Nevertheless, developments in Hong Kong illustrate how weak courts can be once the democratic constituency is disabled.
[59] Shapiro (n 1) 334.

The authoritarian-leaning approach helps reduce the friction between a court and the authoritarian constituency, but a democratically committed court cannot rely solely on this strategy. Avoiding backlash is not an end in and of itself. The point of avoidance or deference is to *preserve* the institutional strength of a court. A court maintains and capitalizes on the mutually dependent relationship between the authoritarian and the court by occasionally giving in to the authoritarian's preferences. A court that only submits to the authoritarian is self-defeating. Leaning too close to the authoritarian is also potentially counterproductive. Legitimacy, as pointed out before, is hard to replenish. A side-effect of giving in to the authoritarian is to risk losing the support of the democratic constituency. Once a court loses the backing of its allies, it becomes even more vulnerable to direct control from the authoritarian camp.

A conundrum is beginning to reveal itself. The two constituencies are crucial to the perceived legitimacy of a court, but it is not obvious how a court should navigate given how the two constituencies hold opposing beliefs. The court is responsible for the implementation of the constitution and at the forefront in patrolling the ideological boundaries of the two constituencies. The clash in ideologies creates many zero-sum problems for the constitutional court to resolve. The practical implications of the legitimacy paradox are most obvious when the cases confronting the court touch on issues that deeply matter to both constituencies. To establish a "lowest common denominator of agreement"[60] under these circumstances will be challenging to say the least. Describing the challenges divided societies present to a constitution, Tarun Khaitan writes,

> "[S]traightforward accommodation in the face of deep disagreement creates a new problem as it solves another, because accommodation of

[60] Radmilovic (n 20) 859.

> one group is likely to anger another. Taking everyone along requires a fine balancing act, one that offers enough sops to the dissenters, but not so many that their detractors in turn feel tempted to jump ship."[61]

An analogy would be the classic dual agency scenario where an agent is accountable to two principals with conflicting interests. The court is an agent to the democratic and authoritarian constituencies, with responsibilities to both. In private law, an agent can and should withdraw when there is a conflict of interest. Withdrawal is not always available to a court, and even if it is, it is not necessarily a "neutral" option that satisfies both constituencies. Withdrawal can also be read as retreat by those wanting a court to take action.

Another way to express the challenges posed by the legitimacy paradox is to use Lee Epstein, Jack Knight and Olga Shvetsova's model of "tolerance interval".[62] We have here two sets of actors – the democratic constituency and the authoritarian constituency – subscribing to opposing ideologies. Each set of actors has their own expectations of courts, and in each case presented to the court, each set of actors has their own preferred positions over the outcome. The space of the preferred position is called tolerance interval. A set of actors' regard of the court depends on the extent to which the court's judicial decision-making patterns fall within their zone of tolerance. The judicial political dynamic described under this model is not one-off but involves sequential interactions. Deviating from the tolerance interval will increase the chances of hostile reaction from the group,

[61] Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16 *International Journal of Constitutional Law* 389, 408.
[62] Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law and Society review* 117.

while repeatedly staying within the interval helps expand the zone. The decision-making patterns of a court accordingly have cumulative effects on its legitimacy.[63]

In the current situation, a court should ideally find middle-grounds and stay within the overlapping tolerance intervals of the democratic and authoritarian constituencies. This is possible if the tolerance intervals of the two constituencies intersect. It might, for example, be in the interest of both constituencies to tackle corruption, under the assumption that the destabilization of patronage networks do not fundamentally undermine the incumbent's control and might even improve its governance. Because these two groups tell rivalling stories of judicial legitimacy, there is a higher likelihood that their tolerance intervals will not overlap in politically salient decisions. Halfway house decisions, in these instances, will please no one. The consequences of deviating from the two constituencies' tolerance intervals are different, as I have explained. The authoritarian might pack the court, while the democratic constituency will gradually withdraw its support. The consistent lack of overlapping tolerance intervals and the absence of a dominant strategy present grave risks to the legitimacy of a court.

4. Conclusion

Using an audience-based framework to conceptualize judicial legitimacy, this chapter describes a legitimacy problem faced by hybrid regime courts. As a result of the hybridity of a hybrid regime, a constitutional court must be sensitive to the views of both the democratic constituency and the authoritarian constituency. The courts in hybrid regimes have an advantage over those in pure authoritarian contexts, in so far as the political elites in hybrid regimes must pay at least some attention to public opinion. Given the nature of

[63] Ibid 131.

the paradox, a constitutional court must garner the support of the democratic constituency *and* avoid triggering the authoritarian constituency. The challenge lies in the fact that the two constituencies subscribe to fundamentally opposing ideologies and tell rivalling stories of judicial legitimacy. A failure to accommodate either or both constituencies destabilizes a court's constitutional position.

There are two things that need to be emphasized before concluding the chapter. First, while the paradox is a serious problem confronting a court in a hybrid regime and deserves greater attention, we should also not forget that there are instances where the perspectives of the two constituencies can be aligned. There are advantages to the regime when the people have confidence in the court, and not every case presented to the court touches on issues that are of fundamental importance to the regime. These instances may be outside the paradox but are nonetheless useful opportunities to the court to develop their institutional capacity and doctrines that promote liberal-democratic values.

Second, the legitimacy paradox is only of real relevance to a court that is committed to liberal democratic values, as judges who are determined to serve the authoritarian incumbent have no reason to factor in the regard of the democratic constituency. Should a court decide to take up a democratic role as suggested in the previous chapter however, it must figure out how to navigate the political minefield presented by the paradox. The chapter also leaves open the possibility that the legitimacy paradox, or traces of it, can be found outside hybrid regimes, especially in democracies with polarized political communities and pure authoritarian regimes that have recently transitioned from a hybrid regime. Regardless, the legitimacy paradox, the chapter hopes to have shown, is a central feature of a hybrid regime and must be addressed by a constitutional court.

This leaves us with the question of: how should a democratically committed court approach the legitimacy paradox? An easy answer to this question does not exist. "A fine balancing" is required, as Khaitan rightly pointed out. However, is it possible to provide more guidelines to the court? There is a glimpse of hope. Comparative experiences around the world provide insights regarding how to address some of the challenges described in this chapter. The coming two chapters seek to offer theoretical and practical solutions that would enable hybrid regime courts to apply the democratic roles in a sustainable manner.

CHAPTER SIX

DEMOCRATIC JUDGING UNDER AUTHORITARIANISM

1. Introduction

In Chapter Four, I suggested ways in which democratic values can guide the adjudicative function of a court and proposed five democracy-enhancing roles that courts should play in hybrid regimes. The problem, though, is that those roles can lead to confrontations with the authoritarian constituency. We saw in the previous chapter how the legitimacy paradox confronts courts in hybrid regimes. Sometimes but not always, collisions with the authoritarian can endanger the institutional position of the court.

Regime politics is not the only determinant of the fate of the judiciary, however. Judges are also in a position to create conditions favorable to the development of judicial power. For judges to play those roles sustainably requires another layer of consideration, one that takes seriously the political context of a hybrid regime. How can a judge simultaneously commit to democratic principles and accommodate the pressures of the authoritarian in a hybrid regime?

In this chapter and the next, I will present a guide that would help judges play the democratic roles suggested sustainably under the treacherous currents of a hybrid regime. The tools to be offered in the two chapters are divided into two broad categories based on what judges can and should do inside *and* outside the courtroom. The focus of this chapter would be the adjudicative context of a hybrid regime, while the next chapter will address how different kinds of off-bench engagements can help create an environment that favors a democratically committed court.

Inspired by Roni Mann's non-ideal theory of constitutional adjudication,[1] this chapter proposes a theoretical framework that seeks to systematically incorporate strategic judicial decision-making into the democratically guided adjudicative approaches discussed in Chapter Four. This framework helps judges determine when it is permissible to fold prudential considerations into principled judging and how that should be done. It also reveals the different strategic opportunities that are available to judges during judicial decision-making, and explains how these opportunities can help judges in hybrid regimes.

The chapter starts by briefly introducing Mann's theory in Part 2. Her theory is a three-step approach that helps judges address the tension between constitutional principle and institutional prudence. Her theory stands as a rare attempt to bridge the gap between normative constitutional theory and the judicial strategy literature.

In Part 3, I will build on her work to propose a theoretical framework that combines democratic judging with judicial strategy. The approach involves two stages. First is to identify what the ideal position is under a presumption of institutional blindfold. This step is largely the same as the first step of Mann's theory, but we are using different adjudicative theories to fill the respective bodies.

The second step requires lifting the blindfold to check whether, and if so how, the ideal position should be supplemented by strategic considerations. While Mann argues that the blindfold should be lifted under limited circumstances, the theory offered in this chapter suggests that the blindfold should always be lifted. The extent to which the ideal position needs to be supplemented by strategic considerations is determined by the level of risk generated by maintaining the ideal position. The level of risk is defined by the severity of the anticipated consequence and its likelihood.

[1] Roni Mann, 'Non-ideal Theory of Constitutional Adjudication' (2018) 7 *Global Constitutionalism* 14.

The various risk levels will be divided into four scenarios. If the level of risk is negligible or non-existent, judges should consider how judicial strategy can help increase the impact of their decision or bolster the institutional position of the court, without fundamentally altering the ideal position and increasing the level of risk. If the level of risk is high, judges will need to look at how much strategic deviation from the ideal position is necessary to accommodate the authoritarian pressures. There might be instances where the authoritarian pressures cannot be accommodated, because either the required level of accommodation crosses a moral baseline, or the risk level is so high that the threat is unavoidable. These last two scenarios would justify maintaining the ideal position.

Part 4 examines the various strategies that can be adopted by judges during the adjudicative process. As mentioned, these strategies can not only be used to accommodate extra-legal factors, but also enhance the ideal position by increasing the effectiveness of a court's decision and building support of the judiciary. Hence, strategies will likely be relevant to all four scenarios. The strategies will be divided into four categories based on different aspects of judicial decision-making: outcome, reasoning, language and timing.

It should be emphasized that the theory proposed in this chapter is not limited to authoritarian contexts, and judges in democracies may also find it of interest. However, the considerations involved when applying the framework tend to be less salient in democracies. While it has greater relevance in a hybrid regime, the theory can possibly be modified in ways to address similar institutional and political challenges in other contexts.

2. Roni Mann's Non-Ideal Constitutional Theory

Mann's theory tackles an understudied dilemma in constitutional theory: what should a constitutional court do when "there is a significant tension or conflict between what the

court would hold to be right *constitutionally* (in ideal circumstances) and what seems wise or prudent *institutionally*, given the actually existing non-ideal circumstances[?]"[2]

She sees the proper role of a court as "entrusted both with the elaboration, articulation and pronouncement of ideal constitutional values, and with the meaningful and sustainable realization of these values in actual social and political life."[3] The dilemma described is presented in many "institutionally-hard cases", and many existing theories, as she points out, do not address or even recognize the dilemma. Traditional constitutional theory denies the problem by ignoring the institutional difficulties of a court, or deals with it by rationalizing the extra-legal challenges using constitutional language.[4] Both approaches are inadequate, as the prior fails to take reality seriously, while the latter risks creating "diluted" or "distorted" constitutional principles.[5] She also argues that the realist's position is equally unhelpful as the strategic approach "neutralises the force of the ideal, leaving judges free to calculate."[6]

She proposes a non-ideal theory of constitutional adjudication based on John Rawls' distinction of the ideal and non-ideal. According to Mann, the ideal refers to normative constitutional theory, while the non-ideal is the real-life socio-political context in which courts operate. Mann is concerned with how non-ideal or institutional considerations should be "enfolded within" constitutional adjudication.[7] To simply blend institutional considerations with normative theory, or to "idealise the non-ideal",[8] is dangerous as it would "revise ideal theories of how judges should decide constitutional cases" and gradually erode the normative position.[9] She argues that a non-ideal theory of

[2] Ibid 16.
[3] Ibid 38
[4] Or as she calls it, "[d]octrinalising institutional (non-ideal, contextual) considerations". Ibid 26.
[5] Ibid 49
[6] Ibid 18. Her critique of the strategic literature will be questioned later in the beginning of Part 3.
[7] Ibid 40.
[8] Ibid 32.
[9] Ibid 27.

constitutional adjudication is required, one that "chart[s] the *legitimate and effective* path toward a meaningful and sustainable realisation of constitutional ideals."[10] Her theory recognizes the importance of constitutional principles and the social nature of judicial authority.

Her theory has three steps. First is what she calls "the presumption of institutional blindfold".[11] In applying her theory, judges must first "give the best possible interpretation of constitutional principle as if there were no institutional constraints of any sort, even at the price of losing effectiveness or status."[12] The goal here is to distinguish the ideal from the non-ideal, and come up with an outcome based on ideal principles. The first step seeks to establish the *ought to* position without regard to institutional context or any potential backlash from society. This step corresponds to Mann's vision of the ideal role of a constitutional court: a forum that "advances undiluted versions of constitutional principles".[13]

Second, judges must decide whether rebutting the presumption is warranted. She argues that judges can only justifiably lift the blindfold (1) when the institutional considerations pose an existential threat to the court and that the threat is imminent and only temporary,[14] or (2) when it can be shown that these considerations would render the court's ideal position counterproductive, in the sense that the change the court is seeking to make is too progressive for society to accept.[15]

As I mentioned, an important goal under her theory is the *effective* and *sustainable* implementation of constitutional principles. Following this rationale, it would be futile to maintain the ideal position if judges are well-aware that an uncompromising attitude would

[10] Ibid 21.
[11] Ibid 45.
[12] Ibid.
[13] Ibid 46.
[14] Ibid 47-9.
[15] Ibid 49-51.

lead to extreme responses that are detrimental to the constitution and the court. She makes it clear as to what kinds of considerations would *not* justify rebutting the presumption. Mere dissent in society and a "blow to popularity" do not count.[16] Her point about counterproductivity is not clear-cut, as she admits:[17] arguments such as "society isn't ready" are not excuses, for instance, and that lifting the blindfold is only permissible if there are reasons to believe that a gradual process of change is preferred in that instance.[18] She writes that a court "should not be satisfied with empty pronouncements of 'right' principle to deaf ears, for this would harm precisely the quality of principled debate in the political sphere."[19] Judging by the way she puts it, the presumption seems to be a very strong one, perhaps too strong to be meaningful at least in a hybrid regime context as I will argue later.

In the third and final step, even if one of the two conditions under step two are met, departing from the ideal position is permissible *only if* the judges can also install procedures to prevent the non-ideal position from being idealized. She calls this step "anti-stare decisis",[20] and argues that the judges' language should reflect the fact that what is ultimately decided is not the ideal position. The example she gives is a line from the *Bush v Gore* case decided by the US Supreme Court, where the decision explicitly limited its conclusion to the facts of the case.[21]

3. Principled, Strategic Judging

[16] Ibid 48.
[17] Ibid 51.
[18] Ibid 49.
[19] Ibid 50.
[20] Ibid 51.
[21] Ibid 52.

Seeking to combine the insights from constitutional theory and judicial strategy, Mann's theory is a very valuable contribution that speaks to one of the most important constitutional issues troubling courts today.

I have some reservations about her critique of the judicial strategy literature, however. She treats ideal constitutional theory and judicial strategy as competing approaches,[22] but her juxtaposition of normative constitutional theory with judicial strategy is curious as the two are operating on different conceptual levels. A number of the judicial strategy works she cites are plainly explanatory in nature.[23] Those works can perhaps be interpreted by readers in ways to have normative implications, but their main intention is to account for variations among judicial behavioral patterns across different jurisdictions and institutional settings. There are works on judicial strategy that are prescriptive in nature, but they tackle well-defined goals that tend to be uncontroversial, such as how judges can use strategies to build power or help avoid confrontation with the government.[24] Unlike the kind of normative constitutional theoretical works that Mann engages with, those prescriptive works on judicial strategy do not operate on a similarly foundational level. They should be best thought of as mid-level theories that deals with the question of "how" and connects a higher normative theory with empirical realities.

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[22] A third approach that she identifies is called judicial statesmanship. Under this approach, navigating institutionally hard questions primarily depend on the qualities of the judges. She calls this approach "anti-theory" as it "remains unreflective and lacks critical bite", and supplies "no categories or standards" to guide judges. Ibid 32, 37.

[23] Authors that she cite include for example: Lee Epstein and Jack Knight, Ran Hirschl, Georg Vanberg, and Shai Dothan. Ibid 30 note 41.

[24] Theunis Roux's book on the South African Constitutional Court which Mann also cites, might be argued to have some prescriptive flavour to it, especially in the final pages of the book where Roux argue that the South African example shows how courts can possibly adapt to the opportunities presented to them to sustain their institutional position. Theunis Roux, *The Politics of Principle. The First South African Constitutional Court, 1995–2005* (CUP 2013) 397-8. Other perhaps more on point examples in this regard include: Rosalind Dixon, 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change' (2020) 59 *Columbia Journal of Transnational Law* 298; Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wisconsin Law Review* 683; Erin Delaney, 'Analyzing Avoidance: Judicial strategy in comparative perspective' (2016) 66 *Duke Law Journal* 1.

Nevertheless, it does not mean that the two literatures are incompatible; they are only answering different questions within the area of constitutional studies. They ultimately come together in the end as they are both approaching the overarching question of what constitutional judges should do. Building on Mann's theory, this part will show how judicial strategy can be systematically integrated into a theory of adjudication in ways that are sensitive to the challenges posed by a hybrid regime.

a. Presumption of institutional blindfold

Beginning with the first step. The form here is the same as Mann's first step, but a point of distinction is to be made. Her vision of a constitutional court differs from the one I propose. She fills the framework mainly with the Dworkinian idea of "forum of principle", while the concern here is with a constitutional court's role in the advancement of constitutional democratic principles. It is worth mentioning that other adjudicative theories can also be used.

The presumption of institutional blindfold as applied here emphasizes the democratic roles of a constitutional court. Judges who know that they are in a hybrid regime should first identify the relevant role(s) suggested in Chapter Four and apply them without regard to the potential consequences from the authoritarian constituency and other political actors. This is a behind-the-scenes, cognitive exercise that requires judges to be always conscious about what the law requires through a democratic lens. The extent to which the ideal position should be publicly revealed and documented in the judgment is a strategic question for later when the blindfold comes off.

The blindfold offers several advantages in a hybrid regime context. This step is an important reminder of the basic tenets of being a judge – to come up with fair and just

outcomes based on legal and constitutional principles – and of the distinct moral responsibilities that comes with judging in a hybrid regime, which I have argued in Chapter Four. In the face of constant pressure, judges in hybrid regimes might be programmed to "respond with anticipatory obedience". [25] Normative thought-processes are easily abandoned as a result. This habit would lead to judges surrendering to extra-legal concerns more than they should and missing out on opportunities of working towards a democratic and just society. Especially because opportunities for democratic advancement can sometimes be subtle and come at unexpected times, judges should strive to inspect each case with the institutional blindfold on first. Whether the ideal position will be eventually compromised is a separate question, but the blindfold reveals the normative potential of every opportunity presented to a judge.

The first step also serves an instrumental benefit. In theory, it should help maximize the number of opportunities for democratic enhancement, which if the number is significant enough would be reflected in the decision-making patterns of the court. Assuming this improvement can be observed by the judicial audiences, the presumption of institutional blindfold will help promote the perceived legitimacy of the court in the eyes of the democratic constituency by fortifying its image as the guarantor of constitutional democratic values. Judges will be seen as taking their democratic roles more seriously than before, and this should help compensate for the loss of trust from its allies in moments when the judges have to compromise.

b. Supplementing the ideal position

[25] Jens Meierhenrich, *The Remnants of the Rechtsstaat: An ethnography of Nazi law* (OUP 2018) 184.

Step two requires lifting the institutional blindfold to check whether, and if so how, the ideal position should be supplemented with judicial strategy. This stage diverges from Mann's theory. The bar for lifting the institutional blindfold is quite high for Mann. Such stringency is understandable given Mann's commitment to the preservation of constitutional principles. However, setting too high a bar is likely counterproductive and impractical in a hybrid regime. Mann tries to develop categorical exceptions, but those exceptions are highly restrictive. The fact that society is not responding well *should* sometimes be a matter of concern to the court. Likewise, judges *should* be worried if the judiciary is hugely unpopular. Adverse reactions are matters of degree that can rise to a point that justify strategic response. Furthermore, many political backlashes that are eventually realized are the results of accumulated threats. The frequency of adverse reactions against the court is a lot higher in authoritarian contexts, even though these reactions may independently fall short of Mann's threshold. Waiting until an existential threat is clearly identifiable may oftentimes be too late to do anything about it. This is especially the case in a hybrid regime where judicial-political dynamics are volatile and situations can escalate quite quickly. As valiant as Mann's position is, applying it to hybrid regimes might dramatically shorten the lifespan of constitutional courts there. Perceived legitimacy and the institutional status of a constitutional court are not ends of themselves. Rather, the democratic roles need these qualities in order to be played *sustainably*. Precisely because judges are in for the long-haul and that hybrid regimes tend to be durable, a more prudent approach is preferred. Sacrificing the courts too early in the game might not be wise.

Not to mention, courts can do quite some good without sacrificing themselves. To act strategically does not mean to give up the democratic cause. Rebutting the presumption opens the possibility for judges to consider solutions beyond the ideal to address some of

the anticipated risks. As we shall see later, strategizing can be multi-dimensional, and considerations about democracy enhancement and institutional preservation can be addressed by different strategic opportunities.

In short, an excessively restrictive approach will not work or work at too great a cost in a hybrid regime. The bar must be lowered if we are to adopt a long-term horizon in understanding a court's role in enhancing democracy in a hybrid regime. The approach preferred here is for judges to always lift the institutional blindfold and be prepared to act, *but* not necessarily to always act, strategically. When deciding whether to supplement the ideal position with strategic considerations, judges should consider three factors: (1) the nature or severity of the negative outcome risked if the ideal position is to be maintained; (2) the likelihood of that negative outcome; and (3) the amount of deviation from the ideal position required to remove the expected risk. The first two factors combined would be the anticipated level of risk that comes with the ideal position. As it will be clearer later, this approach is not only more sympathetic about the circumstances faced by a constitutional court in a hybrid regime, but the balancing exercise involved allows for a greater degree of flexibility for judges to tailor their solutions to a wider range of often unexpected scenarios.

Before I go on to explain the sub-steps involved in this stage, I would like to preemptively address two possible concerns. First, one might question the significance of the first step given the blindfold would always be lifted anyways. Some of the benefits of the first step have already been discussed. Furthermore, lifting the blindfold does not always result in a departure from the ideal position. Lifting the blindfold requires judges inspecting the pragmatic implications of their rulings, but it does not necessarily require judges to always act on the pragmatic considerations and modify the ideal position. We will look at scenarios later that would justify keeping the ideal position after a careful

assessment of the risks involved. And sometimes, strategizing causes only cosmetic changes to a decision without fundamentally altering the ideal position. Strategies, in those circumstances, leave the core of the ideal position intact.

Another important reason why the first stage should be kept is because it distinguishes legitimate forms of influence from the illegitimate ones. Legitimate forms of influence reflect good faith concerns about judicial accountability, the legal correctness of judicial decisions and the proper constitutional boundary of the judiciary. Illegitimate forms of influence, in contrast, are unguided by principles and have little regard about the demands of the law and the constitution. They typically function to exert pressure on the courts for self-serving political interests. Legitimate forms of influence, such as the views of the legal community and expert opinion when the matter involves issues beyond the competence of the judges, should be factored in the first step, as these considerations might help judges legally sound decisions. Illegitimate forms of influence, however, do not belong to the ideal. The first step seeks to maintain this distinction to avoid distorting and corrupting ideal constitutional principles as much as possible.

Second, some would argue that judges are not capable of strategizing and political forecasting.[26] Judges may not have a crystal ball, but they can probably make good enough assessments about their political surroundings in most cases. For one, most judges grew up and lived in the same community as their citizens do, and the fact that they are part of the same community suggests that judges are likely to have a good grasp of what is current in society, its past and its political culture.[27] They usually possess local knowledge and a good understanding of the shared and contrasting values of different local communities.

[26] Paul Yowell, for instance, questions the fact-finding ability of judges in constitutional rights adjudication. One might argue that questionable empirical analyses by judges will lead to flawed assessments of social facts and inaccurate predictions of the impact of their decisions. See Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and empirical reasoning in judicial review* (Bloomsbury Publishing 2018).
[27] Anna Dziedzic, *Foreign Judges in the Pacific* (Hart, Forthcoming).

Also, in the face of information gaps, they can conduct additional research by themselves, or through their clerks in certain jurisdictions, to learn more about the implications of their potential decision and the motivations of different audiences. Furthermore, the submissions made and evidence produced in the courtroom can illuminate as courtroom dynamics is sometimes indicative of the power dynamics outside the courtroom. Most importantly, many judges might be privy to certain channels of information. The fact that judges are government officials and have gone through the appointment process suggests that they are likely to have an insider view of the government. Their proximity to certain political networks suggests that they might be in a particularly advantageous position to estimate the reactions of groups closer to the incumbent.[28]

For those who remain unpersuaded, my ultimate response is that judges in authoritarian contexts are simply left with no choice but to make those political and strategic assessments. A politically insensitive court in a hybrid regime is bound to suffer dire consequences. The circumstances are not ideal, but they are the cards that judges are being dealt with. Rather than pointing out the limitations of judicial forecasting, we should instead find and explore ways to help constrained judges make better evaluations.

c. Risk assessment

Before deciding whether and if so how the ideal position needs to be supplemented by judicial strategies, judges will have to first conduct a risk assessment with regard to maintaining the ideal position. This, as I have alluded to, involves two factors: (1) the nature or severity of a negative reaction, and (2) the likelihood of such a negative reaction.

[28] See Björn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, 'The Informal Dimension of Judicial Politics: A relational perspective' (2017) 13 *Annual Review of Law and Social Science* 413.

In thinking about the nature or severity of a negative reaction, it would be helpful to first identify the form of negative reaction that is expected as a result of the ideal position. I offer a typology that summarizes four of the most common forms of unfavorable responses that a domestic constitutional court would face as a result of how it decides: negative public discourse, noncompliance or reversal, institutional reform, and actual violence.[29] These four categories are arranged in an ascending order of severity, with negative public discourse usually having no real bite but might still have future implications, noncompliance or reversal directly undermining the efficacy of a court, institutional reform being a severe kind of counterattack that would reverse any court's institution-building efforts, and actual violence endangering the lives of the judges.

Negative public discourse

High-profile judgments draw media attention and are likely to attract critiques from a range of social groups. Critics are not always politically motivated; some would have constructive and legitimate comments, as it might be the case that the court actually got it wrong and deserves criticism. The legitimacy of such critiques aside, negative public discourse can mean many things, and its implications to a court's social and institutional legitimacy depend on where the critique is coming from and what it signifies. In this instance, it is again useful to distinguish between the relevant kinds of audiences that are critiquing the court, which may include government officials, authoritarian elites, the legal community, academia, civil society organizations, the business community, international

[29] My typology draws on the work of Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash Against International Courts: Explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* 197.

organizations and sometimes even foreign officials. How much weight a court should give to these responses would depend very much on where they come from.

While negative publicity, itself, seems to be rather harmless, there are two reasons why courts should pay attention to negative public discourse. First, these discussions reflect the intentions of the speaker, which can be interpreted as attitudinal changes and indicative of the critics' potential follow-up actions. If the speaker is one with substantial power over the court, these signals may foreshadow the court-curbing actions that are about to come. Second, negative public discourse may result in the mobilization of other constituencies, creating more leverage for those who plan to attack the court. Public statements made by state officials for example are not only direct pressures against the court, but also the state's attempt to change the public's perception of the judiciary. Similarly, the legal community and academia's disappointment in a decision or a series of decisions may weaken the public and other constituencies' confidence in the judges. As a result, while the immediate effects of negative public discourse may seem negligible, persistent negative publicity may lead to a loss of public support, weaken the court's authority and trigger other more severe responses.

Noncompliance or reversal

The enforcement of judicial decisions relies on the cooperation of the political branches and the citizens. In an act of defiance, these actors may choose not to obey the judicial decisions. Those with political power may even create laws or amend the constitution to effectively annul a decision. Defiance (including non-compliance and reversal) has immediate effects on the decision of the court, and limits the efficacy of the court. Defiance, however, can also have long-term effects on the image of the court and judicial authority.

As Jeffrey Staton and Georg Vanberg describe, defiance especially by the government and other visible actors has "corrosive effects":

> "noncompliance by a policy maker today may begin to undermine the general perception that court decisions must be respected, and thus induce more and more noncompliance as citizens and political elites become less likely to react when policy makers fail to adhere to judicial rulings."[30]

A one-off defiance may snowball into habitual defiance, opening the door for a gradual erosion of the legitimacy of the court. Defiance can build up to an existential threat by triggering a culture of cynicism and giving court enemies the political energy to take down the judges.

Institutional reform

Institutional reform, which may include court-curbing actions and court-packing, is usually the worst kind of institutional response that a court can attract because it tends to cause long-term damage to the judiciary as an institution. It diminishes the power of a court in a way that is oftentimes irreversible (at least in the foreseeable future) and makes judicial maneuvering a lot harder. Institutional reform causes a change in the rules of the game of judicial politics and would fundamentally disrupt the calculus of judges. These responses may include: appointing loyal judges or removing defiant judges, impeachment,

[30] Jeffrey Staton and Georg Vanberg, 'The Value of Vagueness: Delegation, defiance, and judicial opinions' (2008) 52 *American Journal of Political Science* 504, 507.

redesigning the structure of the court (such as the size of the court), amending the procedures of the court (such as access rules or the number of votes required to render a decision), changing the formal powers of the court (such as carving out the court's jurisdiction or disabling judicial review), and diminishing the budget of the court.

Actual violence

Once in a while, a decision may result in the political assassination of judges, physical damage of the court building and other kinds of violent responses. This happens more often in authoritarian regimes with a strong military presence and in states experiencing intense violent conflicts. The *threat* of physical violence has similarly coercive and chilling effects.

d. A holistic assessment

The typology above captures most kinds of adverse reactions faced by domestic courts. By pinpointing the form(s) of resistance that is anticipated, judges should have a better idea as to the severity of the negative political outcome that is expected to possibly follow the ideal position. It should be emphasized that these categories are only heuristics for thinking about the question of severity. While, for example, institutional reform tends to be more drastic than reversal, there are kinds of institutional reforms that are arguably rather mild, such as reducing the retirement age of judges by one year. I should also add that multiple forms of resistance might sometimes be anticipated, and that the different responses combined may have cumulative effects.

After estimating the severity of the negative outcome, judges need to have a sense of the likelihood of occurrence. Uncertainty around any kind of political forecasting is unavoidable, and even the savviest judges can sometimes get it wrong. The setbacks experienced by the Hong Kong, Pakistani and Ugandan judges because of their commitment to democratic constitutional principles may shed light on the question of when political backlashes are to be reasonably expected if the ideal position is to be maintained.

In Pakistan, Chaudhry's continuous efforts to challenge Musharraf's regime had chipped away authoritarian powers and sown the seeds for the Lawyers' Movement. However, it must not be forgotten that Chaudhry was actually suspended from office (and "manhandled" out of his house)[31] not long before the regime-changing moment began. The backlash suffered by the judiciary cannot be traced to a single incident. Instead, as Cheema observes, Chaudhry's numerous attempts to embarrass the executive, coupled with the fact that high-stakes general elections were coming up, explain why Musharraf felt the need to defang a defying judiciary.[32] It turns out that history has been kind to Chaudhry as he was shortly reinstated and that Musharraf subsequently lost the elections, but events could easily have unfolded differently, with the constitutional crisis entrenching authoritarian powers instead.

Low points in judicial-executive relations in Uganda provide another illustration. To refresh the readers' memories, in 2005 and 2007 an infamous hit squad known as the Black Mambas were dispatched to break into the courthouse and re-arrest the defendants during bail hearings. These were not ordinary defendants, as they were political opponents and posed a credible threat in Uganda's general elections. In less dramatic fashion, the

[31] Shoaib Ghias, 'Miscarriage of Chief Justice: Judicial power and the legal complex in Pakistan under Musharraf' (2010) 35 *Law & Social Inquiry* 985, 986
[32] Moeen H. Cheema, 'The Chaudhry Court: Deconstructing the Judicialization of Politics in Pakistan.' (2016) 25 *Washington International Law Journal* 447, 451.

courts' challenges against Museveni's policies were often met immediately with "furious" responses and threats to "render those judicial decisions nugatory".[33] These incidents need to be also read in context, as Uganda before Museveni's reign had a history of physical violence against judges.

The post-handover Hong Kong courts have been exceptional in their ability to navigate authoritarian politics. All forms of negative reactions were rare up until 2019. Perhaps the more notable political retaliations happened when the Hong Kong Court of Final Appeal sought to place itself constitutionally above the Chinese authorities in *Ng Ka Ling (No. 1)*, and when a first instance court ruled unconstitutional anti-mask laws during the 2019 protest.[34] The prior decision was effectively overruled by a constitutional interpretation issued by Beijing, and the latter, which was ultimately reversed by higher courts, was followed by warnings to remove constitutional review powers in Hong Kong.[35]

Three lessons that may illuminate judges in similar positions about gauging the possible repercussions of maintaining the ideal position can be drawn from the experiences outlined above. First, it seems that the likelihood (and severity) of a negative reaction is correlated with the salience of the issue in front of the court. A judicial challenge that touches on matters fundamental to the regime's survival will probably lead to some form of immediate, negative response. Second, macro-political events outside the courtroom is another variable that might explain the propensity of court-curbing threats and/or actions. Some of the activist decisions that led to consequential political retaliations coincided with politically sensitive periods, such as when general elections are around the corner (in Pakistan and Uganda) or mass protests against those in power are ongoing (in Hong Kong).

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[33] Joseph M. Isanga, 'African Courts and Separation of Powers', (2009) 2 *Northwestern Interdisciplinary Law Review* 69.
[34] Julius Yam, 'Hong Kong's Anti-mask Law: A Legal Victory with a Disturbing Twist', *IACL-AIDC Blog* (3 December 2019), available at https://blog-iacl-aidc.org/2019-posts/2019/12/3/hong-kongs-anti-mask-law-a-legal-victory-with-a-disturbing-twist (visited at 29 June 2022).
[35] Ibid.

The regime's tolerance of an uncooperative judiciary will naturally be at its lowest when the incumbent feels that political circumstances have put them under an existential threat. Third and relatedly, in some instances, court-curbing threats or actions cannot even be traced to a specific judicial decision. Instead, they may be attributable to past patterns of judicial decision-making (as in Pakistan), or even be the result of spillovers from intra-branch disputes or social conflicts.[36] The Hong Kong court's experience after 2019 illustrates the latter point. The enactment of the national security law was arguably a direct response to the political turmoil caused by the 2019 protest. Nevertheless, the all-encompassing nature of the national security law, and the fact that the authorities' interpretation of "national security" seems to be boundless, had brought into question how much is left of *de facto* judicial independence in Hong Kong. Since the passing of the national security law, critics observe that the courts have shown a "readiness… to give up fundamental rights and to convict on tenuous grounds".[37] The second and third lessons suggest that judges need to pay close attention to the political climate at the time when trying to make out the likelihood and severity of political retaliations.

The risk assessment is completed by combining the two factors of severity (such as from mere pushbacks to existential institutional threats or life-endangering attacks) and likelihood (from low to high). The "formula" proposed is not a mathematical equation, and perfect accuracy is not realistically expected. It is an analytical tool that helps judges in hybrid regimes to consider more carefully the political consequences that might ensue by breaking down and highlighting the relevant factors that judges should be paying attention to. The suggestions offered in the thesis seek to provide scientific rigor to the strategic assessments judges have to make in hybrid regimes. The hope is that the stories told and

[36] See Gretchen Helmke, *Institutions on the Edge: The Origins and Consequences of Inter-branch Crises in Latin America* (Cambridge University Press 2017).
[37] Johannes Man-mun Chan, 'National Security Law in Hong Kong: One Year On' (2022) 30 *Academia Sinica Law Journal* (forthcoming).

the tools offered in the thesis can reduce the uncertainty involved in judicial strategizing. The pushbacks and backlashes encountered by the courts spotlighted in this thesis should not cast doubt over the approach advocated here. As I already argued, deciding to turn a blind eye to what is happening outside the courtroom will almost guarantee the demise of a democratically committed court. Political forecast may not be the forte of judges, but there are reasons to believe that judges can, in many instances, have a rough but good enough sense of what to expect. Judges are not asked to come up with an exact estimate, but to instead figure out whether the chances of pushbacks and backlashes are *sufficiently high* to warrant strategic considerations.

e. Deciding whether and how to supplement the ideal position

After gauging the level of risk exposed to a court, judges will need to determine the amount of deviation from the ideal position required, if any, to address the expected risk. Different risk exposure levels warrant different kinds of strategic responses. The four scenarios to be discussed are not hard categories and they might slide into each other.

Low-risk scenario

In some situations, the risk level might be so low that there is practically no need to deviate from the ideal position ("low-risk scenario"). This is usually the case when the likelihood of any backlash is very remote. It should be mentioned, however, that even in these situations, judicial strategy may still be relevant. Some strategies, as we will discuss in the next part, are cosmetic, in the sense that whatever changes they may create, the core of the decision (or the ideal position) is left untouched. Judges can consider deploying strategies

in these instances for the purpose of improving the social impact of the decision, providing additional constitutional protection to their allies and/or building the perceived legitimacy of the court, so long as these strategies do not materially increase the risk level and that the ideal position is kept intact.

High-risk scenario

There are also instances where the risk is serious enough to justify a departure from the initial position ("high-risk scenario"). Judicial strategies here primarily function to protect the institutional integrity of the court while approximating the ideal position as much as practically possible. When deciding how to choose between different strategic routes, there are three principles to bear in mind.

First, the priority is to narrow the options down to those with manageable levels of risk. The target is not a complete neutralization of the risk, since it is perhaps impossible or too costly in many instances. Self-preservation, again, is not the ultimate goal, but a court needs to be sufficiently confident about its institutional safety if it seeks to play the democracy-enhancing roles sustainably. Second, within the options that present tolerable levels of risk, judges should choose a path that preserves as much of the democratic impact of the decision as practically possible.

It might be the case that the deviation required does not leave an option that retains any democratic content. If that is the case, the third principle demands judges to choose an option that minimizes the authoritarian effects as a result of deviating from the ideal position. This is particularly important because the flip side of a constitutional court's democratic potential is its authoritarian potential. The fact that a constitutional court can crystalize democratic norms suggest that it can also easily entrench authoritarian ones.

Similarly, the fact that a constitutional court can educate the public on democratic values suggests that the same court also has the potential to promote guardianship values.

This third principle resembles Mann's anti-stare decisis rule. Mann takes a more restrictive position and argues that the rebuttal of the presumption is only permissible if an anti-stare decisis procedure can be installed. However, as I already noted, my approach here is more sympathetic to the circumstances faced by judges in hybrid regimes. The principle here only requires judges to adopt an option that reduces the authoritarian effects as much as practically possible. Some might rightly argue that my suggestions here seem to prioritize the institutional health of the courts over anything else, even democracy. This is a legitimate concern, but there are two other scenarios that I am about to explain that would justify maintaining the ideal position *despite* risk levels being high.

Baseline scenario

The first exception to the high-risk scenario is when a departure from the ideal position crosses a moral baseline ("the baseline scenario"). To put it differently, the moral costs might in some cases be too high to justify any kind of strategic deviation. Attempts to avoid political backlash would sometimes mean adopting a position that creates authoritarian effects as we discussed. While one of the principles proposed just now requires minimizing authoritarian effects as much as *practically* possible, there are times when *any* deviation from the ideal position would lead to an evil or profoundly immoral outcome. An obvious example is whether slavery is constitutional or not, and there can only be one correct answer here.

Mann's response to this challenge is to "refuse complicity – even at the expense of sacrificing [the court] itself."[38] As she writes, "[t]he extreme cases that legal theorists call 'evil regimes' clearly would justify a constitutional court sticking with principle, staking its existence for the sake of being true to its purpose[.]"[39] I agree that that should be the case under a baseline scenario, but we both recognize the same problem, that is *when* is the moral costs large enough to justify maintaining the ideal position. To this, her answer is simply that, "judges will have to decide whether a given situation is severe enough to justify such a final act of defiance as resistance."[40] I confine this exception to moral evils, such as when people's lives or security are at stake, and to situations where the health of the democratic half of a hybrid regime is in existential danger, such as what remains of the political rights of the population is at stake. Strategic deviation is morally wrong in these situations, but judges are allowed to consider strategies for ends other than mere institutional preservation, such as increasing the reach of the decision or mobilizing judicial allies. Even in these extreme cases, if a judge can temper an evil system, perhaps he or she should do so.

Unavoidable scenario

A second exception is when the likelihood of a severe political backlash is so high that no practical amount of strategizing would mitigate the risk ("the unavoidable scenario"). In other words, an existential threat is unavoidable and judicial strategy will not make any material difference. "Living to fight another day"[41] only makes sense if that "another day" exists. However, perhaps because of prior judicial-political confrontations, it may

[38] Mann (n 1) 48.
[39] Ibid.
[40] Ibid.
[41] Rosalind and Issacharoff (n 24).

sometimes be clear to the judges that a storm that would fundamentally alter the institutional character of the court is inevitable. Institutional preservation is hopeless under this circumstance as the question is not *if* but only *when*, and it is self-deceiving to linger on. Our assumption about adopting a long-term horizon of a constitutional court does not hold under this scenario as the court will soon undergo transformation that drastically reduces its power and autonomy. Since it is futile to try and escape fate, the logical route is for the judges to stand firm and play the democratic roles to the fullest till the very end. Not only is this the right thing to do, but there is also great symbolic significance attached to this. The court's refusal to admit defeat may inspire local and international communities, as well as further spotlight the authoritarian nature of the regime. Strategic deviation in this instance will not save the court, but strategies can be used to further undermine the authority of the regime.

4. Strategic Opportunities and Considerations

We have covered *when* judges should consider judicial strategies and discussed principles that would guide *how* judges should be selecting and adopting judicial strategies. The two-step approach suggested functions to systematically incorporate prudential considerations into principled constitutional adjudication and helps judges determine when it is permissible to consider judicial strategy.

An important question remains: *what* kinds of judicial strategies are available to hybrid regime judges? And, how do they actually help judges? Effective strategizing relies on a judge's ability to make legally and politically sensible assessments that are suitable

to the environment they are in.[42] Simply highlighting the importance of strategizing would be "anti-theory" as it leaves everything to judicial statesmanship.[43] Perhaps a good way to balance judicial agency and the insights from the judicial strategy literature is to focus on the different aspects of judicial decision-making that may potentially have strategic implications and describe the conditions under which each strategic technique may be salient. The virtue of this approach is that while it enlightens judges about the many opportunities available to them and the practical implications of these opportunities, it preserves the room for individual judges to fill in the gaps and decide on what strategies are most appropriate to their situations.

This part overviews the strategic opportunities relevant to a hybrid regime domestic court. While their various effects will be explored, judicial strategies here have different implications to the four scenarios listed, as we briefly discussed. In a low-risk scenario, judicial strategies may help further entrench democratic norms and enhance a decision's social impact. In a high-risk scenario, judicial strategies are needed to mitigate the risks generated as a result of the ideal position. This may involve moving away from the ideal position. Even in baseline and unavoidable scenarios, strategies may help intensify the ideal position and elevate the political stakes on the authoritarian.

For the purpose of the discussion, judicial decision-making can be divided into four dimensions: (1) outcome, (2) reasoning, (3) language, and (4) timing. Each dimension points to an area where judges can include strategic considerations when they craft and issue their judgments.[44] How the strategic opportunities arising from each dimension may become salient in each of the four scenarios will also be generally discussed.

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[42] See Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan, 'Introduction' in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds) *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013).
[43] Mann (n 1) 32.
[44] Rosalind Dixon has also recently written on the different techniques of judicial statecraft that would enhance the perceived legitimacy of a constitutional court in a democracy. While substantively different to

a. Outcome

Given how a judicial outcome can immediately create or change social norms, the main concern of any stakeholder in litigation is often the final outcome of the case. Accordingly, adjusting the direction of a ruling will have significant strategic implications. I use "stakeholder" as opposed to litigant because especially in constitutional cases, the litigant in court is often representing a much larger social group. In a constitutional case that involves a binding interpretation of a constitutional provision that applies beyond the immediate case, the interested groups, which include future constituencies, are much wider than the immediate litigants. These people may not be on paper related to the case, but they still maintain a direct interest in what is going on in the courtroom. The litigants in courtroom are almost like these people's stand-ins.

Outcome is most salient in a high-risk scenario when it may be necessary to let the authoritarian win, at least parts of the judgment, in order to defuse a crisis. However, our discussion later shows that outcomes can be adjusted in nuanced ways that preserve certain democratic aspects of a democratic decision while mitigating the more pressing authoritarian risks.

i. From binary to multi

A judicial decision is often thought to have binary outcomes: someone wins, and someone loses. The fact that a decision can mean so much to many people suggest that judges must

the proposals here, the dimensions she focuses are similar, which include for example: authorship, tone, narrative and timing. Dixon (n 24).

be particularly aware of the potential impact of their decisions. More specifically, they need to be sensitive about who would win and lose as a result of their writings. The importance of this sensitivity had been highlighted in the previous chapter, where it was described how a hybrid regime court needs to carefully manage the expectations of different and potentially conflicting social groups.

While outcomes often look binary, in some cases, a judge can divide up the outcome by breaking down the issues. One side, for instance, can win on the first and third grounds, while the other may take the second and fourth grounds. These are what might be called halfway house or "win-win" decisions, whereby judges split the outcome of a single case.[45] The logic here is to try to satisfy the expectations of different or perhaps conflicting social groups. Halfway house decisions may help preserve parts of the ideal position while lowering the risk to manageable levels. Wen-Chen Chang uses the examples of the constitutional courts in South Korea and Taiwan to illustrate this technique, whereby the courts there deliberately drew lines so that "everyone obtains some portion of what he or she desires, just not all of it."[46]

The feasibility of this sort of technique depends on the nature of a case. In cases that are too single-issue focused, this technique may be futile since there is no good way of slicing up the case. All people care about might sometimes be the one question involved (such as whether abortion is unconstitutional, or whether the election is conducted in a way that is constitutional), and any attempt to make finer distinctions would potentially have minimal effect on people's perception, even though these distinctions might be legally significant. The worst case might be that, these halfway house decisions might intensify political divides, as each side might perceive the other half of the judgment as

[45] Julius Yam, 'Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts' (2021) 46 *Law & Social Inquiry* 153, 170.
[46] Wen-Chen Chang, 'Strategic Judicial Responses in Politically Charged Cases: East Asian experiences' (2010) 8 *International Journal of Constitutional Law* 885, 900.

unfair or biased. For example, the Hong Kong Court of Final Appeal's attempt to please everyone by imposing a lenient sentence on a democracy leader while issuing harsher sentencing guidelines for future cases in *HKSAR v. Wong Chi Fung* led to pushbacks from both sides of the community.[47]

ii. Remedial intrusiveness

Judicial remedies introduce more nuances to the notion of outcomes. Traditionally, constitutional courts are vested only with the power to strike down laws and executive actions inconsistent with the constitution. These courts, however, have begun to develop an extensive array of constitutional remedies. These remedies might be considered novel, because they go against the traditional conception of a constitutional court and that they sometimes lack constitutional and/or statutory authorization.[48] The fact that these remedies do not always enjoy textual authority, however, may be a point of inspiration, as it suggests that judges can create remedies to cater to different circumstances. Some of these examples include constitutional damages (awarding victims of constitutional violations financial damages), engagement orders (imposing an obligation on the government to engage with victims of constitutional violations to fix a problem), suspension orders coupled with read-in provisos that automatically take place if the government does not respond in time, and remedial interpretations.[49]

Aside from their ability to address complex legal problems, these remedies can also have strategic effects. They introduce different levels of intrusiveness against the government, and can give the judges the tools to be more expressive of their intentions.

[47] [2018] 2 HKLRD 657.
[48] See Po Jen Yap (ed) *Constitutional Remedies in Asia* (Routledge 2019).
[49] See Po Jen Yap, 'New Democracies and Novel Remedies' (2017) *Public Law* 30.

Engagement orders, for instance, can soften the blow to the government. They portray the court as more respectful of the incumbent and invite the government into a collaborative relationship, even though the decision is against the government. A clever use of remedial interpretation may also help superficially preserve the constitutional authority of the government while injecting liberal democratic substance into unattractive laws.

b. Reasoning

The reasoning is the flesh of a decision, and how a decision is reasoned is another area with strategic implications that a judge has control over. Reasoning, as we shall see, is salient in all four scenarios. It may help address the political risks in a high-risk scenario, fortify an ideal position under low-risk and baseline scenarios by amplifying certain parts of the judgment, as well as increase the symbolic effects of decisions under the unavoidable scenario. Some of the techniques to be described have implications to the legal position of a case, while others are cosmetic and are used to communicate with and build relationships with the court's audiences.

i. Strategic effects of legal reasoning?

Before going into the strategic dimensions of legal reasoning, there are two possible kinds of doubts that I would like to first address.

One might argue that most constituencies relevant to a court, perhaps aside from the litigating teams and the legal field generally, do not read legal judgments and are legally unsophisticated. Another contention might be that all people care about is the final outcome of a decision, regardless of the legal reasoning within the decision. These

arguments might suggest that legal reasoning has at best very limited strategic effects and that whatever implications it might have, they are directed to a small group of people who are fluent in the language of the law.

While it is probably true that the strategic effects of legal reasoning cannot travel *directly* to those who have not read the judgment or who have a very limited command in legalese, it is highly plausible that the strategic implications can take effect *indirectly* through communicative intermediaries such as the legal academy, legal organizations, the media and pundits.[50] These intermediaries typically have some degree of legal knowledge and are responsible for monitoring the activities of the court. They not only help increase the visibility of certain cases, but also explain to the public the highlights of the judgments. How they present their interpretation of a judgment has huge weight on the perceived legitimacy of the court as these intermediaries are capable of shaping the court's image. The importance of the contents of a judgment is further highlighted under the current trends of judicialization *and* legalization of politics.[51] Political actors of all sorts are adopting legal language and legal rationales to their day-to-day political interactions. The law decided by the courts is shaping how political actors conduct their activities. These political actors may not be well-versed in the law, but they have legal advisors and other intermediaries to inform them of legal developments and legal merits. Convincing laymen requires convincing sophisticated intermediaries, and the opinions formed by the intermediaries about the courts are conditioned by the legal reasoning deployed by the judges.

[50] See David Law, 'A Theory of Judicial Power and Judicial Review' (2008) 97 *Georgetown Law Journal* 723, 751; Olof Larsson et al., 'Speaking Law to Power: The strategic use of precedent of the court of justice of the European Union' (2017) 50 *Comparative Political Studies* 879.
[51] See also Alec Stone Sweet, *Governing with Judges: Constitutional politics in Europe* (OUP 2000) Chapter 7.

Furthermore, while outcomes play a significant role, to say that everything hinges on outcomes is an exaggeration. First, courts face all sorts of audiences, and some of them are legally trained. Legal reasoning clearly matters to lawyers and other sophisticated intermediaries as they are socialized into the legal field. Legal reasoning is critical to the idea of rule of law, and good legal reasoning helps build perceived legitimacy at least among actors within the legal field. These constituencies are likely to accept an unfavorable or unwelcoming outcome if the judgment is well-reasoned. Second, regarding those who are less legally sophisticated, as I have mentioned, one way for strategic effects to reach these audiences is through sophisticated intermediaries. For laymen who have been exposed to the legal reasoning adopted in a judgment, social psychology research has confirmed the relevance of judicial reasoning in shaping lay people's assessment of a decision. Investigating whether judicial reasoning promotes laymen's acceptability of a decision, Dan Simon and Nicholas Scurich find that "[laymen] were indifferent towards the modes of reasoning when they agreed with the outcome of the judges' decision, but were differentially sensitive to the judicial reasoning when the judge's decision frustrated their preferred outcome."[52] The mode of reasoning particularly matters when one does not agree with the outcome. Studies also suggest that the mode of reasoning need not be sophisticated to convince a layperson.[53] Hence, for those who have read or been exposed to the contents of the judgment, legal reasoning would likely have an impact on how the decision and the court are perceived.

In short, the fact that many audiences may not have a background in law does not necessarily undermine the utility of strategic legal reasoning. Social scientists are uncovering the precise cognitive effects of legal reasoning on individuals with varying

[52] Dan Simon and Nicholas Scurich, 'Lay Judgments of Judicial Decision Making' (2011) 8 *Journal of Empirical Legal Studies* 709.
[53] See Ibid; Deena Skolnick Weisberg et al., 'The Seductive Allure of Neuroscience Explanations' (2008) 20 *Journal of Cognitive Neuroscience* 470.

levels of legal sophistication and how these effects travel in society, but to say that judicial reasoning is irrelevant and perceived legitimacy is determined only by the favorability of an outcome must be false. For judges, an important point to keep in mind is which constituency they are trying to persuade, as this would affect how they should reason.

ii. Depth and breadth of reasoning

Not only are judges in control of how to divide up the issues, but they can also be selective with regard to which issue(s) to address and the coverage of each issue. A shallow ruling that leaves foundational issues undecided may be a way for the court to address high-risk scenarios and stay out of political conflicts that it cannot win.[54] This approach seeks to draw conclusions based on rationales that everyone would agree on, or to build consensus by avoiding questions that are likely to give rise to public disagreement. If a court wants to limit the precedential value of its decision (perhaps because of the authoritarian effects arising from strategic deviation), it may consider issuing narrow decisions as well. Particularizing a decision based on the facts of the case should, in principle, limit its precedential value and, as Mann would say, prevent the decision from becoming idealized.

A minimalist approach is not always successful in defusing political risks though. Tensions are sometimes so high that common ground cannot be feasibly established. Or, there might be a demand from both sides on the judges to engage with deeper constitutional questions, and failing to do so will only impair the court's legitimacy and prolong the social tensions. In these situations, judges might have to consider a more maximalist approach by giving their opinion on the foundational issues at stake. This is perhaps a counterintuitive approach to dealing with political risks, as deeper rulings might create

[54] Cass R. Sunstein, *One Case at a Time: Judicial minimalism on the Supreme Court* (HUP 2001).

more points of contention especially in polarized contexts such as hybrid regimes. However, a more thoroughly reasoned judgment also allows judges to clarify and explain their positions better. This would reduce the room for misinterpretation, distortion, and the uncertainty that might otherwise follow.

Aside from institutional preservation reasons, the depth and breadth of reasoning can be adjusted to increase the court's democratic impact. When a risk is being reduced to a tolerable level, a court may engage in deeper reasoning to lay the foundations for future pro-democracy decisions. Similarly, in a low-risk scenario, it may be preferrable to issue wide decisions and cover more grounds that are conducive to democracy in order to take advantage of the favorable political conditions. This may include, for example, expanding a constitutional right to cover a broader range of beneficiaries. Providing greater constitutional protection to more social groups has the potential of creating mutually supportive relationships between judicial allies and the court, as we shall explore in greater detail in the next chapter. Baseline and unavoidable scenarios are also relevant in this regard. When there is only one morally acceptable answer or when the inevitable is near, judges should use the opportunity to explicate what is wrong about the constitutional system and how current developments are inconsistent with democratic values. The goal is to damage the legitimacy of the authoritarian. Even if the authoritarian attacks the court, it will be made politically costlier to do so as a result of a critical and comprehensive reasoning against the government.

iii. Procedural versus substantive review

Deciding *how* to justify an outcome affects the persuasiveness of a decision. More specifically, a court needs to adopt a kind of reasoning that resonates with its intended

audience. A court may, for instance, ground a decision using guardianship reasons if it wants to convince its authoritarian readers. It may also adopt a methodology that its audiences prefer to ground its decision (such as how conservative groups in the United States might prefer originalism). The general message here is, to use Robert Hume's words, to "choose a legal grounding that will advance their relationship with the audience that they are most interested in targeting based on the conditions presented in each case."[55]

A distinction that might illuminate is procedural review versus substantive review. I refer to these two categories of legal reasoning not in a technical sense, but they are broadly reflective of two different ways of grounding a decision. Substantive review involves a deeper look into the merits of the case and probing into the validity of the arguments launched by the parties. Procedural review is similar in function to the Referee Role suggested in an earlier chapter, and involves checking whether the parties and their actions in question have been compliant with established rules and procedures. Procedural review appears to leave less space for judicial discretion given how rules and procedures tend to be drafted in a more unequivocal way. I say "appears to" because interpretative room is a matter a degree, and judges can sometimes still find space to creatively construe procedural provisions.

Relying on procedural grounds to dispose of a case tends to help preserve a court's neutral appearance. There is a shared belief that the administration and interpretation of procedural rules is part and parcel of the duty of a judge.[56] A commitment to procedural justice through a fair use of procedural review not only lowers the political risk of a supposedly controversial position, but can also help bolster its impartial image.[57] Hume

[55] Robert J Hume, 'Courting Multiple Audiences: The strategic selection of legal groundings by judges on the US courts of appeals' (2009) 30 *Justice System Journal* 14, 17.
[56] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transaction Publishers 2005) 58, 66.
[57] Tom Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375.

makes a similar argument, as he finds that American appeal courts in the administrative law context can more effectively deflect scrutiny from higher court judges and other political actors when these appeal courts confine their analysis to the facts of the case and avoid engaging with the substantive points raised by the litigants.[58] It should, nonetheless, be noted that when the underlying procedures are being perceived as unfair, an unwavering commitment to a formalistic vision of proceduralism would instead be perceived as unjust. This would weaken the democratic constituency's support of the court. The caveat here suggests that it may sometimes be impossible for judges to appear neutral when the very rules that the judges are asked to interpret and apply laws that lack social authority. The procedural approach is hence not necessarily foolproof for the purpose of preserving perceived legitimacy.

iv. Strategic citation

Citations in a judgment affect how judicial audiences perceive the court. To use legal precedents to justify an argument is the essence of common law reasoning, and an accepted practice in many civil law jurisdictions. Studies have found that when judges anticipate pushbacks when laying down a new doctrine, they tend to argue more carefully and cite more extensively in order to increase the chances of acceptance.[59] Judicial citations are not only used to convince legal actors, and its strategic effects can reach those outside the legal field as well. Larsson et al., for instance, find that the Court of Justice of the European Union tends to embed its decisions more in case law when ruling against EU governments,

[58] Hume (n 55).
[59] David Walsh, 'On the Meaning and Pattern of Legal Citations: Evidence from state wrongful discharge precedent cases' (1997) 31 *Law & Society Review* 337; Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A network analysis of case citations by the European court of human rights' (2012) 42 *British Journal of Political Science* 413.

so as to persuade them of the legal quality of its decisions.[60] The fact that these governmental actors are, strictly speaking, not lawyers or jurists does not matter, as they have legal experts who can translate the legal contents and help them appreciate the legal justifications.

A selective use of precedents can liberate judges from tight spaces. This is especially the case for apex level constitutional courts that are not bound by precedents. This point is best illustrated by the strategic use of comparative jurisprudence which includes foreign and international law. Judges seek to increase their legal persuasion by referring to and comparing the positions of different jurisdictions. The extent to which comparative citation as a strategic tool is available to judges depend on pre-existing institutional and legal norms and rules, such as whether the law explicitly sanctions this practice or whether there is a history of doing so.[61] Even without explicit authority however, there are many constitutional courts that cite comparative law "voluntarily".[62] Some judges have been candid about how selective their approach is when it comes to the use of comparative citation.[63]

The kinds of comparative jurisprudence cited reflect the image that a court wants to portray. Just as authoritarians may attempt to ride on the reputation of other mature democracies by calling themselves democratic, courts in hybrid regimes may wish to "defer" to foreign practice by citing precedents decided by the more "canonical" group of courts.[64] Judge may seek to gain support of the people and allies by establishing linkages with reputable courts through citations. The Ugandan courts is a case in point. While the

[60] Larsson et al., (n 50).
[61] Yam (n 45) 171-2; Michal Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013).
[62] Ran Hirschl, 'In Search of an Identity: Voluntary Foreign Citations in Discordant Constitutional Settings' (2014) 62 *American Journal of Comparative Law* 547; Patrick Glenn, 'Persuasive Authority' (1987) 32 *McGill Law Journal* 261.
[63] Anthony Mason, 'The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 *Hong Kong Law Journal* 299, 306.
[64] Hirschl (n 62) 564.

courts do not enjoy explicit constitutional authority to refer to foreign and international jurisprudence, foreign and international laws have played an important role in Uganda's constitutional legal developments. Johanna Kalb argues that a function of these citations have been used to bolster the authority of anti-regime decisions and its institutional position by drawing on support from domestic and international NGOs and donors.[65] Not to mention, citing foreign and international jurisprudence is a direct way of showing respect to foreign and international courts. Similarly, a court can refrain from referring to "unattractive" jurisdictions or lines of jurisprudence, even if they might be legally relevant, so as to avoid associating itself with the "wrong crowd". A selective use of comparative citation tends to be an adaptable technique capable of catering to ideologically diverse outcomes given the plethora of comparative jurisprudence out there.

Aside from domestic and comparative precedents, judges may cite non-binding secondary materials in the judgments to persuade non-legal actors.[66] These materials may include legal dictionaries, works by prominent jurists and philosophers, statements by political figures, and legal or political treaties. The idea, as Hume points out, is based on a psychological phenomenon called priming, which describes how exposure to certain stimulus – which in the case is the prestige or legitimacy of the cited materials – might unconsciously affect how a judgment and the court are being perceived.[67] Unlike the citation of legal precedents however, these materials tend to be outside the legal realm and lack legal authority. This technique does not increase the *legal* persuasiveness of a decision. However, in the eyes of the audiences that appreciate and approve of the secondary

[65] Johanna Kalb, 'The Judicial Role in New Democracies: A Strategic Account of Comparative Citation' (2013) 38 *The Yale Journal of International Law* 423, 446-8.
[66] Robert J. Hume, 'The Use of Rhetorical Sources by the US Supreme Court' (2006) 40 *Law & Society Review* 817. See also Robert J. Hume, 'Strategic-Instrument Theory and the Use of Non-Authoritative Sources by Federal Judges: Explaining References to Law Review Articles' (2010) 31 *Justice System Journal* 291.
[67] Hume (2006) ibid 821.

materials cited, this technique improves the standing of the court and make its decisions practically more persuasive.[68]

c. Language

Language plays an indispensable role when it comes to writing a judgment, as the law is fundamentally made up of words. As Frank Cross and James Spriggs puts it, "[t]he influence of an opinion, on society and future courts, is largely determined by its language because that is what an opinion is."[69] Effective communication has been widely recognized as one of the key indicators of a well-written judgment. Indeed, there are courses and textbooks on how legal judgments should be written, and plenty of discussions about, for example, the proper length of a judgment and how a judgment should be structured. What we are concerned with here though is not only effective communication of legal ideas, but how the linguistic presentation can affect the decision's authoritativeness and the attitudes towards the court.

Language-related techniques are arguably more cosmetic. A court can find different ways to linguistically present the same legal position. Hence, what we are about to discuss is generally relevant to all four scenarios. How exactly should the following techniques be applied, however, is a highly context-specific question as it depends on with whom the court is trying to communicate.

i. Natural language or legal language?

[68] Ibid.
[69] Frank B. Cross and James W. Pennebaker, 'The Language of the Roberts Court' (2014) *Michigan State Law Review* 853, 857.

There has been an increasing debate about what sort of language – natural language or legal language – should judges use in their opinion. This debate is to some extent conditioned by the expectations of the political community. In societies pushing for legal accessibility, using natural language, it is argued by some, may help legitimize the court by "bringing the author down nearer to the human level of the litigants" and "humaniz[ing]… the judicial process…".[70]

The choice, nonetheless, also has strategic implications. The traditional law and politics divide suggests that the legal language is peculiar to the legal field. Judges, it is argued, can hide their intentions and the political substance of the case behind the "mask" of law.[71] By framing a judgment in technical terms, the mythical aura of the law legitimates the outcome and protects judges from attacks by the untrained eye. As Michael Blauberger and Dorte Martinsen put it, "politically unwelcome case law can only be challenged on its own legal terms."[72] The aim is to deny the role of politics through seemingly apolitical presentations. The decisions of the German Constitutional Court have been described as "dry" and "technical",[73] but presenting itself as a technocratic court has helped build its impartial image. This approach may be particularly useful in divided contexts seeking integration, as the legal language may help play down the political saliency of a contentious issue. In some cases, progressive legal ideas that sow the seeds for future doctrinal developments can even be covered up by complex legal justifications, waiting to be invoked and unlocked by future judges when the timing is right.

[70] Patricia M. Wald, 'The Rhetoric of Results and the Results of Rhetoric: Judicial writings' (1995) 62 *The University of Chicago Law Review* 1371, 1417.
[71] Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A political theory of legal integration' (1993) 47 *International Organization* 41, 72.
[72] Michael Blauberger and Dorte Sindbjerg Martinsen, 'The Court of Justice in Times of Politicisation: 'Law as a mask and shield' revisited' (2020) 27 *Journal of European Public Policy* 382, 384.
[73] Michaela Hailbronner, 'Transformative Constitutionalism: Not only in the Global South' (2017) 65 *The American Journal of Comparative Law* 527, 551.

Natural language offers its own set of advantages though. Hoping to provide soundbites in their decisions, the judge may need to write in a simple and accessible way if he or she wants the messages to cut through. Going for a more laymen friendly approach may allow ideas to travel more directly and deeper to a broader population. This is especially relevant when the court is trying to educate and mobilize the public or, as in the baseline and avoidable scenarios, when the court is trying to make a statement to the world.

Natural language may also reduce the likelihood of noncompliance (and hence address some of the anticipated political risks) as it minimizes the room for legal ignorance on the laymen's part. Another more indirect reason why natural language might improve compliance rate relates to the discursive resources that an accessible judgment might generate. Studying the rulings of World Trade Organization panels, Marc Busch and Krzysztof Pelc discover a higher number of affect-laden words deployed when these panels have to decide on politically charged cases.[74] Explaining this phenomenon, they suggest that the affect-laden words could be used as discursive resources by the national governments to persuade domestic actors. National governments would have an easier task of persuading their citizens when the contents of the judgments invoked by the government are linguistically accessible to and resonate with domestic audiences. Applying the insight to a domestic context, it would seem that a constitutional court can increase the chances of compliance using affect laden words and natural language because of these rhetorical tools' ability to relate to the public.

ii. Strategic vagueness

[74] Marc L. Busch and Krzysztof J. Pelc, 'Words Matter: How WTO rulings handle controversy' (2019) 63 *International Studies Quarterly* 464.

Another linguistic aspect which judges can utilize is specificity. A highly specific language aligns the outcome with the judges' intentions by making deviations from the law easier to detect.[75] Judges should be specific when they are trying to assert themselves against the government and make their position clear to their audiences.

When it becomes harder to navigate however, toning down on the specificity may avoid bringing up unnecessary troubles. Judges may hide their resistance using vague language. [76] For example, a court may establish important liberal democratic principles but underspecify the context in which they apply. The devil is in the details, and by fudging the language, real areas of contention are suppressed. Vagueness can however be abused by the audiences. Judges rarely have the chance to explain themselves when they are being misinterpreted, and any side-effects of vagueness may be long-lasting as a result.[77]

iii. The power of narrative

A more subtle area that judges have control of is the narrative of the judgment. This is related to, but goes beyond, our discussion above on the choice of language. A distinction here needs to be made between narration and argumentation. They represent two different kinds of rhetorical appeals, with narration appealing to emotions and argumentation appealing to logic.[78] Argumentation relies on accepted modes of reasonings with the help of evidence to justify claims, whereas narration relates to how the structuring and description of the flow of events and characters can create emotions or experiences to audiences. When it comes to law, most would focus on the argumentative elements of a

[75] Lee Epstein and Tonja Jacobi, 'The Strategic Analysis of Judicial Decisions' (2010) 6 *Annual Review of Law and Social Science* 341, 354.
[76] Staton and Vanberg (n 30).
[77] Judges can usually explain their previous decisions in a future judgment, but this is not a timely way to explain themselves and can cause further confusion in the legal position.
[78] This distinction can be traced back to Aristotle's work *Rhetoric.*

judgment, such as the admissibility of the evidence, the appropriateness of the adopted mode of interpretation, and the relevance and authority of the cited precedents. The importance of argumentation was already illustrated in our discussion on reasoning.

What narrative the court adopts can significantly shift certain constituencies' attitudes towards the court and determine the social impact of a decision as well. Courtrooms are often described as battlegrounds for litigants to assert their preferred narratives. A judge adopts a narrative by, for example, using a particular set of vocabulary, portraying certain actors as protagonists and antagonists, sequencing the events in a certain manner, and foregrounding selective principles or factual elements. The choices made by judges in telling the "story" of the case has the ability to construct and reconstruct historical events as well as create new frames for interpretation.

The power of narrative is perhaps best displayed by the Indian and Pakistani courts. They are widely regarded as some of the most active and involved constitutional courts in the world, and one commonality among them is their deployment of populist rhetoric.[79] This kind of rhetoric involves natural language but goes beyond that. These courts make an active effort to connect themselves to "the people" by appealing to public sentiment and mimicking the vocabulary of politicians. The Indian Supreme Court had even cited poetry in their judgments.[80] These courts are labeled as populist and politicized as a result, but their ability to mobilize the public as a result of the narratives they deploy cannot be understated. Less dramatically, we have seen some Hong Kong courts adopting a pro-China narrative of events in politically sensitive cases.[81] Whether the judges truly believe

[79] Anuj Bhuwania, 'Courting the People: The rise of public interest litigation in post-emergency India' (2014) 34 *Comparative Studies of South Asia, Africa and the Middle East* 314; Yasser Kureshi, 'What is judicial populism and how does it work in Pakistan?' *Dawn* (1 February 2019) available at <https://www.dawn.com/news/1461194>, last visited 11 November 2021.
[80] Hailbronner (n 73) 552.
[81] 'Court finally releases English version of judgment that jailed Hong Kong activists Joshua Wong, Nathan Law and Alex Chow' *SCMP* (20 August 2017), available at <https://www.scmp.com/news/hong-kong/politics/article/2108919/court-finally-releases-english-version-judgment-jailed-hong>, last visited 11 November 2021.

in that version of events is unclear, but this move can show to the authoritarian constituencies the loyalty of the court.

d. Timing

A consensus among students of judicial strategy is that timing is always a factor at play. Our assumption throughout the thesis has been that interactions between the court and political actors are never one-off but repeated. The importance of being sensitive to timing is built into the two-step framework and relevant to all four scenarios, as judges are required to make judgments about their current and future political circumstances based partly on past events. However, what does "good timing" mean?

Timing is "right" in the sense that a case is decided at a moment with optimal effects. For instance, the *Obergefell* decision to recognize the right to same sex marriage is considered well-timed because it coincided with increasingly liberal attitudes towards gender and sexuality topics. Similarly, the landmark *Ng Ka Ling (No 1)* case decided by the Hong Kong Court of Final Appeal to establish its power of judicial review in the early days of the handover involves great timing, as the court was able to find and exploit the political opportunities when China at the time was still under close international scrutiny.

Timing can be right for the legal/policy position of a decision and/or the institutional position of a court.[82] The Hong Kong example is perhaps a well-timed decision for the court as it was a successful move to entrench its powers, but not so much in relation to the substance of the decision. The court's decision to broaden the right of abode was hugely controversial as pundits thought it would have led to a significant

[82] David Fontana, 'Docket Control and the Success of Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

number of immigrants. The case itself was ultimately "overruled" by the Chinese authority, but the power of judicial review was left undisturbed.

i. Timing in three stages

Timing of judicial action is important. But more importantly, a court has opportunities to control timing. These opportunities are best understood through "the life cycle of a case"[83] – the *ex-ante* stage of deciding whether to hear a case, the *in-medio* stage of hearing a case, and the *ex-post* stage of the release of the actual judgment. The three different timeframes highlight different opportunities where judges can exercise their agenda-setting powers. There are always three options available to judges when it comes to time-related opportunities: to engage, to avoid, or to delay. Judges may want to delay or avoid politically risky cases when the conditions are not right, and engage with those where the conditions are appropriate. The opportunities to be described call to attention about how judges can adapt the timing of their decisions to increase or downplay the salience of the circumstances involved.

Beginning with the *ex-ante* stage. Crucial to a court here is its docket control power, that is its power to decide whether to hear a case or not.[84] The docket control power of constitutional courts vary in practice. In some cases such as India and Pakistan, judges enjoy *suo moto* powers to pursue an action on its own accord. Such a power allows judges to actively control its own agenda and the pace of pursuing their agenda. Most courts are passive actors and the docket control power to a large extent depends on the supply side of the equation. Some such as the United States Supreme Court have complete discretion

[83] This framework is borrowed from Delaney (n 24) 5.
[84] Fontana (n 82) 625.

as to whether to hear a case brought by applicants. More intricately, as Theunis Roux observes, the South African Constitutional Court's expansive jurisdiction over matters relating to public power coincided with its strict approach to direct access to court.[85] The strategy allows the court to "measure the political temperature" of cases directly brought by applicants before deciding whether to accept the petition.[86] More commonly, the discretionary power to decide whether to hear a case is structured. The discretionary element still exists, but it may be subjected to a number of principles and rules. In many common law jurisdictions for example, an applicant must demonstrate that the case is of sufficient legal or public importance, or meets a merits test. Constitutional courts in civil law jurisdictions are commonly obligated to hear a case, at least that is what the rulebook says. In practice, there is still considerable discretion for judges to select cases and manage its caseload. For instance, judges can interpret procedural and standing rules to control the flow of the cases, and allocate their time and effort more efficiently through a more strategic allocation of judge panels.[87]

The strategic importance of docket control power is best illustrated by its absence. A truly passive court will always be at the mercy of external actors when it comes to when and what kinds of cases are to be heard. This is particularly troublesome in judicialized polities, as a passive court will have no choice but to confront all sorts of highly controversial cases. Those seeking to undermine judicial authority may even manipulate the agenda of the defenseless judges by deliberately launching claims that would likely lead to unpopular outcomes. Docket control power provides much-needed flexibility to the court to cope with shifting circumstances. By exercising its discretion, judges can pick attractive cases, delay ones with potential to a time when the political conditions are

[85] Roux (n 24) 377-383.
[86] Ibid 366.
[87] Christoph Engel, 'Does Efficiency Trump Legality? The case of the German Constitutional Court' in Yun-chien Chang (ed) *Selection and Decision in Judicial Process around the World* (CUP 2019).

favorable, and avoid engaging with high risk scenarios. But again, the extent to which a court can utilize its docket control power for strategic purposes is limited by pre-existing rules that structure the court.

There is also room for strategic maneuvering in the next two stages. In particular, during the *in medio* hearing and trial stage, judges first get to decide when to hear a case. Second, they also have a say with regard to the amount of time dedicated for the trial. Third and most importantly, judges can be selective about what issues to address. A narrow focus functions to delay unwanted issues to the future, as we discussed previously. Needless to say, delaying is impossible if the contention the court is seeking to avoid forms the crux of the case.

The final stage is when the judgment is released. The effects of the decision takes place once the judgment is published. Finding the right time to issue the decision is of great strategic importance, and a court can time the releasing of decisions to shape their image and public discourse. This is an area limited by case management norms and each jurisdiction has its own practice. Nevertheless, the judges writing the decision usually retain a degree of discretion. For example, a common reason to expedite a case is when it involves matters of great public importance. Despite a huge backlog of pending cases, the Supreme Court in Pakistan has often prioritized cases of deemed social importance.

A more substantive temporal element regarding the final stage is remedies. We have briefly discussed how choosing between different remedies can allow for varying degrees of intrusiveness. We can also look at remedies through the angle of time. Some remedies take place immediately, such as the nullification of a provision, but others might be of delayed effects. What a suspension order does, for instance, is to effectively suspend the declaration of unconstitutionality for a period of time to allow for the political actors to comply with the decision. Engagement orders have similar delaying effects as they leave

considerable discretion to the political actors with regard to how best to implement the aspirations specified in the decision. Normatively speaking, remedies seeking to delay is often justified on democratic legitimacy grounds.[88] They are humble judicial technique seeking to construct dialogues with the political branches. Strategically, delayed remedies may reduce the risk of immediate backlash by effectively pushing trickier questions of implementation to a later date or showing respect to the incumbent by inviting them into a collaborative relationship.

ii. Incrementalism

A time-related theme that is worth highlighting is incrementalism. In some ways, strategy is by definition incremental – it is a plan, or steps in a plan towards a long term or overarching goal. The theory of democratic judging proposed in the thesis assumes a long-term horizon, as we discussed. It is presumed that the benefits deriving from the theory are not always immediate, and the goals of democratic advancement and judicial empowerment are long-term and continuous. This is consistent with the understanding that regime-change, or democratization, is a long, gradual and oftentimes zig-zagging process. Based on this assumption, there is a general case to be made for approaching the topic of institution-building in an incrementalist fashion.

Incrementalism refers to the idea of achieving progress through small and successive steps.[89] Incrementalism is best contrasted with a revolutionary approach that seeks to align reality with certain goals immediately through large-scale, transformative changes. In the context of constitutional theory, incrementalism has been applauded by

[88] See Delaney (n 24).
[89] Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16 *International Journal of Constitutional Law* 389; Jeff King, *Judging Social Rights* (CUP 2012) Chapter 10.

many for its normative benefits: the approach tends to reduce error cost as a result of competency limitations of a court, offers more possibilities for courts to adapt to changing and complex circumstances, as well as is more respectful of democracy because it leaves more room for the courts to work with the political branches.[90]

From a strategic perspective, judicial incrementalism also seems to be a more sensible route. First of all, what we hope to achieve here is not simply democratic policies or decisions, but the entrenchment of democratic norms as evidenced by a change in institutional structures and a cultivation of democratic attitudes of the government officials and the public. All things being equal, it is unrealistic to expect the kinds of change we are hoping here to happen overnight through a revolutionary kind of approach. Second, courts are vulnerable institutions, and suffering an existential backlash would likely mean irreparable damage. Losing the court would mean losing a possible avenue of change, which there may not be that many in a hybrid regime. The potential advantages that can be offered by a court may be modest, but it nonetheless can play an important supporting role. We have already seen situations where a revolutionary approach may be justified, such as the unavoidable and baseline scenarios. Aside from those instances, as a general strategy, incrementalism seems to be preferred. Finally, incrementalism would likely help hone the political intuition of the judges. Through each successive step, a court is expected to take in and study the feedbacks from society. The dynamic process is a good learning opportunity for judges to gain a better understanding of their local context.

e. Combining the Techniques

[90] See ibid.

It is important for judges to remember that these techniques can and should be combined when applying them. For example, a court might let the authoritarian win the substantive decision while planting liberal democratic norms inside the judgment. To protect itself while seeking to discredit the authoritarian and/or minimizing the harm against democratic principles, the Ugandan courts have upheld allegedly fraudulent elections to confirm Museveni's electoral victory while acknowledging electoral malpractices and noting how political rights were comprised as a result in their reasonings.[91] This might remind some readers of the *Marbury* decision where a pro-regime outcome coincided with a reasoning that was supportive of judicial power. A court also does not have to adopt the same language and tone throughout the whole judgment. There are plenty other combinations and judges should apply whatever techniques they see fit after carefully assessing the circumstances. The techniques can and should be used in tandem with one another, creating multidimensional and complex social effects that would help courts achieve their strategic aims.

f. Sensitivity to audiences

Finally, it needs to made clear that a high degree of audience-sensitivity is required if judges want to deploy these strategies effectively. Populistic rhetoric, for instance, would probably not fit systems that are more accustomed to a legalistic language, despite the theoretical payoffs that we explored. The importance of audience-sensitivity is not limited to language, as we saw how citations and other reasoning techniques can be catered to different kinds of audiences.

[91] See Jude Murison, 'Judicial Politics: Election petitions and electoral fraud in Uganda' (2013) 7 *Journal of Eastern African Studies* 492.

Audience-sensitivity involves not only knowing the background and culture of the relevant audiences, but also understanding their preferences. Different kinds of audiences may have different priorities and hence may react differently depending on the issue at stake. Courts can make distinctions between their preferences to find opportunities' for selective assertiveness. The Pakistani courts, for example, knew that they could not challenge the military in relation to its institutional autonomy, but other policy areas of the military were relatively safe.[92] The Hong Kong courts consistently showed deference in cases that concerned the interests of mainland China such as national sovereignty and electoral reform, but asserted themselves outside those areas.[93] A similar pattern can be found in Uganda as liberal human rights development coincided with "consistent[] defer[ence]" in issues that might fundamentally undermine Museveni's power.[94] . These courts have been able to differentiate questions that involve the core interests of the authoritarian –which are typically out of bounds because of the political risks involved – from those of lower political stakes, and their deployment of judicial strategies reflect their savviness. Not to mention, the audiences' preferences may change overtime. As a hybrid regime becomes more connected to the West or internationalized for instance, certain domestic audiences may be more tolerant of liberal-democratic norms, creating new opportunities for the court to build alliances and create leverage. Effective deployment of judicial strategies would require judges learning the motivations of their audiences and be constantly aware of how ongoing political changes might affect the preferences of the audiences.

5. Conclusion

[92] Yasser Kureshi, 'When Judges Defy Dictators: An Audience-Based Framework to Explain the Emergence of Judicial Assertiveness against Authoritarian Regimes' (2021) 53 *Comparative Politics* 233.
[93] Yam (n 45) 153.
[94] Isanga (n 33).

This chapter has sought to offer a theoretical framework that integrates judicial strategy with the democratic adjudicative theory proposed in Chapter Four. The framework involves two general steps: ascertaining the ideal position through the institutional blindfold, and assessing whether and how to supplement the ideal position using strategic means. Aside from specifying the conditions under which judicial strategy may be salient, the chapter has also discussed the different strategic opportunities available to judges in four dimensions of the judicial decision-making process and how they might help hybrid regime courts.

It is worth mentioning again that the goal of strategizing is not simply institutional preservation, but an approximation to the democratic roles of a hybrid regime constitutional court. The importance of institutional preservation is justified on democracy grounds: while democracy takes priority over institutional preservation, we also need an institutionally healthy court to advance democracy. Difficulties arise when there seems to be a tension between the two values. The framework reflects these complexities and how constitutional democratic principles should be balanced with prudential considerations under different scenarios.

To fully understand the range of options available to judges and their potential to fulfill their democratic roles, we must not ignore their social capacity. In the next chapter, we move away from the adjudicative context and explore what democratically committed judges can do off-bench to build and preserve power. More specifically, we will look at how judges can establish and maintain relationships with constituencies outside the courtroom and what they can do to resist attacks. The off-bench techniques might sit uncomfortably with the conventional understanding of a judicial role, but, as we shall see,

those tools will help judges cope with the complex authoritarian realities of hybrid regimes more effectively.

CHAPTER SEVEN

"MINGLING IN THE WORLD"

1. Introduction

While a court is principally defined by its adjudicative role, we must not forget that judges do not only operate within the courtroom. Judges also engage with their audiences when they are not deciding cases. They may create allies and defuse enemies to strengthen the court. This chapter focuses on what judges can do to protect the judiciary and make their judgments more effective using off-bench tools and by relying on their social networks. These tools further highlight the socially constructed nature of judicial power in a hybrid regime.[1] As Alexei Trochev and Rachel Ellett argue, "[l]aw is neither completely autonomous from hybrid regimes nor completely autonomous from informal power networks."[2] When the constitutional protection of judicial powers is not as robust as it is in mature democracies, judges in a hybrid regime may have to rely on their social networks and consider non-judicial techniques to help reinforce their institutional position.[3]

The chapter discusses four sets of tools. The first is relation-building. No matter how dedicated a court is, it is unlikely to succeed without allies in society. Before going into how judges can develop friendly relations with other institutions, we need to identify the institutions that are capable of offering protection to the court first and the ways in which they can support a court. In part 2, we will look at seven potential allies of a committed court: (1) lawyers, (2) legal academics, (3) the media, (4) civil servants, (5)

[1] Alexei Trochev and Rachel Ellett, 'Judges and Their Allies: Rethinking judicial autonomy through the prism of off-bench resistance' (2014) 2 *Journal of Law and Courts* 67.
[2] Ibid 84.
[3] Ibid; Björn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, 'The Informal Dimension of Judicial Politics: A relational perspective' (2017) 13 *Annual Review of Law and Social Science* 413.

international organizations, (6) general public, and (7) fellow judges. Establishing and maintaining relationships with them will not only offer greater leverage to the court, but also strengthen the bonds within the democratic constituency.

After identifying the relevant potential allies, the more important question is, what can judges do to bring these institutions onto their side? As argued in the previous chapter, judges can decide in ways that provide these groups with greater legal and constitutional protection, or build connections by citing in the judgments materials that these institutions produced or resonate with. On top of these in-courtroom strategies, part 3 examines how alliances can be forged through two kinds of off-bench engagements: public relations and judicial diplomacy. Public relations is a diffused technique that is used to build, defend and maintain the general image of a court, while judicial diplomacy is more targeted. We will also look at some of the occasions where judges can conduct judicial diplomacy to connect with the institutions identified in part 2.

Part 4 explores a second set of tools to address hostile parties. While having allies are important, there are times when they are unable to protect the court, and judges will have to deal with those who oppose them or their decisions themselves. It is challenging to bridge the ideological gap between the court and its adversaries. Nevertheless, establishing diplomatic connections with hostile groups may help smooth things out. In dire circumstances, judges should consider negotiating with the adversary in private. Some scholars have identified instances where judges seem to have secretly negotiated with political elites.[4] Drawing on the concept of backchanneling, I will explore theoretically the potential dangers and benefits of engaging with hostile parties in the dark.

The third tool to be discussed is protest. Judges may have to consider extreme measures when options are limited. Protesting is one of them. The focus of part 5 will be

[4] Trochev and Ellett (n 1).

on judicial protesting for institutional autonomy or the democratic cause. Judicial protesting is more common that many might imagine. It is a quick and effective way for judges to get the attention of the public and the regime. As powerful as judicial protesting can be, it also poses great risks to protesting judges' career and personal safety. Judicial protesting also raises concerns about the ethical rules around judicial conduct, which will be discussed as well.

As a last resort, a judge can consider resigning. Part 6 focuses on the practical impact of judicial resignation in protest. The resignation of committed judges sends out a strong message that can potentially mobilize other constituencies and delegitimize the regime. Judicial resignation may, however, be very costly to the democratic constituency because vacancies will unlikely be filled by like-minded colleagues. The part will discuss ways to structure the dilemma and argue that resigning should only be considered as a last resort.

2. Identifying the Allies

Before going into how judges can use off-bench techniques to build relationships with institutions that can protect a court, this part identifies *who* these potential judicial allies are by disaggregating the democratic constituency into its common constituents, and the support they can offer to a court.

A key lesson from Chapter Five is that, enhancing a court's position in a hybrid regime requires the support of a democratic constituency. The argument was that the democratic constituency can act as a buffer between the court and the authoritarian constituency by imposing political restraints on the hybrid regime incumbent and its supporters. Much of the discussion there builds on the electoral logic in a hybrid regime,

and hence the democratic constituency was largely equated with a democratically inclined mass. The reality, though, is that the democratic constituency can involve a plurality of social groups. A disaggregation of the democratic constituency allows us to see more clearly the distinct contributions of each constituent institution.

It should be emphasized that some institutions to be discussed in reality may oppose the court, making it harder for judges to maneuver. A common example is a state-backed media that acts as the mouthpiece of the authoritarian. As Terence Halliday, Lucien Karpik and Malcolm Feeley find, a court's relationship with these actors may be characterized as unengaged, cooperative, oppositional or detached.[5] Furthermore, within themselves, those social groups are not always united in their cause. Hence, cross-cutting situations might appear where alliances are formed between factions of these social groups, or temporary alliances on specific issues only.[6] Nevertheless, the institutions identified are *potential* allies that judges should build relationships with for reasons to be discussed.

a. Lawyers

Based on two decades of research on lawyers and judicial politics, Halliday and his colleagues find a "critical interdependence between the bar and bench for the rise of political liberalism in disparate historical contexts."[7] In the periods under study here of Hong Kong, Uganda and Pakistan, lawyers have proven integral to the development of judicial power and constantly risen to the occasion to defend their judiciaries.

[5] Terence Halliday, Lucien Karpik and Malcolm Feeley, 'The Legal Complex and Struggles for Political Liberalism' in Terence Halliday, Lucien Karpik and Malcolm Feeley (eds) *Fighting for Political Freedom: Comparative studies of the legal complex and political liberalism* 1 (Hart 2007) 7-8.
[6] Ibid.
[7] Ibid 4.

The Hong Kong Bar Association is one of the most outspoken defenders of the rule of law and judicial independence in Hong Kong. One of the many examples of the Bar Association actively mobilizing its members in support of the judiciary goes back to 1999 shortly after the handover.[8] The judiciary was facing fierce attacks from Mainland China after the landmark constitutional case of *Ng Ka Ling*. As a sign of solidarity, the bar organized their first ever silent march. Since then, members of the bar have time and again stood up for the judiciary and educated the public the importance of judicial independence and rule of law.

Lawyers in Uganda have shown similar willingness to fight for their courts in critical moments. In 2007 after the High Court granted bail to prominent opposition figures, the Ugandan government sent a group of gunmen known as the Black Mambas to re-arrest the defendants.[9] Doors were broken, and a lawyer was beaten unconscious when the armed personnel stormed the court. An almost identical event occurred in 2005. In both instances, members of the bar, joined by judges in 2007, organized strikes to protest against the blatant interference from the state. The week-long strike in 2007 ultimately ended with Museveni's apology.

The Pakistani bar had supported the judiciary in an even more spectacular fashion. After Musharraf suspended the constitution and packed the Supreme Court in 2007, the lawyers took to the streets and started The Lawyers' Movement. Lawyers refused to take oath under the newly imposed emergency laws, boycotted the regime by refusing to appear at lower courts and organized hunger strikes.[10] The movement developed into a popular mass protest and confrontations became increasingly violent. Crackdowns on activists and

[8] Mark Landler, 'After 2 Years, Hong Kong Looks More Like China' *New York Times* (1 July 1999).
[9] 'Uganda Lawyers in Protest Strike' *BBC* (12 March 2007) available at <http://news.bbc.co.uk/2/hi/africa/6441239.stm> (last visited 9 November 2021).
[10] See Shoaib Ghias, 'Miscarriage of Chief Justice: Judicial power and the legal complex in Pakistan under Musharraf' (2010) 35 *Law & Social Inquiry* 985.

lawyers further exposed Musharraf's authoritarian nature. His party was eventually defeated in the electoral box in 2008. Facing impending impeachment, Musharraf went into exile shortly after.

Lawyers are arguably the most natural ally of judges because of their similarity in background and their alignment in interests. Lawyers likely appreciate the importance of constitutional values such as rule of law and judicial independence better than others because lawyers and judges have gone through similar socialization processes, such as law schools and legal workplaces.[11] Furthermore, actors within the legal ecosystem are interdependent, and lawyers have an interest in protecting the judiciary. Executive attacks against the judiciary, for example, would affect the reputation of the entire legal profession, which might accordingly undermine the stability of the legal practice. The fact that they are oftentimes in the same boat gives lawyers an incentive to call out on judicial interferences when judges need assistance.

The examples outlined above show that lawyers can offer a wide range of cover to the court, including public education, public statements, government boycott, silent marches and street protests. The kinds of assistance offered by lawyers may seem no different than those provided by, for instance, a pundit or a street protestor. However, the special weight that comes with the words and actions of lawyers stems from their *status* as legal professionals. Professions are "traditionally a set of occupations distinguished from others by their high education, complex body of knowledge and skills, their status, and their fiduciary responsibilities."[12] Derived from their legal expertise and proximity to the

[11] Mark Verhagen and Julius Yam, 'The Law of Attraction: How similarity between judges and lawyers helps win cases in the Hong Kong Court of Final Appeal' (2021) 65 *International Review of Law and Economics*.
[12] Marta Choroszewicz and Tracey L. Adams, 'Introduction: Themes, objectives and theoretical perspectives' in Marta Choroszewicz and Tracey L. Adams (eds) *Gender, Age and Inequality in the Professions* (Routledge 2019) 4.

court, this special status gives lawyers the power to mobilize other constituencies on legal and judicial topics.

b. Legal academics

Closely related to lawyers are legal academics. What is especially noteworthy about legal academics is their potential ability to shape social norms[13] and lead public opinion. Having academics on the court's side facilitates the educative role of a court and helps generate legal professionals that share the aspirations of a democratically committed court.

Legal academics are responsible for producing dedicated and principled lawyers and judges. The quality of, the values within and the professional role conception of the legal profession are to a large extent determined by the education provided by the legal academy.[14] As I mentioned, legal academies are one of the key sites of socialization for lawyers and judges. Law schools are responsible for setting intellectual directions and ideals. Notions about the proper role of lawyers, judges and courts are internalized when future lawyers go through law school. The educational process has significant influence over the general legal culture of a jurisdiction, including the character of the lawyers as well as the competency and attitude of the legal profession. Research has shown how judicial behavior can be affected by the judges' educational background, which confirms the impact of legal academies in shaping jurisprudential and ideological norms.[15]

Other than their capacity as teachers, legal academics provide an environment conducive to a democratically committed court by shaping public opinion and

[13] Terence Halliday, 'Why the Legal Complex is Integral to Theories of Consequential Courts' in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds) *Consequential courts: Judicial roles in global perspective* (CUP 2013) 339-340.
[14] See Lisa Hilbink, 'The Origins of Positive Judicial Independence' (2012) 64 *World Politics* 587.
[15] See e.g. Verhagen and Yam (n 11).

constitutional democratic norms.[16] In some countries, the government may have a habit of consulting legal scholars especially on constitutional issues. Public intellectuals may choose to climb down from the ivory tower and engage with the broader audience directly. Because of their expertise, legal scholars enjoy a social authority similar to that of lawyers, giving them also the ability to mobilize the public on legal and judicial topics. They may act as a fulcrum between lay people and lawyers, explaining decisions to the public. As pundits, they can also lend legitimacy to encouraging constitutional legal developments, but also discredit "bad" laws through their critiques. While academic writings may have a limited audience, some judges do read them and find them helpful, even if they may not always cite them. [17] Hence, academics can also enlighten judges and supply ideas to them when the judges are facing challenges, be those political or jurisprudential.

c. The media

Previously, I have suggested that some of the strategic effects produced by the court travel through and depend on sophisticated intermediaries. Much of what the public knows about the court is learnt via the media. As an intermediary, the media interprets the judgment, selects relevant aspects and broadcast them to the public. Each step of the process has significant influence over the public's perception of the court and its actions. The media may interpret a decision in accordance with the judges' intentions, but misinterpretation (accidental or deliberate) can result in misinformation. Media reports are filters of reality. Framing, or the exercise of deciding what to include or exclude and magnify or downplay,

[16] As William Twining and his colleagues write, "[t]his mobility [of legal scholars] may be one of the most important channels of influence of law schools on practical legal affairs." William Twining et al., 'The Role of Academics in the Legal System' in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (OUP 2005) 921.
[17] See e.g. Michel Bastarache, 'The Role of Academics and Legal Theory in Judicial Decision-Making' (2009) 37 *Alberta Law Review* 739.

would accordingly create different implications and determine the relative salience of the subjects and issues. Not to mention, the reach of the judgments and the transparency of the court are also controlled by the media. Decisions are not always picked up by the media; even if a decision is reported, the reporting style can affect public awareness of courtroom actions.

The media is an indispensable ally of the court as it helps a court build or defend its image. While it varies, the media is often semi-free in a hybrid regime, as opposed to in a pure authoritarian regime where there is little hope.[18] The media can plausibly become an ally of a hybrid regime court. Through its portrayal of the judges and their decisions, the media influences public attitudes of the court and the court's relationship with other actors. Legitimacy-building involves not only the court of law, but also the court of public opinion. A court needs the media's help to counter and compete against anti-court rhetoric in the public space.

Furthermore, the ability of the public to monitor the court and regime depends on how informed the public is.[19] Even if the public is ideologically aligned with the court, the public cannot sanction the authoritarian if the public is not aware of executive interferences and/or the court's decisions. The level of public awareness, therefore, has a direct effect on the level of protection offered by other constituencies, and the court needs a media to alert the judicial allies of possible transgressions.

d. Civil servants

[18] Katrin Voltmer, Kjetil Selvik and Jacob Høigilt, 'Hybrid Media and Hybrid Politics: Contesting informational uncertainty in Lebanon and Tunisia' (2021) 26 *The International Journal of Press/Politics* 842.
[19] Georg Vanberg, *The Politics of Constitutional Review in Germany* (CUP 2004); Jeffrey Staton, *Judicial Power and Strategic Communication in Mexico* (CUP 2010).

Civil servants that respect the independence and expertise of the court can protect the judiciary by imposing political transaction costs on the regime. Before I explain the kinds of benefits derived from the civil service, one may wonder if those who work for a hybrid regime government can realistically be an ally of a democratically committed court.

I have explained in earlier chapters that hybrid regimes, or authoritarians more generally, are not monolithic entities. They are not free to act in whatever way they want due to the agency cost of monitoring and controlling the administrative bureaucracy. The trade-off between competence and loyalty is a classic governance problem faced particularly by authoritarians.[20] The state needs competent agents to carry out all sorts of policies effectively, but talented civil servants would increase the risk of internal resistance and revolt. For the sake of survival and stability, some authoritarians would sacrifice competence for loyalty. This choice by no means guarantees long-term regime survival and stability, as an incompetent bureaucracy will lead to poor governance. To address this problem, some authoritarians may choose to indoctrinate their agents. However, in a hybrid regime, this kind of top-down strategy in maintaining ideological homogeneity, as Eric Ip argues, is "counterproductive in light of the necessity of keeping up a liberal façade."[21] There is no easy way out of this trade-off in a hybrid regime, and diversity within a hybrid regime executive is expected.

Examples from Hong Kong and Pakistan illustrate the challenges faced by a hybrid regime in keeping its agencies in line and how certain less-than-loyal factions or institutions within the government can provide tremendous help to the court. As Carol Jones suggests, the idea for a more representative and rule-of-law based government

[20] Georgy Egorov and Konstantin Sonin, 'Dictators and their Viziers: Endogenizing the loyalty–competence trade-off' (2011) 9 *Journal of the European Economic Association* 903; Alexei Zakharov, 'The Loyalty-Competence Trade-off in Dictatorships and Outside Options for Subordinates' (2016) 78 *The Journal of Politics* 457.
[21] Eric C. Ip, *Hybrid Constitutionalism: The politics of constitutional review in the Chinese Special Administrative Regions* (CUP, 2019) 47.

during colonial Hong Kong came from civil servants.[22] After Hong Kong resumed Chinese sovereignty, the ideological dissonance between the bureaucracy and the ruling elites became increasingly obvious as Hong Kong took an authoritarian turn. Thousands of civil servants, for instance, joined the anti-extradition bill protest in 2019 and refused to pledge loyalty to the government in 2021.[23] Retired civil servants have become staunch supporters of the court, openly defending judicial independence and the practice of judicial review in numerous occasions.[24]

The relationship between the bureaucracy, democratic institutions and the military has historically never been straightforward in Pakistan. Once a powerful and autonomous institution, the bureaucracy was severely weakened after a constitutional reform in 1973 and the subsequent stacking of military personnel in the bureaucracy, especially during Musharraf's rule.[25] Recognizing the potential of the bureaucracy, the Chaudhry court, Asher Qazi argues, "actively attempted to build a strong relationship with the civil service" by offering greater protection and autonomy to civil servants.[26] The court made matters relating to civil service justiciable, and drastically reduced political control and discretion over appointment and removal of civil servants. His study finds that the court was largely successful in "capturing" the civil service as an increase in compliance rate was observed.[27]

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[22] Carol Jones, ''Dissolving the People': Capitalism, law and democracy in Hong Kong' in Halliday, Karpik and Feeley (n 5).
[23] 'Hong Kong's Civil Servants Protest Their Own Government' *New York Times* (2 August 2019) available at <https://www.nytimes.com/2019/08/02/world/asia/hong-kong-civil-servants-protest.html> (last visited 9 November 2021); Christy Leung, 'About 200 Hong Kong civil servants face dismissal for refusing to pledge allegiance to city and mini-constitution' *SCMP* (9 March 2021) available at <https://www.scmp.com/news/hong-kong/politics/article/3124609/about-200-hong-kong-civil-servants-face-dismissal-refusing> (last visited 9 November 2021).
[24] Koel Chu, 'CY's criticism of judicial review could damage the rule of law – former Civil Service Sec.' *Hong Kong Free Press* (15 January 2016) <https://hongkongfp.com/2016/01/15/cys-criticism-of-judicial-review-could-damage-the-rule-of-law-former-civil-service-sec/> (last visited 9 November 2021).
[25] Andrew Wilder, 'The Politics of Civil Service Reform in Pakistan' (2009) 63 *Journal of International Affairs* 19.
[26] Asher Qazi, 'A Government of Judges: A Story of the Pakistani Supreme Courts Strategic Expansion', JSD dissertation, University of Chicago, 2018, 129.
[27] Ibid 156.

Fully capturing the executive is hard, but siding with certain factions or executive institutions can prove helpful. Authoritarians and their agents are unlikely to have uniform preferences in a hybrid regime. Divisions along ideological and interest lines between the ruling elite and the administrative bureaucracy can be exploited by the court to fracture the regime and create more space for judicial maneuvering. The active support of the civil service can improve the efficacy of the court and delegitimize attacks from the executive. Responsible for carrying out the authoritarian's orders, these agents may, for instance, delay policies that are unfavorable to the court, prevent these policies from being realized through internal resistance, weaken them through intentionally poor implementation, provide informational advantages to the judges by whistleblowing or simply cripple the administration by going on strike.

e. International organizations

International organization, as used here, is a large and heterogenous category; it can cover association of states (such as the United Nations), transnational organizations exercising government-like functions (such as the World Bank), and private or non-governmental research and advisory agencies operating on a global scale such as the Economist Intelligence Unit and Freedom House.

International organizations are useful allies to have, especially in jurisdictions that depend on foreign and international recognition.[28] They provide direct support to domestic judiciaries by investing in judicial capacity. Over the past few decades, rule of law has been a multi-billion-dollar investment project worldwide. Regardless of the motives of

[28] Pakistan, and to a larger extent Uganda, are economies that have benefited tremendously from foreign and international aid, and Hong Kong's prestigious status as an international financial center is built around the esteem held by foreign investors and states.

these programs, domestic judiciaries of recipient countries are direct beneficiaries of these initiatives. Aside from training local judges and reforming judicial laws, some of these programs, with the help of activists, have led to ideational changes among the bench and more rights-protective judicial decision-making patterns.[29]

They also protect these courts by threatening to sanction hybrid regimes that attack judicial independence. Judicial independence and rule of law are conditions of many development assistance programs. Donors would regularly monitor the recipient state, and issue warnings if the conditions are not met. These measures are sometimes in tension with state sovereignty. Nevertheless, they create pressure points to the advantage of domestic judiciaries.

Similarly, international organizations can control the authoritarian impulses of hybrid regimes through periodic appraisals. Rule of law and judicial independence rankings are seen as indicators of economic competitiveness and good governance. Economies such as Hong Kong and Singapore frequently rely on these indices to promote their systems. Attacking the court can trigger a ripple effect when the economy depends on the reputation of the judicial system.

Some international organizations play a watchdog role. International organizations such as Amnesty International, Human Rights Watch and the aforementioned Economist Intelligence Unit and Freedom House periodically publish updates and reports on constitutional and legal developments around the world. They flag up and draw international attention to court-curbing attacks. Through naming and shaming, these international organizations may mobilize local and international constituencies to support the court.

[29] Ezequiel González-Ocantos, *Shifting Legal Visions: Judicial change and human rights trials in Latin America* (CUP 2016).

Lastly, international organizations can legitimate the actions of a democratically committed court. Some of them are in charge of developing liberal democratic norms in the international stage and best practice guidelines regarding judicial independence. These instruments offer justifications for a domestic court to ground their liberal rulings, as hybrid regimes claiming to be democracies may feel obliged to adopt and follow these norms.

f. The general public

The current model of power building relies on the electoral logic of a hybrid regime. That is, a hybrid regime constitutional court can only expand its role if it has the support of a democratic constituency. The model builds on public support theories of judicial legitimacy. Accordingly, the general public is a crucial constituent. Much of the discussion throughout the thesis builds on the assumption that the support of the public would increase the chances of their decisions being enforced and shield the court from attacks. Some of the strategies suggested and the importance of certain allies such as the media, for instance, would not make sense if the public has a minimal or no role to play, as in a pure authoritarian regime. The public matters in a hybrid regime because there is sufficient political space for it to create leverage through (the threat of) voting and (the threat of) protesting. Both means can destabilize or even transform the regime. It is the fact that the public can credibly threaten the regime that makes the public the most important ally that the court can ask for.

g. Fellow judges and overseas colleagues

Throughout the thesis, I have assumed that committed judges exist in a hybrid regime, and have shown that this is a realistic possibility. This contrasts with many works on courts in authoritarian regimes that tend to depict judges as loyal to the regime or even cowardly. The reality, of course, is that judges are not a monolithic group either. There are judges of different personal views in every polity, with some more committed to democracy than others. Borrowing González-Ocantos' typology, there are three kinds of judges in a hybrid regime: committed judge, indifferent judge, and recalcitrant judge.[30] Committed judges are those who have already internalized constitutional democratic norms. Recalcitrant judges are the "unpersuadable" ones who will never be receptive to constitutional democratic ideals. Indifferent judges are those showing no signs of sympathy but can possibly be transformed.

The pool of democratically committed judges can be expanded by converting indifferent judges into committed ones. While data on how judges interact behind closed doors are often incomplete, judges do interact and have an influence over each other. They deliberate and decide how to write a judgment together.[31] A phenomenon known as "panel effect" describes how the combination of judges on a judicial panel can create significantly different voting patterns.[32] Social interactions between judges create meaningful behavioral or even ideational changes, and it is reasonable to imagine committed judges persuading their indifferent colleagues.

Recalcitrant judges are more challenging. Seeking to capture the judiciary, authoritarian regimes sometimes intentionally stack the bench with recalcitrant judges.[33] Per definition, ideational transformation is almost impossible for recalcitrant judges.

[30] Ibid 8.
[31] See Lee Epstein and Jack Knight, *The Choices Justices Make* (Sage 1997).
[32] See Cass Sunstein, David Schkade and Lisa Michelle Ellman, 'Ideological Voting on Federal Courts of Appeals: A preliminary investigation' (2004) *Virginia Law Review* 301.
[33] Authoritarians may intentionally keep some committed judges for legitimacy purposes.

Removing them is hard as the appointment power lies with the regime. Civil society may organize campaigns to push recalcitrant judges into resigning,[34] but this is not a strategy available to an individual judge. Since recalcitrant judges are likely a given, committed judges should find ways to work with them amicably. Even if they may never become allies, recalcitrant judges can be important sources of information as they are part of the authoritarian network. Keeping the enemy close might help committed judges stay informed of possible risks.

Aside from domestic judges, judges in foreign jurisdictions and international courts can sometimes offer symbolic, practical and moral support to domestic colleagues. The symbolic support offered by overseas peers is similar in function to citing comparative law. Having the validation of reputable judges elsewhere would lend legitimacy to the actions of the committed judges. The endorsement of reputable judicial figures overseas increases the political costs of executive interferences. Foreign and international judges can also understand the challenges faced by the constrained domestic judges, as every constitutional judge to some extent faces some political challenges. Domestic judges may learn about the jurisprudential and strategic techniques necessary to survive and develop the institution. In addition to offering their practical experiences and legal ideas, these colleagues may give understated moral support to besieged judges. A chief justice of the Zimbabwean Supreme Court recounts how letters and faxes received from colleagues around the world when the court was threatened and attacked by the Mugabe regime reminded him that "I am not alone."[35]

3. Relation-Building

[34] González-Ocantos (n 29) 8.
[35] Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2009) 99.

The discussed institutions may not always be allies of the court, but theories and comparative experiences have shown that they can create conditions favorable to the protection of judicial autonomy and enable the democratic roles of a hybrid regime court. A more important question is, are there ways for courts to bring these institutions onto the courts' side?

The strength of the court's bonds with other actors depends partly on the sitting judges' pre-existing social networks. Before becoming full-time judges, judges in many jurisdictions were previously lawyers, prosecutors and academics. These judges are not only bringing their expertise to the bench, but also expanding the social network of the judiciary. Elite lawyers, for example, would be much more willing to extend their help to the judiciary if the judges were once part of the elite lawyers' network. Similarly, academics will naturally be more inclined to speak out for judges who were once their colleagues. This is perhaps a good reason to introduce diversity to the bench. Having judges of different career and educational backgrounds not only lowers the risk of biases arising from groupthink,[36] but also creates a more well-connected judiciary.[37]

As we saw in the previous chapter, judges can develop connections with other institutions in the adjudicative context. The hope is to build on the "politics of reciprocity"[38] to create mutually supportive relationships with their allies. Providing greater constitutional protection to judicial allies will not only strengthen their constitutional position, but also demonstrate the court's willingness to stand up for the allies. Language and citations can also be deployed strategically to create favorable

[36] Verhagen and Yam (n 11); N.W. Barber, 'Two Meditations on the Thoughts of Many Minds' (2010) 88 *Texas Law Review* 807.
[37] Career-judge systems may be disadvantaged in this regard as their judges may lack exposure beyond the judiciary.
[38] Ghias (n 10) 989.

attitudes. Adopting a liberal narrative and citing foreign rights-protective judgments, for instance, may create a more progressive image among certain circles. Judges may also have a "dialogue" with foreign and international courts through the decisions and citations.[39] Some judges have admitted that they would intentionally cite a certain jurisdiction's judgment in order to establish a friendly relationship with their overseas peers.[40]

Going beyond the adjudicative context, this part adds to the list by exploring two kinds of non-judicial techniques for relation-building – public relations and judicial diplomacy.

a. Public relations

Public relations is a diffused method for a court to manage its public image and build good will. According to public relations theorists, the typical way courts disseminate information falls under the "public information model".[41] The model is characterized by its one-way mode of communication. A court transmits information to the public through, for instance, publication of the judgment and press releases, without expecting a response or a dialogue. Intermediaries would interpret and disseminate the information provided by the court, but judges ultimately decide what information to communicate with their audiences.

[39] See e.g., Slaughter (n 35) 65-103; Michael Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges' (2008) 9 *Melbourne Journal of International Law* 171.
[40] David Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) *University of Pennsylvania Law Review* 927, 1005-6.
[41] Bryna Bogoch and Anat Peleg, 'Silence is No Longer Golden: Media, public relations and the judiciary in Israel' (2014) 4 *Oñati Socio-Legal Series* 819; Philipp Meyer, 'Judicial Public Relations: Determinants of press release publication by constitutional courts' (2020) 40 *Politics* 477.

Traditionally, courts have dealt with the media and the public through the "judicial ethos of silence in the public sphere".[42] The classical public relations strategy for courts is non-engagement. Many courts did not even have an established communication practice.[43] Some judges believe that arguing with critics "lowers the judge into the arena of public opinion and all who scrabble there."[44] Aside from publishing their judgments, judges would typically refrain from talking to the public and journalists. As David Taras observes, "High Court judges in most countries seem to share many of the same fears in dealing with journalists."[45] Judiciaries would rather let their decisions speak for themselves.

Under a new journalistic landscape however, "silence is no longer golden".[46] Traditional media is increasingly replaced by digital media. Information is becoming more fragmented and travelling much quicker. Unfiltered and unmediated contents are finding it a lot easier to enter public spaces. Communication is now mostly interactive. New platforms have allowed people around the world to connect and exchange based on their shared topics of interests. The divide between a content producer and a content receiver has also blurred. It is no longer exclusive to journalists in publishing information.

These shifts have impacted judiciaries across the world in profound ways. The ease in accessing information has led to increased coverage on constitutional judgments and cases with political overtones across the borders.[47] These cases tend to have great media value because they have a broader and/or deeper social impact. However, the

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[42] Ibid Bogoch and Peleg 822.
[43] See Leslie Moran, 'Judicial Institutional Change and Court Communication Innovations: The Case of the UK Supreme Court' in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018) 257; Gunnar Grendstad, William R. Shaffer and Eric N. Waltenburg, 'Norway: Managed Openness and Transparency' in in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018) 245.
[44] Justice Beverley McLachlin, 'Judges and the Public: Ivory Tower recluses or Engaged Actors?', High Court of Hong Kong, 12 December 2019, 12. Available at < https://www.hkcfa.hk/filemanager/speech/en/upload/2248/20191212%20McLachlin%20NPJ%20-%20Address%20to%20Judiciary%20(final%20for%20uploading).pdf>, last visited 9 November 2021.
[45] David Taras, 'Introduction: Judges and journalists and the spaces in between' in Davis and Taras (n 43).
[46] Bogoch and Peleg (n 41).
[47] Moran (n 43).

democratization of the journalistic landscape has also resulted in a higher level of reporting inaccuracies on court-related topics, as those who write on these topics may have no expertise in law.[48] Authoritarian regimes may even deliberately subvert public discourses to undermine resistances using disinformation and internet trolls.[49] The classical non-engagement strategy does not address all these problems at all. If anything, this ostrich mentality invites misinformation and manipulation. At the very least, most modern judges would agree that factual clarifications are sometimes necessary to fend off baseless political attacks.[50]

Judges must respond to these new challenges, and many courts are making efforts to adapt. As Richard Davis notes, "[j]ustices have begun to realize that judicial communication serves the interests of the courts since the messages about the institutions and their specific actions may be more accurate and thorough if accommodations are made to serve press interests."[51] Studies on the public relations side of a court are currently drawn mainly from courts in democracies, but those insights can still be useful to hybrid regime courts that enjoy sufficient administrative and financial autonomy to implement public relations strategies.[52]

Courts issue press releases and press summaries to communicate their judgments more effectively. This provides an opportunity for courts to present information in ways that align with the judges' intention and interests, as well as to help the media including journalists and lay audiences translate legal jargons and better understand the contents of the judgments. The hope is to "encourag[e] timely and accurate reporting".[53]

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[48] See Rachel Spencer, 'Communication beyond the Judgments: The Australian High Court, Speaking for Itself, but Not Tweeting' in Davis and Taras (n 43).
[49] Seva Gunitsky, 'Corrupting the Cyber-commons: Social media as a tool of autocratic stability' (2015) 13 *Perspectives on Politics* 42.
[50] McLachlin (n 44) 17.
[51] Richard Davis, 'Conclusion' in Davis and Taras (n 43).
[52] See e.g. Davis and Taras (n 43).
[53] Moran (n 43) 267.

In addition to official government websites, many constitutional courts have established their own dedicated websites. These websites, alongside with official social media accounts, are initiatives to educate the public about the judicial process, the legal system, as well as normative values crucial to the judiciary. Social media in particular has made real-time update and clarifications on court-related subjects possible.

To bridge time-gaps and increase the court's exposure, some courts have decided to televise or live-stream court proceedings, especially in cases of public importance. By making proceedings public, these courts have not only sought to educate the mass about the legal process, but also protect its decisions from interreferences. This move limits the scope of misrepresentation, as well as subjects the government's actions in court to greater public scrutiny.

Some courts have also experimented on branding strategies commonly found in the private sector to maximize their influence. For instance, the Korean Constitutional Court had used a celebrity athlete as its ambassador to promote goodwill, and created cartoons for introducing the court to its younger audiences.[54] The Hong Kong judiciary hired a branding agency to redesign their logo to increase its recognizability and better convey a sense of "solemnity and dignity".[55]

There is no hard-and-fast rule when it comes to the public relations strategies for courts, aside from the fact that non-engagement or silence *alone* is outdated and incapable of dealing with the complexities arising from modern judicial politics. The Brazilian Supreme Court, for example, is regarded as "the most transparent high, constitutional court" in the Americas.[56] As Ingram notes, the court has its own "in-house media operations –

[54] Law (n 40) 1007.
[55] Stepworks, 'Judiciary unveils brand to signify institutional independence', available at <https://stepworks.co/en/hk-branding-agency-portfolio/judiciary-of-the-hong-kong-special-administrative-region-of-the-peoples-republic-of-china-brand-development/>, last visited at 9 November 2021.
[56] Matthew C. Ingram, 'Uncommon Transparency: The Supreme Court, Media Relations, and Public Opinion in Brazil' in Davis and Taras (n 43).

including televised coverage of plenary sessions and a wide range of educational programming on TV Justiça, daily programming on Radio Justiça, and a strong social media presence, specifically on YouTube and Twitter".[57] Some evidence show that media exposure is positively correlated with confidence in the Brazillian court.[58]

Nevertheless, it can be imagined that this strategy may not work elsewhere. The Norwegian judiciary, for instance, is much more guarded, preferring to carefully manage openness. This approach nonetheless works for its system.[59] It has always been a highly trusted institution, and the media has traditionally taken little interest in judicial actions. The need for the Brazilian approach does not exist there. Transparency can also bring problems. A court that is highly unpopular to begin with will not benefit from maximum exposure because it will simply be inviting closer scrutiny and more criticisms. Media overexposure may also risk creating a more politicized impression of the court, depending on the legal culture of the jurisdiction.

In short, what kind of communication strategy is called for depends on a few factors: the journalistic landscape, the resources available to the court, and, most importantly, the kind of image that the court wants to advance. That being said, there are three important lessons for hybrid regime courts that may be generally applicable.

First, judges should always be selective when it comes to what information to communicate. Jeffrey Staton's monograph builds on public support theories of judicial legitimacy to make this point.[60] Using Mexican constitutional judges as a case-study, Staton argues how judges can manage public opinion of the court through the information the court communicates to the public and the media. He acknowledges that this power to influence media coverage and public perception is perhaps a limited one, but is nonetheless

[57] Ibid 77.
[58] Ibid 74.
[59] Grendstad, Shaffer and Waltenburg (n 43).
[60] Staton (n 19).

an important as it provides another way for judges to manipulate the boundaries of their power.[61] A key assumption behind public support theories of judicial legitimacy is public awareness of court actions. The public is incapable of supporting the court if information about the court is not transparent.

Extending this logic, Staton rightly points out that judges can adjust the transparency of their actions to strategically influence public's perception of the court. He observes how the Mexican Supreme Court selectively promotes decisions in their press releases to media outlets. The emphasis here is selectiveness.[62] For instance, decisions that might be considered biased could be played down if judges want to construct an image of impartiality, whereas underscoring the court's assertiveness against the government may help depict a principled court. A study has found that the Germany Constitutional Court tends to be reluctant to mention decisions in press releases when the decisions involve dissenting opinions,[63] perhaps because the court wants to maintain a picture of judicial unity. These arguments are not limited to press released. What sort of information judges or the court decide to communicate on social media websites, during public interviews and etc. will all contribute to public perception.

The second lesson is about the potential benefits of institutionalizing public relations,[64] such as investing in public communications, establishing communications practices and developing their own public relations arms. What I have in mind here is not simply logistical and technical aspects of information dissemination, which are tasks that can be and already are performed by regular administrative staff within the judiciary. Instead, I am referring to "formal and informal mechanisms for developing the relationship

[61] Ibid 16.
[62] Ibid 124.
[63] Meyer (n 41).
[64] Davis (n 51) 288-289; Jane Johnston, 'Three Phases of Courts' Publicity: Reconfiguring Bentham's open justice in the twenty-first century' (2018) 14 *International Journal of Law in Context* 525.

between courts, the media and the public."[65] This is a proactive and specialized role that requires *both* legal and public relations expertise. The judiciary's institutionalization of public relations is a logical response to an "increasingly critical…media".[66] For example, according to Druscilla Scribner, the Argentinian judiciary's decades of legitimacy crisis had led to the decision to invest in communication and media strategies. Similarly, Trochev finds that in light of mounting criticisms, the Russian Constitutional Court "launched a massive PR campaign to mark the 10-year anniversary of the Court."[67] There seems to be a general agreement among scholars and judges that these initiatives, if properly executed, tend to bring about positive results.[68]

How might having a specialized communication intermediary improve the legitimacy of the court? For one, it may enable the court to pursue "purposeful communication".[69] Whatever public image that the court seeks to build, having experts in public relations to help bridge the expertise gap would make promoting the courts' views to the public a lot easier and more effective. Judges can also rely on them for "damage control" after issuing an unpopular decision.[70] Where they already exist, these press officers are oftentimes lawyers who have worked in the PR industry before or retired judges.[71] They have the legal knowledge to give proper explanations when necessary, as well as the media training to interact with and persuade the press and the public.

Also, these experts may help review and develop communication guidelines within the court. As I mentioned, many courts do not have an established communications

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[65] Johnston ibid 530.
[66] Ibid.
[67] Alexei Trochev, *Judging Russia: the role of the constitutional court in Russian politics 1990–2006* (CUP 2008) 253.
[68] See Johnston (n 64) 530; Davis (n 51) 288-289; Bogoch and Peleg (n 41).
[69] Druscilla Scribner, 'Judicial Communication: (Re)Constructing Legitimacy in Argentina' in Davis and Taras (n 43).
[70] Trochev (n 67) 253.
[71] France is an example that employs retired judges as "press judges" who are responsible for explaining important decisions. Bogoch and Peleg (n 41) 823.

practice, aside from the general judicial ethical rules. As Jane Johnston puts it eloquently, "the world *around* the courts has radically changed, while changes *within* courts' structures have been far more subtle."[72] These internal guidelines in relation to dealing with the outside world needs to be revamped and updated. Common themes that need to be address include: when public interviews by judges are allowed, reporting guidelines for the press, procedures for judges when engaging with the press, processes to get judges involved in media inquiries even if judges may not be the face in answering these inquiries, and protocols in dealing with media attacks. Establishing a more sophisticated system would also allow the judiciary to adapt to shifting circumstances more swiftly and effectively.

Finally, when designing public relations strategies, it is important to frame them in accordance with the public's expectations. Generally speaking, social expectations of a court are fundamentally different from those of political institutions. The judiciary is commonly associated with values such as transparency, professionalism, accountability and openness. Judicial public relations strategies should accordingly be framed around these values, even though the kind communication advocated here is in fact purposeful and strategic. Similarly, the court needs to adapt to the contextual characteristics of the community as well. The Brazilian and Norwegian examples show that the "right" degree of transparency depends on prevailing conceptions of law and politics with society. In hybrid regimes with a more legalistic socio-legal culture such as Hong Kong and Singapore for example, creating a relatable judicial image might lower the prestige of court by demystifying its social status. Different societies may have different understandings of legitimate judicial authority, and effective image-building depends on the court's ability to adjust to its social conditions while pursuing its communicative agendas.

[72] Johnston (n 64) 534.

b. Judicial diplomacy

Judicial diplomacy also involves strategic communication, but judicial diplomacy is a more targeted means involving a high degree of intentionality.[73] While public relations is one-way, judicial diplomacy is more interactive, requiring judges to interface with other actors outside the courtroom. And while public relations is about shaping the attitudes of the general public, judicial diplomacy functions to establish and build relationships with specific audiences. Another characteristic of judicial diplomacy is that the interactions are seen as representative of the judiciary and hence have practical implications for the institution. Whether the judge has the actual authority to represent the judiciary is irrelevant here. What matters is if the audiences believe that the diplomatic activities represent the judiciary.[74]

My account of judicial diplomacy does not envisage judges acting as diplomats or ambassadors of the state. Nevertheless, the activities that judges pursue in non-adjudicative contexts do resemble the practices of a diplomat. Judicial diplomatic activities include but are not limited to negotiations, advocacy, exchanges, promotion, representation, and consultation.

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[73] The concept of judicial diplomacy as used here is inspired by the international relations concept of public diplomacy. As Giles Scott-Smith points out, a key feature that distinguished public diplomacy from other channels of diplomacy is "the intention to direct specific ideas at specific targets for specific political goals". Giles Scott-Smith, 'Mapping the Undefinable: Some thoughts on the relevance of exchange programs within international relations theory' (2008) 616 *The Annals of the American Academy of Political and Social Science* 173, 186. Traditionally, the concept of public diplomacy excludes communications with non-state actors. With the increased involvement on non-state actors in global policy making, many are now drifting away from a state-centric understanding of the term, and defining public diplomacy by the capabilities of the actors, formally recognizing the possibility for non-state actors to engage in diplomatic actions. See Kadir Jun Ayhan, 'The Boundaries of Public Diplomacy and Nonstate Actors: a taxonomy of perspectives' (2019) 20 *International Studies Perspectives* 63.

[74] Andrew Rehfeld, 'Towards a General Theory of Political Representation' (2006) 68 *The Journal of Politics* 1.

The literature on judicial diplomacy is in its infancy. Existing works largely focus on the judicial networks formed between national courts of different regions,[75] and how transnational and international judges interface with domestic actors to assert their authority.[76] The traditional usage of the term diplomacy is limited to inter-state activities. By analogy, since the subject of diplomacy under judicial diplomacy is the court as opposed to the state, internal-versus-external is defined against the *court* instead of the *state*. Accordingly, there is no reason why we should limit the term judicial diplomacy to engagements with actors in a foreign jurisdiction or international actors, as it seems to be the case of the current literature. National courts can use and have used similar diplomatic means to interface with international and foreign courts, as well as domestic constituencies such as government officials, the legal profession, civil society, international organizations, academia and etc.

The institutions explored in part 2 are those that a court should particularly ally with. Judicial diplomacy should be directed towards those actors in order to gain their trust and support. Judicial diplomacy can enable a hybrid regime court's relation-building agenda in three ways. First, judicial diplomacy can be used to promote the court. As discussed previously, it is important for the court to combat disinformation and misinformation. This is especially the case in a hybrid regime where the government may limit the support of a defiant judiciary through propaganda. Judicial diplomacy involves more tailor-made solutions for different kinds of audiences who are ignorant of or indifferent about the court and its role. Through meetings with these actors, judges can

[75] See e.g. Klodian Rado, 'The Judicial Diplomacy of the Supreme Court of Canada and its Impact: An Empirical Overview' (2020) 58 *Alberta Law Review* 1; Gregory Davies, 'The Rise of Judicial Diplomacy in the UK: aims and challenges' (2020) 40 *Legal Studies* 77.
[76] See e.g. Ezequiel González-Ocantos, 'Communicative Entrepreneurs: The Case of the Inter-American Court of Human Rights' Dialogue with National Judges' (2018) 62 *International Studies Quarterly* 737; Theresa Squatrito, 'Judicial Diplomacy: International courts and legitimation' (2021) 47 *Review of International Studies* 64; Allan Tatham, ''Off the Bench but Not off Duty': The Judicial Diplomacy of the Court of Justice' (2017) 22 *European Foreign Affairs Review* 303.

inform them of the different aspects of the judiciary and clarify any misconceptions. Aside from pure informational content, the court can also deliver more value-laden narratives to promote the substantive goals of the court.[77]

Second, hybrid regime courts may conduct judicial diplomacy to mobilize the relevant constituencies. The judiciary might, for example, need the legal profession to stand up for them, or the active support of international organizations to flag up threats against judicial independence. Judicial diplomacy of this sort may require persuasion and negotiation, or even happen behind closed doors. Before enlisting the active support of its audiences, it is important to establish common goals and have a good mutual understanding to start with.

Third, judicial diplomacy can be deployed to create changes in normative structures. This involves judges convincing or "educating" their audiences about what the law or constitution ought to be, and socializing its audiences into conforming with the standards set by the committed judges. This might seem confrontational at times in a hybrid regime where the authoritarian is also battling with the democratic constituency on the ideological level. Socialization techniques need not always be scripted and lecture-like though, as committed judges can also work together with their audiences and come up with new normative standards together. This is a softer technique that depicts a more collaborative relationship between the judges and their audiences.[78]

Sometimes, judges may reach out directly to other actors. Separation of powers principles and judicial ethic rules, however, may seem to limit the scope of diplomatic practices, forcing judges to conduct judicial diplomacy in the dark. That need not always be the case, as there are plenty of socially legitimate opportunities for judges to connect

[77] Squatrito ibid.
[78] González-Ocantos (n 76).

with the institutions identified in the previous part. The rest of this part identifies some of the more common formal occasions where judges can engage and connect with some of the institutions discussed in part 2.[79]

i. Judicial networks

There are many transnational and international judicial networks in the world of which judges can be members, such as the Association of Asian Constitutional Courts, Union of Arab Constitutional Courts & Councils, Africa Judges & Jurists Forum, Conference of European Constitutional Courts, Ibero-American Conference of Constitutional Justice, International Association of Women Judges and International Commission of Jurists. Informal networks involving multilateral collaborative relationships between different transnational and domestic courts also exist. Judicial networks allow judges of different jurisdictions to get together and have conversations about various judicially related topics such as legal developments and case managements. On top of providing networking opportunities, these meetings might also facilitate norm diffusion. The Supreme Court of Singapore, together with judges from a number of common law jurisdictions, has promulgated the Judicial Insolvency Network Guidelines. It is not only a useful guide for judges and other stakeholders that handle complex bankruptcy issues in Asia and beyond,[80] but also an instrument to improve the social standing of the Singaporean judiciary domestically and internationally. Hybrid regime courts can also be on the receiving end of the norm diffusion process and gain valuable legal insights that would help them navigate

[79] There may also be informal occasions for judges to socialize with other actors, such as private gatherings and dinners at private clubs or people's houses. These are also opportunities for judges to create informal links and can be similarly effective, but they are very hard to document.
[80] Emily Lee and Eric C. Ip, 'Judicial diplomacy in the Asia-Pacific: theory and evidence from the Singapore-initiated transnational judicial insolvency network' (2020) 20 *Journal of Corporate Law Studies* 389.

challenging circumstances. Latin American courts, for example, have also worked closely with the Inter-American Court of Human Rights to develop their human rights jurisprudence.[81]

ii. Foreign visits

The judicial networks above are multilateral in nature. Many judiciaries also have bilateral engagements with one another, setting up exchange programs and sending judges to visit their overseas counterparts. Canadian judges, for example, have visits with apex courts of many countries, ranging from the United States and the United Kingdom, to Israel and Germany.[82] Similarly, the UK Supreme Court meets with common law courts such as the Canadian Supreme court and the South African Constitutional Court. [83] The Hong Kong Chief Justice would also regularly invite overseas senior judges to sit on the bench and give talks. These foreign visits overlap in function with the judicial networks discussed above. Foreign visits, however, tend to be more intensive experiences as visiting judges will have prolonged exposure in one court. These are opportunities to consolidate relations with foreign judiciaries and build deeper ties.

iii. Academic conferences and writings

From time to time, judges are invited to participate in academic workshops and conferences. Perhaps the most famous one in this category is Yale's Global Constitutionalism Seminar, where constitutional judges from all around the world are

[81] González-Ocantos (n 29).
[82] Rado (n 75) 6.
[83] Davies (n 75) 80 note 24.

flown in to have meetings with academics on important constitutional topics.[84] Local conferences of a smaller scale also exist. Judges will get to meet colleagues and academics relevant to their areas in these intimate academic settings. Constitutional judges may also advance their understanding of the constitution and law under the auspices of "intellectual exchange", as well as learn about doctrinal tools from other jurisdictions and fresh perspectives about their judicial role. The proceedings of these conferences may sometimes turn into academic writings, allowing the judges' views to travel to a wider audience.

iv. Professional seminars

Similar in format are seminars organized by the legal profession, but the obvious differences are that the topics here might be more about legal practice, and that the audiences involved are lawyers and other actors of the legal field such as prosecutors and lawmakers. Judges might get helpful feedback about the judiciary's performance in the exchanges and gain a better understanding of the profession's view of the court and its concerns. Judges might also be asked to provide training to the legal profession, giving judges the chance to devise new behavioral standards for the field.

v. Policy committees

Occasionally, judges might be invited to sit on policy committees, both on domestic and international levels. These are rare occasions to have exchange of ideas with the political

[84] Yale Law School, 'Global Constitutionalism Seminar', available at < https://law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/global-constitutionalism-seminar>, last visited 9 November 2021.

representatives. For example, judges are sometimes asked to be a member of a law reform working group. By working together, judges may foster friendly but professional relations with the political representatives and civil servants involved. These collaborations might also promote mutual support and improve intra-branch relations. The same logic applies to international policy committees. The United Nations Office on Drugs and Crime for example organizes the Global Judicial Integrity Network, with the aim of "assist[ing] judiciaries across the globe in strengthening judicial integrity and preventing corruption in the justice sector".[85] Judges from different jurisdictions are part of the network. Among its many contributions, the network collaborates with other transnational and regional organizations and offer virtual and in-person seminars and conferences to develop best practice guidelines. Participating judges will get to connect with policy-makers and representatives of international organizations through these programs.

vi. Local exchanges

Politicians regularly meet with their constituencies and engage in public consultations. Similar opportunities sometimes arise for judges. For example, they might be asked to give a speech at the university's graduation ceremony, offer some reflections at the closing of a legal year, or speak about a legal topic at a charity event organized by an NGO. Functionally similar to policy consultations, exchanges with the local communities allow judges to collect views about the preferences and perceptions of different domestic audiences. When the occasion is a pubic one, how the judges present themselves in these exchanges will have a direct effect on public attitudes of the court.

[85] For the official website of the Global Judicial Integrity network, see https://www.unodc.org/ji/.

4. Engaging Hostile Parties

The focus so far has been on developing relationships with institutions that can provide cover to the court. Despite the court's best efforts however, there will be groups that are hostile against the judiciary because of ideological differences and prior rulings. Furthermore, judicial allies are not always effective in defending the court, especially in situations where the expected benefits of pushing through a court-damaging policy outweighs its costs. This leaves judges no choice but to engage with hostile parties themselves.

a. Judicial diplomacy and hostile relations

The idea of engaging those who oppose the court – generally or on specific issues – may seem dangerous at first sight as it may portray an image of a politicized or pressured court. The whole idea of judicial diplomacy, as argued above, is to foster better relations with other institutions. It should not be forgotten that the institutions identified above are only *potential* allies, and some of their members can be antagonistic in reality. The fact that some of these audiences may be hostile offers a strong reason for engagement as well. Some diplomatic theorists argue that continuous dialogue between adversaries is conducive to peace-building.[86] By analogy, maintaining some level of communication between the court and its opponents is generally desirable. The same benefits mentioned above with regard to judicial diplomacy can be adopted here too. It is important to be aware of the preferences and views of all relevant constituencies, even those that are

[86] See Geoffrey Wiseman, 'Engaging the enemy: An essential norm for sustainable US diplomacy' in Costas M. Constantinou and James Der Derian (eds) *Sustainable Diplomacies* (Palgrave Macmillan 2010).

ideologically distant from the court. The information gained help courts strategize and better understand the motivations of those opposing or dissimilar to them. A step further is to convert these groups through norm-promoting judicial diplomatic activities. Recalcitrant groups are unlikely to shift their ideology anytime soon, but overtime and through exchanges, dialogues and exposing them to the "right" standards and norms, some hostile groups might soften the edges or become allies one day.

The larger the ideological gap between the court and its audiences, the harder it will be for judges to develop friendly relationships. Hence, judicial diplomacy directed to an authoritarian constituency will likely be of limited immediate effect. Nevertheless, establishing diplomatic relations with hostile groups is still a worthy investment considering the possible benefits that can be derived. The fear that judicial diplomacy of this sort might weaken the image of the court is mitigated by the fact that there are legitimate forms of public engagements, as discussed previously. For example, if invited, committed judges should participate in and speak at professional and academic conferences organized by the government and pro-regime think-tanks. The contents and tone of the judges' speeches of course need to be adjusted accordingly, but these occasions may nevertheless be useful for the judges to connect with the regime and gain information about the preferences of hostile parties.

When serious challenges against core democratic principles are on the horizon, judges may consider a more hawkish diplomacy by sending a judicial flare, warning hostile parties the unconstitutionality of a looming policy or bill and the likelihood of judicially striking it down if the government tries to force its way through. Part of its preventive function derives from the flare's ability to create public pressure. These flares can take different forms including extra-judicial remarks made in a public occasion and an open letter to the government. Lord Woolf, for example, famously delivered a lecture at the

University of Cambridge, criticizing the British government's plan to remove judicial powers over asylum review cases. His language was described by the press as "militant", and provocative sound bites of his speech sparked public debates.[87] In a mature democracy where there is mutual respect between the branches, judges can afford to be more fearless when going public. However, such a confrontational approach will inevitably be riskier in a hybrid regime, and judges need to be sure that the issue at stake is worth taking a stand against the authoritarian considering the possibility of backlash against the individual judges *and* the judiciary.

b. Backchanneling

More controversial is the idea of making a deal with the devil: backchanneling. Backchanneling, sometimes known as the "black markets" of negotiations,[88] is a concept borrowed from international relations and describes secret bargains that operate alongside or at times override other channels of communication. In politics, backchanneling is commonly used between adversarial parties in conflict resolution processes and labor disputes.[89]

I have been using the metaphor of a tacit bargain to describe the relationship between a semi-autonomous court and a hybrid regime, that a court enjoys the space it is given at the price of self-restraint in matters that the authoritarian cares most about, and the authoritarian in return obtains legitimacy gains and other associated benefits. This

[87] Woolf for instance noted, "I am not over-dramatising the position if I indicate that, if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution." See 'Woolf leads judges' attack on ministers' *The Guardian* (4 March 2004).
[88] Anthony Wanis-St. John, 'Back-channel Negotiation: International bargaining in the shadows' (2006) 22 *Negotiation Journal* 119, 120.
[89] See Dean Pruitt, 'Back-channel Communication in the Settlement of Conflict' (2008) 13 *International Negotiation* 37.

bargain will be unstable and the relationship will start to break down when either side begins to relentlessly push for more. Negotiations may then have to become explicit.

Judges do regularly engage in some form of bargaining with the government in court over certain issues of a case. Judges might, for example, persuade the government to drop certain points because they do not sound convincing, and the government, through their legal representatives, might explain how much they are willing to concede. This is a legitimate and semi-open form of negotiation between the authoritarian and the judiciary, with lawyers being the conduit.

In contrast, backchannel negotiation is a lot more controversial because it is secretive, lacks any form of public scrutiny, and the negotiation terms are completely dictated by the negotiating parties. While secret negotiations involving judges are very hard to detect, we know that they probably exist. Ellett and Trochev find traces of evidence to support the claim.[90] For example, judges in east Africa would approach political elites to "smooth the way forward" in anticipation of a difficult judgment.[91] Similarly, Uganda officials were reportedly visiting a judge's chambers before a presidential election, and the court that the judge heads had previously released the leading opposition leader on bail. The examples they give are all from authoritarian regimes, which is expected because, as mentioned in the beginning, there is a real need for weakly protected judges to find unorthodox means to maintain their institutional position.

The contents of backchannel negotiations are unknown to the public, making it nearly impossible to assess the different implications of these negotiations. Since the methodological problem cannot be overcome at the moment, we shall look for insights from international relations, the area of origin of the concept of backchanneling.

[90] Trochev and Ellett (n 1).
[91] Ibid 72.

As I noted, backchanneling is a very common form of diplomacy intended for conflicting groups to reach settlements. The advantages of backchanneling are derived from secrecy. Taking negotiations underground free negotiating parties from the pressure and manipulation of the public and third-party interveners. Public scrutiny would encourage negotiators to adopt hardline positions, especially when tensions are high. This audience effect would hinder settlement processes.[92] There is no need to perform for an audience or grandstanding under backchanneling, because there is no audience to begin with.[93] Backchanneling would as a result allow for a "more inventive negotiation context".[94] Compared to the public and more ritualized channels of communication, parties in secret negotiations would have greater space to explore middle options without fear of how the public might react. Backchanneling can occur alongside public or front-channel negotiations, and negotiators can adjust the expectations of the public before reaching an agreement through backchanneling. Front-channel negotiations and public responses may also affect how backchannel negotiations are conducted. Feedback mechanisms exist between the front-channel and backchannel.

These insights from international relations are relevant to courts in hybrid regimes. Many forms of public communications are not available to a court, and judges need to be very careful about how they present themselves and speak in the public. Even when there is a looming threat against the judiciary or if the judiciary is entangled, they may be handicapped to deal with the situation because ethical rules forbid ostensibly political involvement, or because it is deemed socially unacceptable for courts to take a public stand. Previously-mentioned alternative techniques may be inconclusive, exhausted or have

[92] Anthony Wanis-St. John, 'An Assessment of Back Channel Diplomacy: Negotiations Between the Palestines and Israelis', Program on Negotiation at Harvard Law School, <http://w3.gavintextile.com/sis/faculty/upload/Wanis-Back-Channel-Working-Paper.pdf>.
[93] Niall Ó Dochartaigh, 'Together in the Middle: Back-channel negotiation in the Irish peace process' (2011) 48 *Journal of Peace Research* 767, 774.
[94] Wanis-St. John (n 87) 7.

already proven ineffective. Backchanneling provides another avenue to defuse the danger while preserving the image of judicial independence. Judges can more honestly express themselves and bargain with the hostile parties without the need for public posturing.

Backchanneling, however, raises normative and pragmatic challenges. How can a court claim to be autonomous when it is engaging in shady deals with the authoritarian? Removing the negotiation process from public purview further weakens public accountability over the government, which would be against the very goal of the constitutional democratic project. Backchanneling, if exposed, will also severely undermine the democratic constituency's image of the court and weaken the bonds with its allies. One might also argue that the idea of backchanneling is self-defeating. Judges would presumably have to give up something to reach an agreement, and that something would usually be anti-regime decisions. To use the words of Cecilia Sosa, ex-president of the Venezuelan Supreme Court, "a court that committed suicide to avoid being assassinated has the same result – it is dead."[95] Surrendering to prevent an attack sounds as futile as being attacked by the adversary. Being in a stronger bargaining position, the authoritarian will take advantage of the secrecy to bully the court in whatever way the authoritarian wants. There are also trust problems, such as the possibility of the regime not following through on its promise because there is no third party to enforce the agreement.

These critiques are hard to refute. Indeed, sometimes it may be in the court's favor to confront the regime publicly, especially when the public is sympathetic to the court and willing to stand up for it. This will be explored shortly. Nevertheless, backchanneling is built on mutual trust and reciprocity. Both sides – the authoritarian and the court – care about their image and can expose each other. While there is little formal protection offered

[95] Freedom House, *Freedom in the World 1999 - Venezuela*, 1999, available at: <https://www.refworld.org/docid/5278c6c214.html>, last visited 9 November 2021.

to the judges during backchannel negotiations and that the bargaining power is not necessarily equal, judges can sometimes count on the self-interest of the adversary to sustain an agreement.

Backchanneling is unquestionably dangerous for judges, but it is an option that they should consider when other adjudicative and diplomatic means have been tried and failed. Backchanneling might provide a solution in desperate times. Backchanneling appears to go against the idea of judicial independence as it invites undue interference, but it is perhaps justifiable when the undue interference is otherwise inevitable. Backchanneling may allow judges to control and minimize the severity of the influence. As counterintuitive as it may sound, without better options, backchanneling seeks to preserve judicial independence as much as possible, both the appearance and substance. Backchanneling can also be used in ways to induce the regime into doing something *for* the court. Increasing the capacity of the judiciary or implementing a judicial decision, for example, requires the active support of the regime. It may be worthwhile in these instances to "trade" with the authoritarian in return for its support. Judges will have to very carefully manage the negotiations, making sure that they are not conceding too much to an extent where space for playing democratic roles is virtually eliminated. In such cases, backchanneling becomes no different from "telephone law," when judges are forced to habitually do whatever they are told. If their bottom lines are crossed, judges should consider escalation and more dramatic responses, which we are about to see.

5. Collective Protest

There may be times when judges have to make their point loud and clear. Protest is another form of diplomacy involving collective expression of disapproval or objection. Most

protests are reactive, meaning they are in response to and seeking to change what is happening in society.[96] The power of protests lies in their ability to gather the masses, attract attention, influence public opinion, and potentially to destabilize the regime.

Protests around the world are increasingly common and widespread.[97] What is especially interesting for our purpose is that we are seeing judges sometimes joining, or even initiating, these protests. The themes of these protests vary: they can range from court-centered topics such as judicial pay rises and judicial reform to more macro-political issues such as anti-corruption and democratization. Some of these protests may be more confrontational, involving strikes or even violence, while others are more tame such as sit-ins and silent marches. The impact of these protest may not always be tangible, amounting to no more than an expression of disapproval at times, but might occasionally mobilize other constituencies and lead to more dramatic changes such as political reform or regime-change.

The Ugandan boycott and protest against the Black Mambas' sieging of the court and Pakistan's Lawyers' Movement are two already mentioned example of judges taking an active role in nationwide protest movements. Asking his colleagues and allies outside the courtroom to take action, an outspoken Ugandan judges stated publicly that, "the [Museveni] government has not developed a culture of killing vocal judges so judges should use this opportunity to resist any thing that smells like dictatorship and abuse of human rights."[98] Several protests during Mubarak's regime in demand for judicial independence and against election fraud involved Egyptian reformist judges and the

[96] María Inclán and Paul D. Almeida, 'Ritual demonstrations versus Reactive Protests: Participation across mobilizing contexts in Mexico City' (2017) 59 *Latin American Politics and Society* 47, 49-50.
[97] 'Political protests have become more widespread and more frequent', *The Economist* (10 March 2020), available at <https://www.economist.com/graphic-detail/2020/03/10/political-protests-have-become-more-widespread-and-more-frequent>, last visited 9 November 2021.
[98] As quoted in Rachel Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African courts* (Routledge 2013) 193.

politically active judicial organization the Judges Club.[99] In 2012, judges in Egypt again went on strike to protest against a decree that effectively immunized the president from judicial challenge.[100] Magistrates in France organized a boycott against Nicolas Sarkozy in 2011 and accused the president of meddling with the judicial system for political capital.[101] Around a thousand judges and prosecutors staged a silent protest in Romania in 2017, expressing their dissent towards a proposed change in the criminal code that would allegedly undermine the investigative power of prosecutors and afford less protections to potential victims.[102] More recently in 2020, judges and lawyers around the EU have gathered in the streets to show solidarity with Polish judges and to protest against the Polish government's attempt to introduce a judicial disciplinary chamber to curb judicial powers.[103] The list goes on.[104]

More and more judges may be protesting, but the idea of protest might sit uncomfortably with the conventional understanding of the judicial role. The exact rules governing judges' participation in street protests and workplace strikes vary jurisdiction by jurisdiction, but most jurisdictions have standards limiting judges' involvement in ostensibly "political" events. For instance, a rule in Pakistan stipulates:

[99] Michael Slackman and Mona El-Naggar, 'Police Beat Crowds Backing Egypt's Judges', *The New York Times* (12 May 2006) available at <https://www.nytimes.com/2006/05/12/world/middleeast/12egypt.html>, last visited 9 November 2021.
[100] Sarah El Deeb, 'Egypt judges strike to protest president's decrees', *Associated Press* (29 November 2012), available at <https://apnews.com/b7c91e7fc0b24f0c88f2c3878507cb4a>, last visited 9 November 2021.
[101] 'Sarkozy under pressure as French judges take to the streets', *The Guardian* (10 February 2011), available at <https://www.theguardian.com/world/2011/feb/10/sarkozy-french-judges-protest>, last visited 9 November 2021.
[102] 'Fresh protest in Romania over legal system changes', *Associated Press* (19 December 2017), available at <https://apnews.com/article/30f1fdfa1ede41bca164e6a7c9aa25c1>, last visited 9 November 2021.
[103] 'Thousands protest against Poland's plan to discipline judges', *Reuters* (12 January 2020), available at <https://www.reuters.com/article/us-poland-judiciary-toga-march-idUSKBN1ZA0PD>, last visited last visited 9 November 2021.
[104] See Trochev and Ellett (n 1) 67-68.

> "Functioning as he does in full view of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law."[105]

Similarly worded restrictions are found in other hybrid regimes such as Uganda[106] and Hong Kong,[107] as well as democracies. Judges in the EU are advised to "exercise their freedom of expression in a manner compatible with the dignity of their office" and "refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality".[108] In light of widespread protests against racial injustice happening in the United States, judicial ethical committees around the country issued guidelines to judges, warning them of the damage that participating in politically charged public events may stain the courts' image of impartiality or create an appearance of impropriety.[109]

These rules share the same message: appearance matters. There are concerns about judges being seen to operate outside the "judicial" confines. To what extent a matter is "too political" for a judge to be publicly involved is open to debate. Regardless, protesting risks tarnishing the court's reputation by politicizing the judges. It makes judges look weak and vulnerable, and there might be a price to be paid in terms of confidence in the court.

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[105] Article V of the Code of Conduct to be Observed by Judges of the Supreme Court of Pakistan and of the High Courts of Pakistan.
[106] Clause 4 of The Uganda Code of Judicial Conduct.
[107] Clause 75 and 76 of the Guide to Judicial Conduct of the Hong Kong Judiciary.
[108] Point VI of the Resolution on Judicial Ethics adopted by the Plenary of our European Court of Human Rights on 23 June 2008.
[109] See 'In response to recent events: Judicial participation in demonstrations, protests, marches, and rallies', *Judicial ethics and discipline: blog of the Center for Judicial Ethics of the National Center of State Courts* (28 July 2020), available at <https://ncscjudicialethicsblog.org/2020/07/28/in-response-to-recent-events-judicial-participation-in-demonstrations-protests-marches-and-rallies/>, last visited 9 November 2021.

Judicial protesting may also provide an additional ground for critics to weed out defiant judges. The conduct rules will be cited by hostile parties as a ground for professional misconduct allegations. Furthermore, the development of a protest is beyond the control of judges. Judges involved in protests that turn out to be unlawful or violent may be arrested and charged for serious crimes. The uncertainty that comes with protesting poses safety and career concerns to individual judges as well.

Protesting is risky for the judiciary and the judges. There are safer ways to express the judges' views – through, for example, judgments, public interviews and more diplomatic means. Why, then, should judges protest at all given it is fraught with danger?

Desperate times call for desperate measures. When the court is facing an imminent attack, long-term image-building techniques such as public relations are not fit to address pressing problems. Alternative means such as judicial diplomacy or backchanneling might have also failed. Judges, especially in authoritarian contexts, may be deprived of powerful allies to negotiate on their behalf. In these instances, judges are essentially forced to go public to fend off attacks. Organizing a protest can be a quick way to respond to an event of great immediacy and appeal to the court-supporting mass. In support of the EU-wide protest supporting the Polish judges, Kees Sterk, a Dutch judge and president of the European Network of Councils for the Judiciary, sums up this point perfectly:

> "Judges are reaching out to citizens, saying 'defend us, so that we can defend you'…In countries where judicial independence is respected, then of course judges should not get involved in politics. But when

judicial independence is being destroyed, you cannot expect them to allow themselves to be led like lambs to the slaughter."[110]

On top of protesting to protect their own autonomy, judges may find it necessary to take a public stand when a hybrid regime is facing a constitutional crisis, such as when rule of law and democratic norms are fundamentally at stake. Judges cannot always resort to protest when they disagree with a policy; for ethical and institutional reasons, they must keep a professional distance from politicians and protestors. However, when features that define the democratic half of a hybrid regime are under an existential threat, committed judges may feel compelled to do everything in their capacity to prevent authoritarian backsliding. The hope is that because judges rarely participate in public events and that they are seen as symbols of justice, their participation in critical moments of a major protest movement would provide the necessary catalyst to put an end to the crisis.

6. Resign in Protest

Judicial resignation is the most radical option in the list and, for reasons to be explained, should be considered only a last-resort. I am not interested in judicial resignation for age or health reasons. Rather, judicial resignation here refers to judges who voluntarily resign in protest of the regime or for a political cause.

Quite a number of judges have resigned in protest in authoritarian regimes. Laurie Ackerman resigned during apartheid South Africa and described the decision as "an

[110] 'Judges join silent rally to defend Polish justice', *The Guardian* (12 January 2020), available at <https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers>, last visited 9 November 2021.

exclusively personal matter of conscience".[111] He subsequently accepted a university chair in human rights law, stating he "believe[s] that the effective protection of human rights in this country is the most important issue facing lawyers in the short, medium and long term."[112] In German occupied Norway during the WWII, judges of the Norwegian Supreme Court resigned to "sen[d] a clear message to the Norwegian population about the illegitimacy of the civil rule established by the Germans".[113] Pakistani judges resigned as a response to Musharraf's removal of Chief Justice Chaudhry.[114] Australian judge James Spigelman resigned recently from his capacity as a foreign judge on the Hong Kong Court of Final Appeal, reportedly due to concerns over the national security law.[115] Foreign and local judges in Fiji have also resigned after military coups in 1987 and 2000.[116] More strikingly, a Nicaraguan Supreme Court judge Rafael Solís Cerda resigned in 2019 with an open letter to the president, writing "I fought against a dictatorship and I never believed that history would repeat itself on account of those who also fought against that same dictatorship."[117] The same letter also accused the Ortega government for transforming the country into a "state of terror".

A judge usually resigns when he or she believes that the judicial oath can no longer be upheld. When assuming office, judges take an oath that they will administer justice.

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[111] David Dyzenhaus, Ju*dging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing 1998) 79–80.
[112] Ibid 79.
[113] Hans Petter Graver, 'Why Adolf Hitler Spared the Judges: Judicial opposition against the Nazi state' (2018) 19 *German Law Journal* 845, 851-852.
[114] '5 Pakistani judges resign to protest removal of chief justice', *The Seattle Times* (19 March 2007), available at <https://www.seattletimes.com/nation-world/5-pakistani-judges-resign-to-protest-removal-of-chief-justice/>, last visited 9 November 2021.
[115] 'Veteran Australian judge James Spigelman resigns from Hong Kong's top court, citing national security law', *SCMP* (18 September 2020), available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3102051/veteran-australian-judge-james-spigelman-resigns-hong>, last visited 9 November 2021.
[116] Tupou Draunidalo, 'The Rule of Law and Judicial Independence Amidst the Coups and Attempted Coups in Fiji since 1987' in Jon Fraenkel and Stewart Firth (eds) *The 2006 Military Takeover in Fiji: A coup to end all coups?* (ANU 2009) 311-2.
[117] 'Nicaraguan supreme court justice resigns in protest', *ABC News* (11 January 2019), available at <https://abcnews.go.com/International/wireStory/nicaraguan-supreme-court-justice-resigns-protest-60300659>, last visited 9 November 2021.

This oath defines the duties relating to the judicial office. The extent to which the oath binds the moral conscience of a judge is very much a personal question. Some judges might treat oath-taking as merely ceremonial with no moral significance, but perhaps most judges would feel morally bound by the oath. The contents of the oath and the political reality faced may create a cognitive dissonance for judges working in "wicked" or oppressive regimes, as judges might feel incapable of continuing their duties. Or as Raymond Wacks puts it, "[a judge] is unable to reconcile his function as repository of justice with statutes which mock that very role."[118]

The oath provides the grounds and justification for resignation, but of greater interest here is the practical impact of judicial resignation. Resigning can be a way for judges to publicly express their condemnation of objectionable laws and an oppressive system. The message sent from the resignation is significant because of what judges represent. Judges who have acted in accordance with principles of justice are seen as a living embodiment of the rule of law. Step downing would be these judges' way of voting non-confidence in the government. Judicial resignation would be particularly damaging to a hybrid regime's reputation because a hybrid regime relies on semi-autonomous judges to create an impression of judicial independence and democracy. Resigning functions to spark transformative change by piercing through the "democratic" veneer engineered by the hybrid regime. The hope is that resigning in protest can not only delegitimize a hybrid regime, but also inspire other judges and constituencies to resist, thereby destabilizing the regime.

The signaling effects produced by resignation can vary depending on how judges resign. The more reputable or higher ranking a judge is, the more symbolic his or her

[118] Raymond Wacks, 'Judges and Injustice' (1984) 46/47 *Bulletin of the Australian Society of Legal Philosophy* 180, 182.

resignation will be. Making the reasons for resignation public, as in the Nicaraguan case, would guarantee headlines. A more silent resignation, like Spiegelman's in Hong Kong, may create less of a focal point, but still be sufficient to generate suspicion. The number of judges resigning is also telling. Resigning *en masse* is a very powerful statement and unequivocally shows that the concerns are widely shared.[119] The timing of resignation would also affect whether the resignation can actually lead to tangible political changes. John Dugard argued that, "there is little doubt that… resignations would have had considerable effect" if the South African judges during apartheid period resigned much earlier.[120] Similarly, resigning when a hybrid regime becomes fully authoritarian would probably be fruitless, as the regime by then has given up on pretending to be a democracy.

Like most options discussed here, judicial resignation faces a tradeoff. The cost here is the removal of committed judges from the system. Vacancies will most likely be filled by loyalists. Accordingly, a possible unintended consequence will be the acceleration of authoritarianism. Not to mention, even when favorable political conditions reemerge, the right kind of judges will not be present to identify and/or take advantage of those opportunities. The worst-case scenario of this route is to weaken the democratic network for nothing in return.

To resign or not, from a utilitarian angle, is a very difficult issue. This topic was hotly debated during apartheid South Africa. It was argued at the time that judges, for moral reasons, should not continue their judicial office, as that would be lending legitimacy to a wicked regime.[121] Similar debates are ongoing in Hong Kong after the passing of the national security law.[122] The potential gain of resignation is rather

[119] John Dugard, 'Should Judges Resign-A Reply to Professor Wacks' (1984) 46/47 *Bulletin of the Australian Society of Legal Philosophy* 200, 206.
[120] Ibid.
[121] Wacks (n 118); see also ibid; Dyzenhaus (n 111).
[122] 'National security law: no Hong Kong judges should resign, Justice Kemal Bokhary says, amid pressure on foreign jurists to quit', *SCMP* (21 March 2021), available at <https://www.scmp.com/news/hong-

"speculative"[123] and involves a high degree of uncertainty. Whether judicial resignation can actually hurt the regime's legitimacy is highly contingent on how political developments are unfolding at the time. Almost all the resignations mentioned fell short of the transformative changes that were hoped for. Given how costly it may be to the democratic constituency and resignation's speculative gains, the expected returns here tend to be low. If anything, likely effects tend to be symbolic only.

When thinking about the impact of resigning, we should also consider what happens to the judge after he or she resigns. Some judges might simply decide to go into exile or retreat into the private sector,[124] escaping his or her moral and professional responsibility all together. Others such as Ackerman may switch to another position, such as becoming a pundit, engaging in international advocacy, or advising allies within the democratic network, and continue their efforts to fight against authoritarianism.

A retired judge may still be able to contribute to the cause in other social roles, but the key question is whether he or she could have contributed more in *or* outside of his or her capacity as a judge, keeping in mind that his or her successor would likely be a recalcitrant or indifferent judge. This involves an even more complex question about whether "the scope for judicial maneuver and creativity in support of human rights" still meaningfully exists if he or she decides to keep the position.[125] Indeed, much of the jurisprudential discussion about this topic is centered around the nature of judicial discretion. Those in favor of resignation believe that judges are "plainly at the mercy of the legislature" and/or the regime,[126] whereas the other camp is more optimistic about the interpretative room of constitutional judges. There is no easy answer here, as it involves

kong/law-and-crime/article/3126359/no-plan-resign-justice-kemal-bokhary-says-amid>, last visited 9 November 2021.
[123] Dugard (n 119) 206.
[124] Some jurisdictions bar judges from practicing as lawyers ever again.
[125] Dugard (n 119) 205.
[126] Wacks (n 118) 193.

one's view about the nature of law and deeper personal convictions. Judges themselves, are in the best position to answer these questions, as they are the persons experiencing the political interreferences and constraining spaces.

While judicial resignation should not be taken off the table, historical examples seem to show that it is generally more meaningful to stay on the bench because there are unique opportunities that come with the adjudicative role. Even defiant judges under Hitler's Germany secretly found ways to fight against discriminatory and unjust laws, sometimes ending up saving the lives and improving the conditions of detained Jews.[127] The number of beneficiaries may not be many considering the total number of victims, but there is still the potential to save lives. Documents released by WikiLeaks revealed that all five judges of the Hong Kong Court of Final Appeal did consider resigning in 1999 when Mainland China issued its first ever constitutional interpretation that effectively overruled the local court's decision. The idea was ultimately dropped as, according to the report, "'[t]he justices feared they would be replaced by less independent or competent jurists."[128] Their decision not to resign has paid off, as we had seen many of the most human-rights protective judgments coming from the first decade after the handover. It may seem futile to a helpless judge to remain in office, but all things considered, staying on the bench, as a general strategy, is more likely to maximize the capabilities of a committed judge.

7. Conclusion

[127] Graver (n 113).
[128] 'All city's top judges 'considered quitting'', *SCMP* (8 September 2011), available at <https://www.scmp.com/article/978391/all-citys-top-judges-considered-quitting>, last visited 9 November 2021.

The off-bench tools discussed in the chapter may be in stark contrast with what might be called the "classic" view of the judicial role. As former Chief Justice of Canada, Beverley McLachlin, describes,

> "Judges are different, set apart, aloof from the world. They live in ivory towers, remote from the bustle and controversy of the real world far below. They do not go to community meetings. They do not talk to the press. When people criticize them, they do not respond, bearing their frustration in silence."[129]

The classic view, however, is likely incapable of dealing with the challenges and complexities of today's world *and* the authoritarian realities faced by a hybrid regime court. As McLachlin also notes, judges today are "climbing down from their ivory tower and mingling in the world". [130] This should not be a surprise and is only a natural response to the new environment confronting today's courts.

The goal of the chapter has been to show how hybrid regime judges may find the off-bench tools helpful or even necessary to truly maximize their chances of survival and playing their democratic roles sustainably. The relational focus of the discussion highlights the influence of judicial-political networks on judicial power.[131] Some of the tools may seem at first to be in tension with familiar conceptions of the judicial role and concepts such as judicial independence and separation of powers. My defense is they are justifiable under the circumstances as constitutional protection of the judiciary is weak in a hybrid regime. Examples were given to show how the techniques can be applied and framed in

[129] McLachlin (n 44) 1.
[130] Ibid 2.
[131] Dressel, Sanchez-Urribarri and Stroh (n 2).

ways that strengthen judicial autonomy and appear consistent with judicial values. The institutional position of a hybrid regime court will likely be further weakened if judges ignore the potential that comes with their social role and fail to make use of the leverages they can create through its relationships with other actors and social networks.

CHAPTER EIGHT

CONCLUSION: OF JUDICIAL CHOICES

The thesis is ultimately about the choices judges *can* and *should* make in hybrid regimes if they seek to push the constitution closer to the democratic end sustainably. These questions are worth asking because many parts of the world are struggling to democratize or experiencing democratic backsliding, *and* that more and more works are showing that somewhat autonomous and powerful courts can exist in this ambiguous regime-type (Chapter One).

A hybrid regime is a kind of authoritarian regime, but its semi-competitive election and claim to be a democracy have significant implications to its constitution and create judicial-political patterns worthy of closer examination (Chapter Two). While courts are not substitutes for an effective democratic process, we should not be too pessimistic about the democracy-enhancing potential of courts in hybrid regimes either. The thesis adopts "a more realistic model of law and of the judicial process" and recognize the dynamic role that courts can play in hybrid regimes.[1] Courts are not merely on the receiving end of regime-politics; they are also in a position to make meaningful democratic contributions (Chapter Three). They play a role in refereeing the rules of the political game, shoring up democratic norms, protecting the rights of and providing participatory opportunities to the politically disenfranchised, mitigating the problems arising from an unfair electoral system and strengthening the democratic culture of a hybrid regime (Chapter Four). Putting into practice these democracy-enhancing roles will win the support of the part of the population that subscribes to democratic norms – the democratic constituency, but it will also risk antagonizing the incumbent and its allies – authoritarian constituency. The dilemma is that

[1] Robert M. Cover, *Justice Accused: Antislavery and the judicial process* (Yale University Press, 1975) 6.

both constituencies are crucial to the maintenance and development of judicial power in a hybrid regime but tell conflicting stories of judicial legitimacy (Chapter Five).

To address the practical challenges created by the legitimacy paradox, the thesis has drawn on interdisciplinary and comparative insights to illuminate a range of options available to committed judges in hybrid regimes to address the goal of sustainable democracy advancement under constraining political spaces. A theoretical framework that seeks to integrate democracy-enhancing adjudicative approaches with judicial strategy was proposed in Chapter Six. It shows that judges are not limited to the simplistic options of applying the law formalistically, lying about the law or resigning. The reality is much more complex: they should consider when it would be permissible to factor in prudential considerations and tinker with different aspects relating to judicial decision-making to create nuanced strategic effects that address those concerns. Judges may also take advantage of its socio-political role to generate political leverage and enhance its institutional position. More specifically, in addition to their adjudicative responsibilities, they may also need to build allies and defuse enemies. The options proposed in Chapter Seven further highlight the socially constructed nature of judicial power in a hybrid regime.

The efficacy of the theories and tools provided in the thesis ultimately depend on the choices judges make. They might look like legal choices but have significant implications to the democratic health of the constitutional order. They are in substance value choices but rarely in absolute terms (such as maximum fulfilment of democracy versus a total regression to authoritarianism); rather, judges must constantly choose between "incremental furtherance" and "marginal vitiation" of competing values.[2] The choices are complicated by a layer of strategic consideration. Like an "evolving hands of cards", as Aziz Huq puts it, the "tactical options" available to a court would vary depending

[2] Ibid 198.

on how the judicial-political relationship unfolds over time.[3] Since this is a matter of choice, a judge's personality and personal motivations would also influence the extent to which a constitutional court can live up to the democratic roles proposed. Not every judge is convinced by the ideal of democracy, and there may be other judicial beliefs and motivations at play, such as career advancement concerns and jurisprudential thoughts. The risk tolerance level of each individual judge may also differ.

The thesis is aware of and reflective of the intricate interplay between moral values, regime politics and constitutional law. The ideas presented may not resonate with all judges, while some may need a bit more persuading. For judges who are democratically committed, the thesis has attempted to show how the theories and tools offered can help them build institutional resilience *and* contribute to democratic values. The suggestions by no means guarantee these goals, as there is a limit as to what judges have control over in authoritarian environments. Nevertheless, constitutional courts are often heavily involved in the shaping of constitutional norms and structures. The choices judges make can influence the path of constitutional development, sometimes in subtler and unexpected ways. By pushing beyond the boundaries set by conventional conceptions of the judicial role, the thesis hopes to have instilled optimism in politically challenging environments and demonstrate how judges who are committed to the democratic cause can improve the chances of survival and success of constitutional courts.

[3] Aziz Huq, 'Democratic Erosion and the Courts: Comparative perspectives' (2018) 93 *New York University Law Review Online* 21, 27.

BIBLIOGRAPHY

Abebe, Adem Kassie and Charles Manga Fombad. 'The Advisory Jurisdiction of Constitutional Courts in Sub-Sahara Africa' (2013) 46 *George Washington International Law Review* 55.

Akkoyunlu, Feyzi Karabekir. 'The Rise and Fall of the Hybrid Regime: Guardianship and democracy in Iran and Turkey', Ph.D. dissertation, LSE, 2014.

Albright, Madeleine and Yoweri Museveni, 'Joint Press Availability' (Kampala, Uganda, 10 December 1997), available at < https://1997-2001.state.gov/statements/971210b.html>.

Amnesty International, 'Uganda: Opposition MPs must not be tried in military court' (16 August 2018), available at <https://www.amnesty.org/en/latest/news/2018/08/uganda-opposition-mps-must-not-be-tried-in-military-court/>.

Arnould, Valérie. 'Transitional Justice and Democracy in Uganda: between impetus and instrumentalisation' (2015) 9 *Journal of Eastern African Studies* 354.

Arrington, Celeste. 'The Mechanisms behind Litigation's "Radiating Effects": Historical grievances against Japan' (2019) 53 *Law & Society Review* 6.

Ayhan, Kadir Jun. 'The Boundaries of Public Diplomacy and Nonstate Actors: a taxonomy of perspectives' (2019) 20 *International Studies Perspectives* 63.

Bagg, Samuel. 'The Power of the Multitude: Answering epistemic challenges to democracy' (2018) 112 *American Political Science Review* 891.

Bar-Siman-Tov, Ittai. 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

Barber, N. W. and Adrian Vermeule. 'The Exceptional Role of Courts in the Constitutional Order' (2016) 92 *Notre Dame Law Review* 817.

Barber, N. W.. 'Two Meditations on the Thoughts of Many Minds' (2010) 88 *Texas Law Review* 807.

- *The Constitutional State* (OUP 2010).
- *The Principles of Constitutionalism* (OUP, 2018).

Barros, Robert. *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (CUP 2002).

Bassok, Or. 'The Two Countermajoritarian Difficulties' (2011) 31 *Saint Louis University Public Law Review* 333.

Bastarache, Michel. 'The Role of Academics and Legal Theory in Judicial Decision-Making' (2009) 37 *Alberta Law Review* 739.

Baum, Lawrence. *Judges and their Audiences* (Princeton University Press 2009).

Beetham, David. *The Legitimation of Power* (Palgrave Macmillan 1991).

Belge, Ceren. 'Friends of the Court: The Republican alliance and selective activism of the Constitutional Court of Turkey' (2006) 40 *Law & Society Review* 653.

Bell, Daniel. *The China Model: Political meritocracy and the limits of democracy* (Princeton University Press 2015).

Bellamy, Richard. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2009).

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

Bhuwania, Anuj. 'Courting the People: The rise of public interest litigation in post-emergency India' (2014) 34 *Comparative Studies of South Asia, Africa and the Middle East* 314.

Biagi, Francesco. *Three Generations of European Constitutional Courts in Transition to Democracy* (CUP 2020).

Bickel, Alexander. *The Least Dangerous Branch: The Supreme Court at the bar of politics* (YUP 1986).

Blauberger, Michael and Dorte Sindbjerg Martinsen, 'The Court of Justice in Times of Politicisation: 'Law as a mask and shield' revisited' (2020) 27 *Journal of European Public Policy* 382.

Bobek, Michal. *Comparative Reasoning in European Supreme Courts* (OUP 2013).

Bogoch, Bryna and Anat Peleg. 'Silence is No Longer Golden: Media, public relations and the judiciary in Israel' (2014) 4 *Oñati Socio-Legal Series* 819.

Bolognani, Marta. 'Virtual Protest with Tangible Effects? Some observations on the media strategies of the 2007 Pakistani anti-Emergency movement' (2010) 18 *Contemporary South Asia* 401.

Brancati, Dawn. 'Democratic Authoritarianism: origins and effects' (2014) 17 *Annual Review of Political Science* 313.

Brand-Ballard, Jeffrey. *Limits of Legality: the ethics of lawless judging* (OUP, 2010).

Brennan, Jason. *Against Democracy* (Princeton University Press 2016).

Brumberg, Daniel. *Reinventing Khomeini: The Struggle for Reform in Iran* (University of Chicago Press 2001).

Burley, Anne-Marie and Walter Mattli. 'Europe Before the Court: A political theory of legal integration' (1993) 47 *International Organization* 41.

Busch, Marc L. and Krzysztof J. Pelc, 'Words Matter: How WTO rulings handle controversy' (2019) 63 *International Studies Quarterly* 464.

Bussey, Erica. 'Constitutional Dialogue in Uganda' (2005) 49 *Journal of African Law* 1.

Caldeira, Gregory A. and James L. Gibson. 'The Etiology of Public Support for the Supreme Court' (1992) 36 *American Journal of Political Science* 635.

Carrubba, Clifford James. 'A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems' (2009) 71 *The Journal of Politics* 55.

Cassani, Andrea. 'Hybrid What? Partial consensus and persistent divergences in the analysis of hybrid regimes' (2014) 35 *International Political Science Review* 542.

Chabot, Christine Kexel. 'Schooling the Supreme Court' (2014) 92 *Denver University Law Review* 217.

Chan, Cassandra. 'Breaking Singapore's Regrettable Tradition of Chilling Free Speech with Defamation Laws' (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 315.

Chan, Cora. 'Deference, Expertise and Information-gathering Powers' (2013) 33 *Legal Studies* 598.

- 'From Legal Pluralism to Dual State: Evolution of the relationship between the Chinese and Hong Kong legal orders' *Law & Ethics of Human Rights* (Forthcoming) (on file with author).

- 'The Dual State and Non-liberal Constitutionalism' (forthcoming) (on file with author).

Chan, Johannes Man-mun. 'National Security Law in Hong Kong: One Year On' (2022) 30 *Academia Sinica Law Journal* (forthcoming).

Chandra, Siddharth and Nita Rudra, 'Reassessing the Links Between Regime Type and Economic Performance: Why some authoritarian regimes show

stable growth and others do not' (2015) 45 *British Journal of Political Science* 253.

Chang, Wen-Chen. 'Strategic Judicial Responses in Politically Charged Cases: East Asian experiences' (2010) 8 *International Journal of Constitutional Law* 885.

Chang, Wen-Chen. 'Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective', JSD Dissertation, Yale Law School, 2001.

Chavez, Rebecca B., John A. Ferejohn, and Barry R. Weingast, 'A Theory of the Politically Independent Judiciary' in Gretchen Helmke and Julio Rios-Figueroa (eds) *Courts in Latin America* (CUP, 2011).

Cheema, Moeen. 'Two Steps Forward One Step Back: The non-linear expansion of judicial power in Pakistan' (2018) 16 *International Journal of Constitutional Law* 503.

– 'The Chaudhry Court: Deconstructing the Judicialization of Politics in Pakistan.' (2016) 25 *Washington International Law Journal* 447.

Cheeseman, Nic and Brian Klaas, *How to Rig an Election* (YUP 2018).

Chilton, Adam and Mila Versteeg. 'Courts' Limited Ability to Protect Constitutional Rights' (2018) 85 *The University of Chicago Law Review* 293.

Choroszewicz, Marta and Tracey L. Adams, 'Introduction: Themes, objectives and theoretical perspectives' in Marta Choroszewicz and Tracey L. Adams (eds) *Gender, Age and Inequality in the Professions* (Routledge 2019).

Choudhry, Sujit. 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment: A reply to Rosalind Dixon and David Landau' (2017) 15 *International Journal of Constitutional Law* 826.

Chua, Lynette. 'Legal Mobilization and Authoritarianism' (2019) 15 *Annual Review of Law and Social Science* 355.

Cichowski, Rachel. 'Courts, Rights, and Democratic Participation' (2006) 39 *Comparative Political Studies* 50.

Clague, Christopher et. al. 'Property and Contract Rights in Autocracies and Democracies' (1996) 1 *Journal of Economic Growth* 243.

Clark, Tom S.. *The Limits of Judicial Independence* (CUP 2010).

Cole, Daniel H.. 'The Varieties of Comparative Institutional Analysis' (2013) *Wisconsin Law Review* 383.

Collier, David and Steven Levitsky. 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' (1997) 49 *World Politics* 430.

Cover, Robert M.**.** *Justice Accused: Antislavery and the judicial process* (Yale University Press, 1975)

Craig, Paul. 'Proportionality, Rationality and Review' (2010) 2 *New Zealand Law Review* 265.

Cross, Frank B. and James W. Pennebaker. 'The Language of the Roberts Court' (2014) *Michigan State Law Review* 853.

Dahl, Robert. 'Decision-making in a Democracy: The Supreme Court as a National Policy- maker' (1957) 6 *Journal of Public Law* 279.

– *Polyarchy: Participation and opposition* (YUP 1989).

Daly, Tom. 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9.

– *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (CUP, 2017).

Davies, Gregory. 'The Rise of Judicial Diplomacy in the UK: aims and challenges' (2020) 40 *Legal Studies* 77.

Davis, Richard. 'Conclusion' in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018).

Delaney, Erin. 'Analyzing Avoidance: Judicial strategy in comparative perspective' (2016) 66 *Duke Law Journal* 1.

Diamond, Larry. 'Breaking Out of the Democratic Slump' (2020) 31 *Journal of Democracy* 36.

– 'Elections without Democracy: Thinking about hybrid regimes' (2002) 13 *Journal of Democracy* 21.

– *Developing Democracy: Toward Consolidation* (JHUP 1999).

Dixon, Rosalind and David Landau. *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (OUP 2021).

Dixon, Rosalind and Samuel Issacharoff. 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wisconsin Law Review* 683.

Dixon, Rosalind. 'Constitutional Rights as Bribes' (2018) 50 *Connecticut Law Review* 767.

– 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change' (2020) 59 *Columbia Journal of Transnational Law* 298.

– 'The Core Case for Weak-form Judicial Review' (2016) 38 *Cardozo Law Review* 2193.

Dobson, William J.. *The Dictator's Learning Curve: Inside the Global Battle for Democracy* (Random House 2012).

Dochartaigh, Niall Ó. 'Together in the Middle: Back-channel negotiation in the Irish peace process' (2011) 48 *Journal of Peace Research* 767.

Dotan, Yoav and Menachem Hofnung. 'Legal Defeats—Political Wins: Why do elected representatives go to court?' (2005) 38 *Comparative Political Studies* 75.

Douglas NeJaime, 'Winning Through Losing' (2010) 96 *Iowa Law Review* 941.

Draunidalo, Tupou. 'The Rule of Law and Judicial Independence Amidst the Coups and Attempted Coups in Fiji since 1987' in Jon Fraenkel and Stewart Firth (eds) *The 2006 Military Takeover in Fiji: A coup to end all coups?* (ANU 2009).

Dressel, Björn Raul Sanchez-Urribarri and Alexander Stroh. 'Courts and Informal Networks: Towards a relational perspective on judicial politics outside Western democracies' (2018) 39 *International Political Science Review* 573.

– 'The Informal Dimension of Judicial Politics: A relational perspective' (2017) 13 *Annual Review of Law and Social Science* 413.

Dugard, John. 'Should Judges Resign-A Reply to Professor Wacks' (1984) 46/47 *Bulletin of the Australian Society of Legal Philosophy* 200.

Dworkin, Ronald. *Law's Empire* (HUP 1986).

Dyzenhaus, David. Ju*dging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing 1998).

Dziedzic, Anna. *Foreign Judges in the Pacific* (Hart Forthcoming).

Easton, David. *A Systems Analysis of Political Life* (John Wiley 1965).

Egorov, Georgy and Konstantin Sonin. 'Dictators and their Viziers: Endogenizing the loyalty–competence trade-off' (2011) 9 *Journal of the European Economic Association* 903.

Ellett, Rachel. 'Emerging judicial power in transitional democracies: Malawi, Tanzania and Uganda', PhD Thesis, Northeastern University, 2008.

– *Pathways to Judicial Power in Transitional States: Perspectives from African courts* (Routledge 2013).

Elster, Jon. *Ulysses Unbound: Studies in rationality, precommitment, and constraints* (CUP, 2000).

Ely, John Hart. *Democracy and Distrust: A theory of judicial review* (HUP 1980).

Engel, Christoph. 'Does Efficiency Trump Legality? The case of the German Constitutional Court' in Yun-chien Chang (ed) *Selection and Decision in Judicial Process around the World* (CUP 2019).

Epp, Charles R.. *The Rights Revolution: Lawyers, activists, and supreme courts in comparative perspective* (University of Chicago Press 1998).

Epperly, Brad. *The Political Foundations of Judicial Independence in Dictatorship and Democracy* (OUP 2019).

Epstein, Lee and Jack Knight, *The Choices Justices Make* (Sage 1997).

Epstein, Lee and Tonja Jacobi, 'The Strategic Analysis of Judicial Decisions' (2010) 6 *Annual Review of Law and Social Science* 341.

Epstein, Lee, Jack Knight and Olga Shevtsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117.

Faller, Julie K.. 'The System Matters: Corruption and vote choice in Uganda' (2015) 53 *Commonwealth & Comparative Politics* 428.

Fallon, Richard. *Law and Legitimacy in the Supreme Court* (HUP 2018).

Farber, Daniel A.. 'Rights as Signals' (2002) 31 *The Journal of Legal Studies* 83.

Ferejohn, John. 'Judicializing Politics, Politicizing Law' (2002) 65 *Law and Contemporary* 41.

Finnis, John. 'Judicial Power: Past, present and future' (2015) Judicial Power Project, 10 < http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf>.

Flanagan, Brian and Sinead Ahern. 'Judicial Decision-making and Transnational Law: A survey of common law Supreme Court Judges' (2011) 60 *International & Comparative Law Quarterly* 1.

Fong, Brian CH.. 'State-society Conflicts under Hong Kong's Hybrid Regime: Governing coalition building and civil society challenges,' (2013) 53 *Asian Survey* 854.

Fontana, David. 'Docket Control and the Success of Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

Fraenkel, Ernst and Jens Meierhenrich. *The Dual State: A contribution to the theory of dictatorship* (OUP 2018).

Freedom House, *Freedom in the World 1999 - Venezuela*, 1999, available at: <https://www.refworld.org/docid/5278c6c214.html>.

Friedman, Barry. *The Will of the People: How public opinion has influenced the Supreme Court and shaped the meaning of the Constitution* (Farrar, Straus and Giroux 2009).

Fuller, Lon. 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

Galanter, Marc. 'The Radiating Effects of Courts' in Keith Boyum and Lynn Mather (eds), *Empirical Theories about Courts* (New York: Longmans 1983).

Gandhi, Jennifer and Ellen Lust-Okar. 'Elections under Authoritarianism' (2009) 12 *Annual Review of Political Science* 403.

Gargarella, Roberto. 'In Search of a Democratic Justice – What Courts Should not Do: Argentina, 1983–2002' (2003) 10 *Democratization* 181.

Garoupa, Nuno and Tom Ginsburg. *Judicial Reputation: Comparative Theory* (The University of Chicago Press 2015).

Gewirtz, Paul. 'Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics' (2001) 31 *Hong Kong Law Journal* 217.

Ghias, Shoaib. 'Miscarriage of Chief Justice: Judicial power and the legal complex in Pakistan under Musharraf' (2010) 35 *Law & Social Inquiry* 985.

Gibson, James et al.. 'The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A survey-based experiment' (2011) 64 *Political Research Quarterly* 545.

Gibson, James L., Gregory A. Caldeira and Vanessa A. Baird. 1998, 'On the Legitimacy of National High Courts' (1998) 92 *American Political Science Review* 343.

Gilley, Bruce. 'Democratic Enclaves in Authoritarian Regimes' (2010) 17 *Democratization* 389.

Ginsburg Tom and Zachary Elkins. 'Ancillary Powers of Constitutional Courts' (2008) 87 *Texas Law Review* 1431.

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

Ginsburg, Tom and Mila Versteeg. 'Why do Countries Adopt Constitutional Review?' (2014) 30 *The Journal of Law, Economics, & Organization* 587.

Ginsburg, Tom and Tamir Moustafa (eds). *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008).

Ginsburg, Tom, Zachary Elkins and James Melton, 'The Content of Authoritarian Constitutions,' in Tom Ginsburg and Alberto Simpser (eds.) *Constitutions in Authoritarian Regimes* (CUP, 2013).

Ginsburg, Tom. 'The Jurisprudence of Anti-Erosion' (2018) *66 Drake Law Review* 9.

- 'The Politics of Courts in Democratization: Four junctures in Asia' in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds) *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013).

- *Judicial Review in New Democracies: Constitutional courts in Asian cases* (CUP 2003).

Glasius, Marlies. 'What Authoritarianism is… and is not: a practice perspective' (2018) 94 *International Affairs* 515.

Glenn, Patrick. 'Persuasive Authority' (1987) 32 *McGill Law Journal* 261.

Gloppen, Siri et al.. *Courts and Power in Latin America and Africa* (Palgrave Macmillan 2010).

Gomez, James. 'Restricting Free Speech: The impact on opposition parties in Singapore' (2006) 23 *The Copenhagen Journal of Asian Studies* 105.

González-Ocantos, Ezequiel. 'Communicative Entrepreneurs: The Case of the Inter-American Court of Human Rights' Dialogue with National Judges' (2018) 62 *International Studies Quarterly* 737.

- *Shifting Legal Visions: Judicial change and human rights trials in Latin America* (CUP 2016).

Graver, Hans Petter. 'Why Adolf Hitler Spared the Judges: Judicial opposition against the Nazi state' (2018) 19 *German Law Journal* 845.

Grendstad, Gunnar, William R. Shaffer and Eric N. Waltenburg, 'Norway: Managed Openness and Transparency' in in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018).

Griffin, John D.. 'Electoral Competition and Democratic Responsiveness: A defense of the marginality hypothesis' (2006) 68 *The Journal of Politics* 911.

Grimm, Dieter. ‘Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics’ (2011) 4 *NUJS Law Review* 15.

– *Constitutionalism: Past, present and future* (OUP 2016).

– ‘Integration by Constitution’ (2005) 3 *International Journal of Constitutional Law* 193.

Grossman, Nienke. ‘The Normative Legitimacy of International Courts’ (2013) 86 *Temple Law Review* 61.

Gunitsky, Seva. ‘Corrupting the Cyber-commons: Social media as a tool of autocratic stability’ (2015) 13 *Perspectives on Politics* 42.

H. Tribe, Laurence. ‘The Puzzling Persistence of Process-based Constitutional Theories’ (1980) 89 *The Yale Law Journal* 1063.

Hailbronner, Michaela. ‘Transformative Constitutionalism: Not only in the Global South’ (2017) 65 *The American Journal of Comparative Law* 527.

Halliday, Terence, Lucien Karpik and Malcolm Feeley. ‘The Legal Complex and Struggles for Political Liberalism’ in Terence Halliday, Lucien Karpik and Malcolm Feeley (eds) *Fighting for Political Freedom: Comparative studies of the legal complex and political liberalism* 1 (Hart 2007).

Halliday, Terence. ‘Why the Legal Complex is Integral to Theories of Consequential Courts’ in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds) *Consequential courts: Judicial roles in global perspective* (CUP 2013).

Haqqani, Husain. ‘History Repeats Itself in Pakistan’ (2006) 17 *Journal of Democracy* 110.

Harel, Alon. *Why Law Matters* (OUP 2014).

Helliwell, John F.. ‘Empirical Linkages between Democracy and Economic Growth’ (1994) 24 *British Journal of Political Science* 225.

Helmke, Gretchen. *Courts under Constraints: Judges, generals, and presidents in Argentina* (CUP, 2012).

– *Institutions on the Edge: The Origins and Consequences of Inter-branch Crises in Latin America* (CUP 2017)

Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (CUP, 2007).

Hilbink, Lisa. ‘The Origins of Positive Judicial Independence’ (2012) 64 *World Politics* 587.

Hirschl, Ran. ‘Epilogue: courts and democracy between ideals and realities’ (2013) 49 *Representation* 361.

- *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP 2009).

- ‘In Search of an Identity: Voluntary Foreign Citations in Discordant Constitutional Settings’ (2014) 62 *American Journal of Comparative Law* 547.

- ‘The Judicialization of Mega-politics and the Rise of Political Courts’ (2018) 11 *Annual Review of Law and Political Science* 93.

- *Comparative Matters: The Renaissance of Comparative Constitutional* (OUP 2014).

Hollyer, James and Peter Rosendorff. ‘Why Do Authoritarian Regimes Sign the Convention against Torture? Signaling, domestic politics and non-compliance’ (2011) 6 *Quarterly Journal of Political Science* 275.

Horowitz, Donald. *Courts and Social Policy* (Brookings Institution Press 2010).

Human Rights Watch, ‘Elections since General Pervez Musharraf took power in 1999’ (2008), available at <https://www.hrw.org/legacy/pub/2008/asia/Elections_Under_Musharraf_1999-2007.pdf>.

Hume, Robert J. ‘Courting Multiple Audiences: The strategic selection of legal groundings by judges on the US courts of appeals’ (2009) 30 *Justice System Journal* 14.

- ‘Strategic-Instrument Theory and the Use of Non-Authoritative Sources by Federal Judges: Explaining References to Law Review Articles’ (2010) 31 *Justice System Journal* 291.

- ‘The Use of Rhetorical Sources by the US Supreme Court’ (2006) 40 *Law & Society Review* 817.

Huntington, Samuel. *The Third Wave: Democratization in the late twentieth century* (University of Oklahoma Press 1991).

Huq, Aziz and Tom Ginsburg. ‘How to Lose a Constitutional Democracy’ (2018) 65 *UCLA Law Review* 78.

Huq, Aziz. ‘Democratic Erosion and the Courts: Comparative perspectives’ (2018) 93 *New York University Law Review Online* 21.

Inclán, María and Paul D. Almeida, 'Ritual demonstrations versus Reactive Protests: Participation across mobilizing contexts in Mexico City' (2017) 59 *Latin American Politics and Society* 47.

Ingram, Matthew C.. 'Uncommon Transparency: The Supreme Court, Media Relations, and Public Opinion in Brazil' in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018).

International Bar Association Human Rights Institute, *Judicial independence undermined: A report on Uganda* (September 2007), available at < https://allafrica.com/download/resource/main/main/idatcs/00011366:c4998078afbb451431dc9f210ed92a03.pdf>.

Ip, Eric. 'Constitutional Competition Between the Hong Kong Court of Final Appeal and the Chinese National People's Congress Standing Committee: A Game Theory Perspective' (2014) 39 *Law & Social Inquiry* 824.

- 'The Democratic Foundations of Judicial Review under Authoritarianism: Theory and evidence from Hong Kong' (2014) 12 *International Journal of Constitutional Law* 330.
- *Hybrid Constitutionalism: The politics of constitutional review in the Chinese Special Administrative Regions* (CUP 2019).

Isanga, Joseph M. 'African Courts and Separation of Powers', (2009) 2 *Northwestern Interdisciplinary Law Review* 69.

Issacharoff, Samuel and Richard H. Pildes, 'Politics as Markets: Partisan lockups of the democratic process' (1998) *Stanford Law Review* 643.

Issacharoff, Samuel. 'Constitutional Courts and Democratic Hedging' (2010) 99 *Georgetown Law Journal* 961.

- 'Fragile Democracies' (2006) 120 *Harvard Law Review* 1405.
- 'Judicial Review in Troubled Times: Stabilizing democracy in a second-best world' (2019) 98 *North Carolina Law Review* 1.
- *Fragile Democracies: Contested power in the era of constitutional courts* (CUP 2015).

Jackson, Donald W. and C. Neal Tate (eds), *Comparative Judicial Review and Public Policy* (Greenwood Publishing Group, 1992).

Jacobsohn, Gary. *Constitutional Identity* (HUP 2010).

Jenne, Erin K. and Cas Mudde. 'Hungary's Illiberal Turn: Can outsiders help?' (2012) 23 *Journal of Democracy* 147.

Johnston, Jane. ‘Three Phases of Courts’ Publicity: Reconfiguring Bentham's open justice in the twenty-first century’ (2018) 14 *International Journal of Law in Context* 525.

Jones, Carol. ‘‘Dissolving the People’: Capitalism, law and democracy in Hong Kong’ in Terence Halliday, Lucien Karpik and Malcolm Feeley (eds) *Fighting for Political Freedom: Comparative studies of the legal complex and political liberalism* (Hart 2007).

Kalb, Johanna. ‘The Judicial Role in New Democracies: A Strategic Account of Comparative Citation’ (2013) 38 *The Yale Journal of International Law* 423.

Kapiszewski, Diana, Gordon Silverstein and Robert A. Kagan, ‘Introduction’ in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds) *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013).

Karl, Terry Lynn. ‘The Hybrid Regimes of Central America’ (1995) 6 *Journal of Democracy* 72.

Kasfir, Nelson. ‘African Ambiguities: “No-party Democracy” in Uganda’ (1998) 8 *Journal of Democracy* 49.

Kavanagh, Aileen. ‘Comparative Political Process Theory’ (2020) 18 *International Journal of Constitutional Law* 1483.

- ‘Participation and Judicial Review: A reply to Jeremy Waldron’ (2003) 22 *Law and Philosophy* 451.

- ‘Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008).

Khaitan, Tarunabh. ‘Directive Principles and the Expressive Accommodation of Ideological Dissenters’ (2018) 16 *International Journal of Constitutional Law* 389.

Khoma, Natalia. ‘Technologies of Political (Socio-political) Crowdsourcing and Crowdfunding: World experience and steps towards implementation in Ukraine’ (2015) 1 *Toruńskie Studia Międzynarodowe* 149;

King, Jeff. *Judging Social Rights* (CUP 2012).

Kirby, Michael. ‘Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges’ (2008) 9 *Melbourne Journal of International Law* 171.

Komesar, Neil K.. *Imperfect Alternatives: Choosing institutions in law, economics, and public policy* (University of Chicago Press 1994).

- *Law's Limits: Rule of Law and the Supply and Demand of Rights* (CUP, 2001).

Kong, Karen. ‘Public Interest Litigation in Hong Kong: A new hope for social transformation?’ (2009) 28 *Civil Justice Quarterly* 341.

Kramer, Larry. *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP 2004).

Krotoszynski Jr, Ronald. ‘Constitutional Flares: On judges, legislatures, and dialogue." (1998) 83 *Minnesota Law Review* 1.

Krygier, Martin. ‘The Rule of Law and State Legitimacy’ in Wojciech Sadurski, Michael Sevel, and Kevin Walton (eds.), *Legitimacy: The State and Beyond* (OUP 2019).

– ‘What's the Point of the Rule of Law’ (2019) 67 *Buffalo Law Review* 743.

Kumar, Sumita. ‘Sharif Vs. Musharraf: The future of democracy in Pakistan’ (2001) 24 *Strategic Analysis* 1861.

Kumm, Mattias. ‘The Idea of Socratic Contestation and the Right to Justification: The point of rights-based proportionality review’ (2010) 4 *Law & Ethics of Human Rights* 142.

Kureshi, Yasser. ‘What is judicial populism and how does it work in Pakistan?’ *Dawn* (1 February 2019) available at <https://www.dawn.com/news/1461194>.

– ‘When Judges Defy Dictators: An Audience-Based Framework to Explain the Emergence of Judicial Assertiveness against Authoritarian Regimes’ (2021) 53 *Comparative Politics* 233.

Kurlantzick, Joshua. ‘Why the 'China Model' Isn't Going Away’, *The Atlantic* (21 March 2013), available at <https://www.theatlantic.com/china/archive/2013/03/why-the-china-model-isnt-going-away/274237/>.

Landau, David and Rosalind Dixon. ‘Abusive Judicial Review: courts against democracy’ (2019) 53 *UC Davis Law Review* 1313.

Landau, David. ‘A Dynamic Theory of Judicial Role’ (2014) 55 *Boston College Law Review* 1501.

– ‘Abusive Constitutionalism’ (2013) 47 *Univeristy of California Davis Law Review* 189.

– ‘Political Institutions and Judicial Role in Comparative Constitutional Law’ (2010) 51 *Harvard International Law Journal* 319.

– ‘Samuel Issacharoff. Fragile Democracies: Contested Power in the Era of Constitutional Courts. Cambridge University Press, 2015’ (2015) 13 *International Journal of Constitutional Law* 1082.

Larsson, Olof et al.. 'Speaking Law to Power: The strategic use of precedent of the court of justice of the European Union' (2017) 50 *Comparative Political Studies* 879.

Lau, Holning et al.. *Support in Hong Kong for Same-Sex Couple's Rights Grew over Four Years (2013–2017): Over Half of People in Hong Kong Support Same-Sex Marriage*, Centre for Comparative and Public Law at the University of Hong Kong, 2018.

Law, David and Mila Versteeg. 'Constitutional Variation among Strains of Authoritarianism' in Tom Ginsburg and Alberto Simpser (eds) *Constitutions in Authoritarian Regimes* (CUP, 2013).

Law, David. 'A Theory of Judicial Power and Judicial Review' (2008) 97 *Georgetown Law Journal* 723.

- 'Judicial Comparativism and Judicial Diplomacy' (2015) *University of Pennsylvania Law Review* 927.

- 'Sham Constitutions' (2013) 101 *California Law Review* 863.

Lazarus, Liora and Natasha Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the doctrine of due deference' in Murray Hunt, Hayley Hooper and Paul Yowell (eds) *Parliament and Human Rights: Redressing the Democratic Deficit* (OUP 2014).

Lee, Emily and Eric C. Ip. 'Judicial diplomacy in the Asia-Pacific: theory and evidence from the Singapore-initiated transnational judicial insolvency network' (2020) 20 *Journal of Corporate Law Studies* 389.

Levitsky, Steven and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (CUP 2002).

Lin, Chien-Chih. 'Autocracy, Democracy, and Juristocracy: The Wax and Wane of Judicial Power in the Four Asian Tigers' (2016) 48 *Georgetown Journal of International Law* 1063.

Linz, Juan J.. 'An Authoritarian Regime: The Case of Spain' in Erik Allardt and Yrjö Littunen (eds) *Cleavages, Ideologies and Party System* (Westermarck Society, 1964).

Loong, Lee Hsien. 'Transcript of PM Lee Hsien Loong's speech at the Debate on the Motion of Thanks to the President on 2 September 2020', 2 September 2020, available at <https://www.pmo.gov.sg/Newsroom/PM-Lee-Speech-at-the-debate-on-the-motion-of-thanks-to-the-president-Sep-2020>.

Lührmann, Anna and Staffan I. Lindberg. 'A Third Wave of Autocratization Is Here: What Is New about It?' (2019) 26 *Democratization* 1095.

Lupu, Yonatan and Erik Voeten. ‘Precedent in International Courts: A network analysis of case citations by the European court of human rights’ (2012) 42 *British Journal of Political Science* 413.

Ma, Ngok. ‘Hong Kong's Democrats Divide’ (2011) 22 *Journal of Democracy* 54;

Madsen, Mikael Rask, Pola Cebulak and Micha Wiebusch, ‘Backlash Against International Courts: Explaining the forms and patterns of resistance to international courts’ (2018) 14 *International Journal of Law in Context* 197.

Mann, Roni. ‘Non-ideal Theory of Constitutional Adjudication’ (2018) 7 *Global Constitutionalism* 14.

Mashaw, Jerry. *Greed, Chaos, and Governance: Using public choice to improve public law* (YUP, 2008).

Mason, Anthony. ‘The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong’ (2007) 37 *Hong Kong Law Journal* 299.

Matheson, Craig. ‘Weber and the Classification of Forms of Legitimacy’ (1987) 38 *The British Journal of Sociology* 199.

Mazepus, Honorata et al.. ‘A Comparative Study of Legitimation Strategies in Hybrid Regimes’ (2016) 37 *Policy Studies* 350.

Mazmanyan, Armen. ‘Judicialization of Politics: The post-Soviet way’ (2015) 13 *International Journal of Constitutional Law* 200.

McAdams, Richard. *The Expressive Powers of Law* (HUP 2015).

McCann, Michael. ‘Causal Versus Constitutive Explanations (or, On the Difficulty of Being so Positive…)’ (1996) 21 *Law & Social Inquiry* 457.

McLachlin, Justice Beverley. ‘Judges and the Public: Ivory Tower recluses or Engaged Actors?’, High Court of Hong Kong, 12 December 2019, 12. Available at < https://www.hkcfa.hk/filemanager/speech/en/upload/2248/20191212%20McLachlin%20NPJ%20-%20Address%20to%20Judiciary%20(final%20for%20uploading).pdf>.

Meierhenrich, Jens. *The Remnants of the Rechtsstaat: An ethnography of Nazi law* (OUP 2018).

Melton, James and Tom Ginsburg. ‘Does De Jure Judicial Independence Really Matter? A reevaluation of explanations for judicial independence’ (2014) 2 *Journal of Law and Courts* 187.

Melton, James. ‘Do Constitutional Rights Matter? The relationship between de jure and de facto human rights protection’ (2013) available at

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.375.9784&rep=rep1&type=pdf>.

Merry, Sally Engle. 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law & Social Inquiry* 975.

Meyer, Philipp. 'Judicial Public Relations: Determinants of press release publication by constitutional courts' (2020) 40 *Politics* 477.

Mietzner, Marcus. 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The role of the constitutional court' (2010) 10 *Journal of East Asian Studies* 397.

Miller, Michael K.. 'Elections, Information, and Policy Responsiveness in Autocratic Regimes' (2015) 48 *Comparative Political Studies* 691.

Montinola, Gabriella R. and Robert W. Jackman. 'Sources of Corruption: A cross-country study' (2002) 32 *British Journal of Political Science* 147.

Moran, Leslie. 'Judicial Institutional Change and Court Communication Innovations: The Case of the UK Supreme Court' in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018).

Morgenbesser, Lee. 'Elections in Hybrid Regimes: Conceptual stretching revived' (2014) 62 *Political Studies* 21.

- 'The Menu of Autocratic Innovation' (2020) 27 *Democratization* 1053.

Morlino, Leonardo. 'Are There Hybrid Regimes? Or Are They Just an Optical Illusion?' (2009) 1 *European Political Science Review* 273.

Morris, Douglas. 'The Dual State Reframed: Ernst Fraenkel's Political Clients and his Theory of the Nazi Legal System' (2013) 58 *The Leo Baeck Institute Yearbook* 5.

Moustafa, Tamir and Tom Ginsburg, 'Introduction: The functions of courts in authoritarian politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The politics of courts in authoritarian regimes* (CUP, 2008).

Moustafa, Tamir. 'Law and Courts in Authoritarian Regimes' (2014) 10 *Annual Review of Law and Social Science* 281.

- *Constituting Religion* (CUP 2018).

- *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (CUP 2007).

Mubangizi, John. 'Strategic Litigation in South Africa and Uganda: Shared perspectives and comparative lessons' (2020) *African Journal of Legal Studies* 1.

Murison, Jude. 'Judicial Politics: Election petitions and electoral fraud in Uganda' (2013) 7 *Journal of Eastern African Studies* 492.

MVA Hong Kong Limited, *Survey on Public Attitudes towards Homosexual*, 2006, available at <https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/public_consultation/public_homosexuals_eng.pdf >.

Neiman, Sophie. 'Will the U.S. Still Back Uganda's Museveni Despite Another Sham Election?' (*World Politics Review*, 25 January 2021), available at < https://www.worldpoliticsreview.com/articles/29376/after-uganda-elections-will-the-u-s-still-back-museveni-s-brutal-regime>.

Nonet, Philippe and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transaction Publishers 2005) 58.

Oloka-Onyango, Joseph. *When Courts do Politics: Public interest law and litigation in East Africa* (Cambridge Scholars Publishing 2017).

Ottaway, Marina. *Democracy Challenged: The rise of semi-authoritarianism* (Carnegie Endowment for International Peace 2003).

Özbudun, Ergun. 'Turkey's Judiciary and the Drift Toward Competitive Authoritarianism' (2015) 50 *The International Spectator* 42.

Perrot, Sandrine, Sabiti Makara, Marie-Aude Fouéré, and Jéróme Lafargue, *Elections in a Hybrid Regime: revisiting the 2011 Ugandan polls* (Fountain Publishers/IFRA, 2014).

Peterson, Carole. 'International Law and the Rights of Gay Men in Former British Colonies: Comparing Hong Kong and Singapore' (2016) 46 *Hong Kong Law Journal* 109.

Pierre, Rosanvallon. *Democratic Legitimacy* (Princeton University Press 2011).

Pitkin, Hanna. *The Concept of Representation* (University of California Press 1967).

Post, Robert and Reva Siegel. 'Popular Constitutionalism, Departmentalism, and Judicial Supremacy' (2004) 92 *California Law Review* 1027.

Post, Robert. 'Democracy and Equality' (2006) 603 *The Annals of the American Academy of Political and Social Science* 24.

Pruitt, Dean. 'Back-channel Communication in the Settlement of Conflict' (2008) 13 *International Negotiation* 37.

Przeworski, Adam. *Democracy and the Market: Political and economic reforms in Eastern Europe and Latin America* (CUP 1991).

Qazi, Asher. ‘A Government of Judges: A Story of the Pakistani Supreme Courts Strategic Expansion’, JSD dissertation, University of Chicago, 2018.

– ‘Suo Motu: Choosing not to legislate, Chief Justice Chaudhry’s strategic agenda’ in Moeen H. Cheema and Ijaz S. Gilani (eds) *The Politics and Jurisprudence of the Chaudhry Court 2005-2013* (OUP 2015).

Radmilovic, Vuk. ‘Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond’ (2010) 43 *Canadian Journal of Political Science* 843.

Rado, Klodian. ‘The Judicial Diplomacy of the Supreme Court of Canada and its Impact: An Empirical Overview’ (2020) 58 *Alberta Law Review* 1.

Rajah, Jothie. *Authoritarian Rule of Law: Legislation, discourse and legitimacy in Singapore* (CUP 2012).

Ramseyer, J. Mark. ‘The Puzzling (in) dependence of Courts: A comparative approach’ (1994) 23 *The Journal of Legal Studies* 721.

Raz, Joseph. *The Morality of Freedom* (OUP, 1988)

Rehfeld, Andrew. ‘Towards a General Theory of Political Representation’ (2006) 68 *The Journal of Politics* 1.

Ríos-Figueroa, Julio. ‘Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002’ (2007) 49 *Latin American Politics and Society* 31.

Rosen, Arie. ‘The Normative Fallacy Regarding Law’s Authority’, in Wil Waluchow and Stefan Sciaraffa (eds) *Philosophical Foundations of the Nature of Law* (OUP, 2013).

Roux, Theunis. ‘The South African Constitutional Court's Democratic Rights Jurisprudence’ (2013) 5 *Constitutional Court Review* 33.

– *The Politics of Principle: The first South African constitutional court, 1995–2005* (CUP 2013).

Rush, Mark. ‘Review of Fragile Democracies by Samuel Issacharoff’ (2016) 15 *Election Law Journal* 193.

Sadurski, Wojciech. ‘Judicial Review and he Protection of Constitutional Rights’ (2002) 22 *Oxford Journal of Legal Studies* 275.

Sanchez Urribarri, Raul A.. ‘Courts Between Democracy and Hybrid Authoritarianism: evidence from the Venezuelan Supreme Court’ (2011) 36 *Law & Social Inquiry* 854.

Sartori, Giovanni. *The Theory of Democracy Revisited* (Chatham House 1987).

Schedler, Andreas. 'Elections Without Democracy: The menu of manipulation' (2002) 13 *Journal of Democracy* 36

- 'Taking Uncertainty Seriously: The blurred boundaries of democratic transition and consolidation' (2001) 8 *Democratization* 1.

- *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* (OUP 2013).

Scheppele, Kim Lane. 'Autocratic legalism' (2018) 85 *The University of Chicago Law Review* 545.

- 'Democracy By Judiciary: Or, why courts can be more democratic than parliaments' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds) *Rethinking The Rule Of Law After Communism* (Central European University Press 2005).

Schlag, Pierre. 'Rules and Standards' (1985) 33 *UCLA Law Review* 379.

Scott-Smith, Giles. 'Mapping the Undefinable: Some thoughts on the relevance of exchange programs within international relations theory' (2008) 616 *The Annals of the American Academy of Political and Social Science* 173.

Scribner, Druscilla. 'Judicial Communication: (Re)Constructing Legitimacy in Argentina' in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018).

Segal, Jeffrey and Albert Cover. 'Ideological Values and the Votes of US Supreme Court Justices' (1989) 83 *American Political Science Review* 557.

Shafqat, Sahar. 'Civil Society and the Lawyers' Movement of Pakistan' (2018) 43 *Law & Social Inquiry* 889.

Shah, Aqil. 'Pakistan's "Armored" Democracy' (2003) 14 *Journal of Democracy* 26.

Shapiro, Ian. 'On Non-domination' (2012) 62 *University of Toronto Law Journal* 293.

Shapiro, Martin. 'Courts in Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008).

Sim, Cameron. 'The Singapore Chill: Political defamation and the normalization of a statist rule of law' (2011) 20 *Pacific Rim Law & Policy Journal* 319.

Simon, Dan and Nicholas Scurich. ‘Lay Judgments of Judicial Decision Making’ (2011) 8 *Journal of Empirical Legal Studies* 709.

Slaughter, Anne-Marie. *A New World Order* (Princeton University Press 2009).

Sokolov, Alexander. ‘Russian Political Crowdfunding’ (2015) 23 *Demokratizatsiya: The Journal of Post-Soviet Democratization* 117.

Sólyom, László. ‘The Role of Constitutional Courts in the Transition to Democracy: With special reference to Hungary’ (2003) 18 *International Sociology* 133.

Sossin, Lorne. *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999).

Spencer, Rachel. ‘Communication beyond the Judgments: The Australian High Court, Speaking for Itself, but Not Tweeting’ in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018).

Ssemogerere, Karoli. ‘Uganda’s age limit petition: Constitutional Court demurs on substance, cautious on procedure’ *Constitution Net* (14 August 2018) available at <https://constitutionnet.org/news/ugandas-age-limit-petition-constitutional-court-demurs-substance-cautious-procedure>.

Ssenyonjo, Manisuli. ‘Women's Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the role of Uganda's Constitutional Court’ (2007) 21 *International Journal of Law, Policy and the Family* 341.

Staton, Jeffrey and Georg Vanberg. ‘The Value of Vagueness: Delegation, defiance, and judicial opinions’ (2008) 52 *American Journal of Political Science* 504.

Staton, Jeffrey. *Judicial Power and Strategic Communication in Mexico* (CUP 2010).

Stephen Gardbaum, ‘What Makes for More or Less Powerful Constitutional Courts’ (2018) 29 *Duke Journal of Comparative and International Law* 1.

- “Comparative Political Process Theory” (2020) 18 *International Journal of Constitutional Law* 1429.

Stone Sweet, Alec and Jud Mathews. ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal Transnational Law* 72.

- *Proportionality Balancing and Constitutional Governance: A comparative and global approach* (OUP 2019).

Stone Sweet, Alec. *Governing with Judges: Constitutional politics in Europe* (OUP 2000).

– ‘Constitutions and Judicial Power’, in Daniele Caramani (ed.), *Comparative Politics* (Oxford and New York: Oxford University Press, 2008).

Sultany, Nimer. ‘State of Progressive Constitutional Theory: The paradox of constitutional democracy and the project of political justification’ (2012) 47 *Harvard Civil Rights-Civil Liberties Law Review* 371.

Sunstein, Cass R.. *One Case at a Time: Judicial minimalism on the Supreme Court* (HUP 2001).

Sunstein, Cass, David Schkade and Lisa Michelle Ellman. ‘Ideological Voting on Federal Courts of Appeals: A preliminary investigation’ (2004) *Virginia Law Review* 301.

Suntrup, Jan Christoph. ‘Between Prerogative Power and Legality – Reading Ernst Fraenkel’s The Dual State as an analytical tool for present authoritarian rule’ (2020) 11 *Jurisprudence* 335.

Svolik, Milan W. *The Politics of Authoritarian Rule* (CUP 2012).

Tam, Waikeung. *Legal Mobilization under Authoritarianism: The case of post-colonial Hong Kong* (CUP 2012).

Tamanaha, Brian. ‘Law's Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society’ (2017) 95 *Washington University Law Review* 1149.

Tang, Dennis T. C.. ‘Judicial Review and the Transition of Authoritarianism in Taiwan’ in Taiwan Studies Promotion Committee of Academia Sinica (ed), *Change of An Authoritarian Regime Taiwan in the Post Martial Law Era* (Academia Sinica 2001).

Taras, David. ‘Introduction: Judges and journalists and the spaces in between’ in Richard Davis and David Taras (eds) *Justices and Journalists: The Global Perspective* (CUP 2018).

Tate, C. Neal and Torbjorn Vallinder (eds). *The Global Expansion of Judicial Power* (NYU Press, 1995).

Tate, C. Neal. ‘Why the Expansion of Judicial Power?’ in Tate and Vallinder (n 1) 28.

Tatham, Allan. ‘‘Off the Bench but Not off Duty’: The Judicial Diplomacy of the Court of Justice’ (2017) 22 *European Foreign Affairs Review* 303.

Teitel, Ruti. *Transitional Jurisprudence: The Role of Law in Political Transformation* (1997) 106 *Yale Law Journal* 2009.

Tew, Yvonne. *Constitutional Statecraft in Asian Courts* (OUP 2020).

Tey, Tsun Hang. ‘Confining the Freedom of the Press in Singapore: A pragmatic press for nation-building’ (2008) 30 *Human Rights Quarterly* 876.

The Economist, ‘Democracy Index 2019: A year of democratic setbacks and popular protest’ (2020).

– ‘How Viktor Orban hollowed out Hungary’s democracy’ (31 August 2019), available at < https://www.economist.com/briefing/2019/08/29/how-viktor-orban-hollowed-out-hungarys-democracy>.

Theresa Squatrito, ‘Judicial Diplomacy: International courts and legitimation’ (2021) 47 *Review of International Studies* 64.

Thompson E.P.. *Whigs and Hunters: The origin of the Black Act* (Breviary Stuff Publications, 1975) 263.

Tiller, Emerson and Frank B. Cross. ‘A Modest Proposal for Improving American Justice’ (1999) 99 *Columbia Law Review* 215.

Tomkins, Adam. ‘The Role of the Courts in the Political Constitution’ (2010) 60 *University of Toronto Law Journal* 1.

Tóth, Gábor Attila. ‘Constitutional Markers of Authoritarianism’ (2019) 11 *Hague Journal on the Rule of Law* 37.

Tripp, Aili Mari. *Museveni's Uganda: Paradoxes of power in a hybrid regime* (Lynne Rienner Publishers 2010).

Trochev, Alexei and Rachel Ellett. ‘Judges and Their Allies: Rethinking judicial autonomy through the prism of off-bench resistance’ (2014) 2 *Journal of Law and Courts* 67.

Trochev, Alexei. *Judging Russia: the role of the constitutional court in Russian politics 1990–2006* (CUP, 2008).

Trubek, David. ‘The ‘Rule of Law’ in Development Assistance: Past, Present, and Future’ in David Trubek and Alvaro Santos (eds) *The New Law And Economic Development: A critical appraisal* (CUP 2006).

Tsebelis, George. *Veto Players: How political institutions work* (Princeton University Press 2002).

Tucker, Paul. *Unelected Power* (Princeton University Press, 2019).

Tushnet, Mark. ‘The Possibility of Illiberal Constitutionalism’ (2017) 69 *Florida Law Review* 1367.

– *Weak Courts, Strong Rights: Judicial review and social welfare rights in comparative constitutional law* (Princeton University Press 2009).

Twining, William et al.. ‘The Role of Academics in the Legal System’ in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (OUP 2005).

Tyler, Tom. ‘Psychological Perspectives on Legitimacy and Legitimation’ (2006) 57 *Annual Review of Psychology* 375.

– *Why People Obey the Law* (Princeton University Press, 1990).

Van der Vet, Freek. ‘“When They Come for You”: Legal mobilization in new authoritarian Russia’ (2018) 52 *Law & Society Review* 301.

Vanberg, Georg. ‘Constitutional Courts in Comparative Perspective: A theoretical assessment’ (2015) 18 *Annual Review of Political Science* 167.

– *The Politics of Constitutional Review in Germany* (CUP 2004).

Varol, Ozan. ‘Stealth Authoritarianism’ (2014) 100 *Iowa Law Review* 1673.

Verhagen, Mark and Julius Yam, ‘The Law of Attraction: How similarity between judges and lawyers helps win cases in the Hong Kong Court of Final Appeal’ (2021) 65 *International Review of Law and Economics*.

Vermeule, Adrian. *Judging Under Uncertainty: an institutional theory of legal interpretation* (HUP 2006).

Voltmer, Katrin, Kjetil Selvik and Jacob Høigilt, ‘Hybrid Media and Hybrid Politics: Contesting informational uncertainty in Lebanon and Tunisia’ (2021) 26 *The International Journal of Press/Politics* 842.

Wacks, Raymond. ‘Judges and Injustice’ (1984) 46/47 *Bulletin of the Australian Society of Legal Philosophy* 180.

Wald, Patricia M.. ‘The Rhetoric of Results and the Results of Rhetoric: Judicial writings’ (1995) 62 *The University of Chicago Law Review* 1371.

Waldron, Jeremy. ‘The Core of the Case Against Judicial Review’ (2005) 115 *The Yale Law Journal* 1346.

– *Law and Disagreement* (OUP 1999).

– *Political Political Theory* (HUP 2016).

Walsh, David. ‘On the Meaning and Pattern of Legal Citations: Evidence from state wrongful discharge precedent cases’ (1997) 31 *Law & Society Review* 337.

Wanis-St. John, Anthony. ‘An Assessment of Back Channel Diplomacy: Negotiations Between the Palestines and Israelis’, Program on Negotiation at Harvard Law School, available at

<http://w3.gavintextile.com/sis/faculty/upload/Wanis-Back-Channel-Working-Paper.pdf>.

– ‘Back-channel Negotiation: International bargaining in the shadows’ (2006) 22 *Negotiation Journal* 119.

Weingast, Barry R.. ‘The Political Foundations of Democracy and the Rule of the Law’ (1997) 91 *American Political Science Review* 245.

Weisberg, Deena Skolnick et al.. ‘The Seductive Allure of Neuroscience Explanations’ (2008) 20 *Journal of Cognitive Neuroscience* 470.

Wilder, Andrew. ‘The Politics of Civil Service Reform in Pakistan’ (2009) 63 *Journal of International Affairs* 19.

Wilson, Sophia. ‘Cause Lawyering in Revolutionary Ukraine’ (2017) 5 *Journal of Law and Courts* 267.

Wiseman, Geoffrey. ‘Engaging the enemy: An essential norm for sustainable US diplomacy’ in Costas M. Constantinou and James Der Derian (eds) *Sustainable Diplomacies* (Basingstoke, UK: Palgrave Macmillan 2010).

Yam, Julius. ‘Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts’ (2021) 46 *Law & Social Inquiry* 153.

– ‘Political Crowdfunding of Rights’ (2020) 50 *Hong Kong Law Journal* 395.

– ‘Hong Kong’s Anti-mask Law: A Legal Victory with a Disturbing Twist’, *IACL-AIDC Blog* (3 December 2019).

Yap, Po Jen. (ed) *Constitutional Remedies in Asia* (Routledge 2019).

– ‘New Democracies and Novel Remedies’ (2017) *Public Law* 30.

Yeh, Jiunn-rong. *The Constitution of Taiwan: A Contextual Analysis* (Hart Publishing 2016).

Young, Alison. ‘In Defence of Due Deference’ (2009) 72 *The Modern Law Review* 554.

Yowell, Paul. *Constitutional Rights and Constitutional Design: Moral and empirical reasoning in judicial review* (Bloomsbury Publishing 2018).

Zakaria, Fareed. ‘The Rise of Illiberal Democracy’ (1997) 76 *Foreign Affairs* 22.

Zakharov, Alexei. ‘The Loyalty-Competence Trade-off in Dictatorships and Outside Options for Subordinates’ (2016) 78 *The Journal of Politics* 457.

Zhao, Dingxin. ‘The Mandate of Heaven and Performance Legitimation in Historical and Contemporary China’ (2009) 53 *American Behavioral Scientist* 416.