4

Five Democratic Roles

4.1 Introduction

The previous chapter concluded with a realistic account of a hybrid regime constitutional court. A hybrid regime imposes constraints on a constitutional court, but a constitutional court also enjoys some agency to shape the political environment. The regime and the constitutional court are mutually dependent, and their relationship is dynamic and interactive. Given that 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 this argument by offering a perspective on constitutional courts in hybrid regimes that reveals their democracy-enhancing potential. Courts, I claim, should play a role in protecting and promoting democratic values in a hybrid regime. This chapter lays out how that can and should be done. Some of the discussion in this chapter stretches beyond democratic settings and addresses pathologies associated with a lack of democracy, such as poor governance and corruption.

Section 4.2 opens the discussion with the familiar counter-majoritarian difficulty. The debate centers on whether judicial review can be justified under democratic theory, given the constitutional court's lack of democratic credentials. This debate highlights the issues that need to be addressed when a democratic role is claimed for a court. Section 4.2 argues that the counter-majoritarian difficulty is severely blunted in a hybrid regime because the democratic conditions necessary for it to hold are weakened or absent. The different ways in which those democratic objections are undermined by a hybrid regime are then illustrated.

The fact that the counter-majoritarian objection is relatively irrelevant in a hybrid regime context does not automatically imply that a constitutional court has the moral authority to take on a democratic

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role in a hybrid regime. It does, however, give us greater room to consider how a constitutional court can support democratic ideals in a hybrid regime. Five different democracy-enhancing roles of a constitutional court are proposed, alongside 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 Section 4.3.

The democracy-enhancing roles I propose are not necessarily unique to a hybrid regime. As the first chapter points out, some degree of fluidity exists among regime types. Democracies typically call for judicial restraint, but can occasionally experience political failures similar to those we encounter in hybrid regimes, which may necessitate creativity on the part of judges or a greater degree of judicial intervention.[1] Conversely, while it would normally be unwise, or even impossible, for constitutional courts to challenge pure authoritarian regimes, windows of opportunity may occasionally open for courts to develop judicial power and press on against the authoritarian. The democratic roles presented in this chapter may be relevant to both these scenarios. This is not necessarily a weakness of the overall argument, as it only extends the applicability of the judicial roles.

Crucially, though, the roles described are customized for constitutional courts in hybrid regimes. Each role addresses the democratic deficit inherent within hybrid regimes and the recurring political problems they experience. While the democratic roles and the accompanying tools may guide and assist courts outside hybrid regimes, they are intended for constitutional courts in hybrid regimes because of the types of challenges those courts encounter. Furthermore, these roles and tools are best suited to constitutional courts in hybrid regimes given what these courts can realistically achieve. For instance, demanding that courts replace the political branches in authoritarian contexts is not only impractical, but also imprudent because of the near certainty of political backlash. For similar reasons, the fashionable basic structure doctrine or unconstitutional constitutional amendment doctrine is excluded from the discussion because the required level of judicial

[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.

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power and autonomy to meaningfully apply the doctrine is usually absent in a hybrid regime context.[2] On the other hand, these roles are very unlikely to be realized in a pure authoritarian political setting 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.

Section 4.4 of this chapter addresses 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 advance democracy. Nevertheless, there are two limiting principles to address, institutional competence and judicial power, which impose normative and prudential limitations respectively on the democratic roles a hybrid regime court can take up. The topic of judicial power is discussed fully in the coming chapters, while Section 4.4 of this chapter addresses the issue of institutional competence. Questions of competency should not be taken lightly, but are not absolute arguments and must be assessed in a comparative institutional manner. I argue that these roles are justifiable because there is a lack of better alternatives in a hybrid regime. Courts are a second-best solution: they may not normally be the best institution to tackle certain political failures, but the inadequacies of the political process in a hybrid regime offer reasons for a constitutional court to take up greater responsibility. Limited departure from the normative boundaries posed by competency concerns is, as a result, justifiable.

[2] There are instances where hybrid regime courts have applied these doctrines, but the conditions for *meaningful* deployment of them are often 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 toward the Ugandan judiciary. For the Constitutional Court's decision, see: Male Mabirizi & Ors v. Attorney General [2018] UGCC 4 (July 26, 2018). See also: Karoli Ssemogerere, 'Uganda's Age Limit Petition: Constitutional Court Demurs on Substance, Cautious on Procedure,' Constitution Net, August 14, 2018, available at https://constitutionnet.org/news/ugandas-age-limit-petition-constitutional-court-demurs-substance-cautious-procedure, last visited November 5, 2021; The Observer, 'Museveni Attacks Judges over Age Limit Petition Ruling,' July 30, 2018, available at https://observer.ug/news/museveni-attacks-judges-over-age-limit-petition-ruling/, last visited January 12, 2026.

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4.2 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-) lawmaking 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 accountable is counter-majoritarian. 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, not unelected judges.

Democratic objections to 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 be misleading. Here, I use the term "democratic objections" to refer to democracy-based arguments against judicial review.

Broadly speaking, there are three types of democratic objection: the intrinsic objection, the instrumental objection, and the cultural objection. These will be outlined briefly as they are already well known and widely discussed elsewhere. The discussion in this section 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.

4.2.1 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 present in 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 the equal treatment of such input through its deliberative process. The political process of a democracy enjoys superior lawmaking authority as it confers roughly equal rights on citizens to decide on matters of law and policy. Judicial review gives the constitutional court a power similar to that wielded by the political branches of government. Constitutional courts establish new social or

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

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political norms, for instance, by disapplying statutes or giving a new meaning to a constitutional provision. Judges are unelected, however, and do 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, it is a form of political domination or arbitrary power.[5]

4.2.2 Instrumental Objection

Critics also argue that judicial review is undemocratic because it generates bad political outcomes. Political outcomes can be democratically bad in two ways. The first is that judicial decisions do not represent the political will of the people. As opposed to the intrinsic objection, which is rights-based, the instrumental objection is more focused on the nature of the outcomes produced by courts. The standard account of this objection is that the political branches of government decide and vote according to the preferences of the people. Facing the prospect of electoral defeat, politicians are incentivized to act in ways that accord with the views of their constituents. 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 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 to make political decisions correctly. The political branches of government are set up in ways that ensure better expertise and information-gathering power in policymaking.[7] For example, legislatures are much larger in size than courts so that they can accommodate a broader range of views during

[4] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *The Yale Law Journal* 1346.

[5] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

[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).

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lawmaking; experts can assist the democratic process to compensate for 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. These branches of government are created for different purposes, and John Finnis calls this the "asymmetry of aims."[8] Demanding that 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 strength of the political branches of government, some might counter that judges are at least better at getting the correct meaning of rights.[10] Judges may be poor policymakers, 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 determine the meaning of the constitution. In response, critics maintain that questions of rights involve or are no different to questions of morality. Given how we disagree on politics, courts do not have privileged access to the truth on questions of rights. There is no reason to believe that courts will get rights questions correct, and good reason to suspect that they may get them wrong because of their institutional deficiencies.

4.2.3 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 other things, 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 the problem of "judicial overhang,"[11] will gradually subvert the political foundations of a democracy in several ways.

[8] John Finnis, 'Judicial Power: Past, Present and Future,' Judicial Power Project, October 20, 2015, available at http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf, last visited November 5, 2021.

[9] *ibid* 11.

[10] Ronald Dworkin, *Law's Empire* (HUP 1986).

[11] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009) 98.

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First, it may "promot[e] legislative disregard of the constitution,"[12] or what Wojciech Sadurski identifies as "legislative apathy."[13] Political representatives, officials, and the people may feel alienated from the constitution when a constitutional court always has the final word. This resulting lack of motivation and responsibility distances 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 inclusivity in constitution-making. Political constitutionalists believe that judicial dominance over the constitution denies the people meaningful opportunities to participate in making the constitution. Judicial review, they argue, is undemocratic because 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 scholars 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 as impositions by an elitist constitutional court, perceiving them 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, and the constitution becomes devoid of moral substance. For instance, Tushnet argues that strong-form judicial review encourages 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,

[12] *ibid*.
[13] Wojciech Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275, 286.
[14] Bellamy (n 5).
[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.

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the existence of a constitutional court might lead to an unattractive, Schumpeterian form of politics that is characterized only by self-interest and competition.

4.2.4 *Democratic Objections in a Hybrid Regime?*

Those defending judicial review have put forward a number of rebuttals.[19] A common counterargument is to justify judicial review by reconceptualizing democracy. Democracy, some say, cannot only be about majoritarianism (or majority preferences) given the dangers of the tyranny of the majority. Under this approach, liberalism is built into the definition of democracy. 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 ameliorate 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 constitutional amendment requirements is an institutional response with a 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 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

[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.

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courts tends to be less contentious than depicted by an American-centric scholarly debate.

This chapter takes no strong view on the points raised, which have been thoroughly debated by others for decades. Instead, my aim here is to test the strength of the democratic objections in a hybrid regime context. In the previous chapter we briefly touched on how it seems intuitively strange to apply the democratic objections to polities other than well-functioning democracies. Intriguingly, however, to the best of my knowledge, the relevance of these democratic objections outside democracies have only been examined episodically.[24] Perhaps this is because it is assumed that these objections simply do not apply, or 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, the strength of the democratic objections in a hybrid regime context deserves more attention.

Here, I take a careful look at how a change in political context affects the democratic objections that many take for granted in a democracy. I show that the democratic objections 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 democracies. I start with a general argument, and then address the three types of democratic objections introduced so far individually.

Let us begin with an 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, by definition, improbable in a hybrid regime. Judicial review is illegitimate when it is juxtaposed against a democratic process that is in "good working order,"[25] or

[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.

[25] Waldron (n 4) 1362.

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"maturely self-determined polities with a discursively deliberative legislature."[26] Democratic institutions in a hybrid regime fail to meet these criteria.

Stepping back momentarily, even those studying constitutionalism in democracies have questioned whether real-life democracies actually satisfy these criteria. For instance, poor economic conditions have undermined people's political rights and ability to access quality information; well-organized interest groups have exercised disproportionate political power in important policy areas; and all sorts of political horse trading has 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 assumed by the theorists who argue against judicial review.

The reason for this gap is partially due to human nature and the messiness of reality, and partially because political equality is only an ideal. Questioning how the counter-majoritarian debate is commonly framed in the literature, Jerry Mashaw rightly observes that, "if 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] One lesson offered by public choice theory, as Mashaw and other economists have demonstrated, is that democracy is an ideal that 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 of reaching collective decisions is limited by 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 juxtapose 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

[26] Finnis (n 8) 20.
[27] Jerry Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (YUP 2008) 202.
[28] Waldron (n 4) 1402.

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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 democracies, 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 will illuminate our later discussion.

Consider the intrinsic objection, which is premised on the notion that the political process confers an equal political right. Under this argument, the normative superiority of the political process derives from how it is structured in an open and inclusive way. As discussed in Chapter 2, the political process in a hybrid regime is defined by its uneven playing field and a lack of electoral competitiveness. The system is designed to disenfranchise dissidents and the opposition, while giving disproportionate power to the incumbent and its allies. The 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 targeted by the incumbent are systematically 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 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 inherently dangerous, as it assumes that the only point of a 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 of political equality, but departures are sometimes justifiable in the pursuit of other goals. For example, central banks and courts are both unelected and not designed to be "representative" like legislatures, but they provide expert services that improve policymaking (for the case of

[29] *ibid* 1401, 1406.

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central banks) and ensure fairness in adjudication (for the case of courts).[30]

Aside from the questionable intrinsic validity of the representation-based instrumental objection, there is the additional question of whether a constitutional court is really antidemocratic when it is overruling unrepresentative or even antidemocratic outcomes. 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 favor 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, allies of the regime are given disproportionate weight. The representation-based instrumental objection hinges on the idea that the political branches of government 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 of government 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 nondemocratic regimes are not necessarily less capable than those in a democracy. In fact, it might be argued that some authoritarian regimes appear to perform well at delivering basic goods: a lack of democratic oversight can result in greater efficiency. Consequently, 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 that shows that the democratic deficit and one-party dominance impact, or are associated with, economic performance[33] and

[30] See Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2019).

[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.

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quality of governance.[34] A lack of democracy can lead to an array of problems, including weaker government accountability, state capture, endemic corruption, less transparent decision-making, and arbitrariness. Hence, while the political branches of a government in a hybrid regime are not necessarily less competent than those in a democracy, there is a much greater 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 incentivize 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 toward the end of this 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 radically weakened, 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 lack the devices to effectively and easily 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 ordinary channels for political and constitutional participation are clogged. If anything, as I explain later in this chapter, 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.

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 already appears to be a defining feature of

[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 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.

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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 identify several important functions of elections in authoritarian regimes, including "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 interest-based networks within 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.

4.3 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 antidemocratic ways does not automatically justify a judiciary's democracy-enhancing role. Nonetheless, 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 noted, the democratic objections might even condition the way a constitutional court should act in a hybrid regime. For instance, a constitutional court may have a role in creating a democratic culture and exerting pressure on 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 of government. Nevertheless, by virtue of its constitutional location and

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

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some of its functions, a constitutional court, I argue, has a role to play in supporting democratic ideals in a hybrid regime.

Five democracy-enhancing roles are presented here. 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 at the beginning of this chapter, 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 I show that they can be mitigated and are potentially worth bearing considering the democratic returns. These roles are not particularly novel; each stems from 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 multifaceted: they not only address antidemocratic 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.

4.3.1 Refereeing Role

The first role envisages a court as a referee that applies clear limits on political powers and ensures dominant political forces are playing by the rules. This is principally a rule-of-law argument: democracy requires the rule of law to operate, and a constitutional court is responsible for upholding the rule of law. The referee role is limited to enforcing unambiguous and unarguable political-constitutional rules, that is, when the law is clear. This is arguably the most modest of the five roles, but is still important as it connects the court to its adjudicative function. The referee role not only provides clarity and certainty to the constitution, but also improves the accountability of the incumbent in a hybrid regime and restores temporary speed bumps within the constitutional order.

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4.3.1.1 Ely and Process Theory

John Hart Ely's renowned process theory of judicial review inspires three of the roles proposed (the referee role, the interpretative role, and the quasi-representative role), so it is helpful to outline aspects 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, according to his theory, enhance participation and reinforce 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]

His argument is motivated by his distrust of 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 are incapable of self-correction when those problems are created by political representatives themselves. 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 by protecting the rights of minorities.

Process theory sounds attractive, as it aims to offer a novel way out of the counter-majoritarian difficulty. Compared with Ronald Dworkin's interpretivism, Ely argues that process theory is more democratically legitimate as courts under his theory need not engage with substantive norms and values. According to Ely, judicial review is justified as it improves democracy without removing the democratic authority of the people. His work is also driven by a strong skepticism of political actors that is commonly found in contemporary constitutional scholarship.[41] The fact that this political distrust still resonates with us today is perhaps one reason why his work remains highly relevant.

A question many have had about Ely's work, however, is whether his theory is actually value- or substance-free.[42] Interpretations of democratic

[37] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP 1980).
[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: Impartiality, Reflexivity, Proximity* (Princeton University Press 2011) 85.
[42] See e.g. Laurence H. Tribe, 'The Puzzling Persistence of Process-based Constitutional Theories' (1980) 89 *The Yale Law Journal* 1063.

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rights and minority rights clearly have substantive dimensions and involve moral disagreements. This line of critique makes one wonder if Ely can completely sidestep the counter-majoritarian difficulty faced by other theories that support judicial review. Nevertheless, this critique is not necessarily fatal. Ely's 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 arguably 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 will shortly be clarified.

4.3.1.2 Courts as Referees

The first role discussed is a literal interpretation of what Ely calls "court as referee."[44] This phrase is 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 this book share a strong distrust of political representatives and seek to orient a hybrid regime toward a more democratic constitutional structure. Departing from Ely, the first role proposed here adopts a narrow 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. The clarity of a rule is obviously a matter of degree, as some rules can be more unarguable than others. However, within every legal community, common standards for determining the meaning of legal and constitutional provisions exist, and there are inevitably rules that lie closer to the "unambiguous" end of the spectrum. The referee role is most applicable to rules close to that unambiguous end. A sports referee is only in the business of enforcing the rules of the game. It is not their job to question the inherent fairness of the rules. Similarly, the role of a court as referee is not to evaluate the substance or constitutionality of government policies or laws, but to guard against rule-breaking

[43] Aileen Kavanagh, 'Comparative Political Process Theory' (2020) 18 *International Journal of Constitutional Law* 1483, 1484.
[44] Ely (n 37) 73.
[45] See Pierre Schlag, 'Rules and Standards' (1985) 33 *UCLA Law Review* 379.

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activities and procedural irregularities. With their constitutional jurisdiction and ancillary powers, courts have the tools to ensure that the constitutional rules and political processes are followed and obeyed.

By limiting a court's role to unambiguous rules and procedures, the referee role largely escapes the substance versus process criticism that haunted Ely's process theory. As a corollary, however, this role seems weak as one might ask how democracy-enhancing a constitutional court is without engaging with 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 antidemocratic laws as well.

I make four points in response to these concerns. First, I am not ignoring substantive approaches. In fact, judicial roles with a more substantive dimension are explored in the next subsections. The refereeing role is only one of five roles; courts should consider all of them whenever they are appropriate under different conditions. While fairness of the law and its democratic pedigree is normally beyond the purview of a constitutional court, the ways in which a constitutional court can challenge the constitutionality and validity of authoritarian laws and policies are explored later in this chapter. Not to mention, it is also occasionally possible to couch questions of fairness, democracy, and justice as questions of constitutionality and validity.

Second, while the referee 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, "authoritarian 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 of dislodging various kinds of oversight, constitutional rules with normative substance are easily ignored or disregarded without repercussions or public knowledge. The referee role compels the incumbent to answer to the law by limiting the

[46] Erin K. Jenne and Cas Mudde, 'Hungary's Illiberal Turn: Can Outsiders Help?' (2012) 23 *Journal of Democracy* 147, 148.

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exercise of arbitrary powers and imposing legal and reputational costs for legal noncompliance.

The Pakistani courts provide an excellent illustration of the referee role. Two political failures that the Chaudhry court focused on tackling were the abuse 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. Perhaps the most famous case in this regard is *Watan Party v. Federation of Pakistan*,[48] more commonly known as the Pakistan Steel Mills case. The case involved the privatization of state-owned steel mills, where the opposition and labor unions as claimants argued that the enterprise was sold at an excessively low 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] The many glaring irregularities included 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] While the incident was only one of many corrupt dealings occurring in Pakistan at the time, the judgment symbolized 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.

Elections in a hybrid regime are another process in particular need of a referee. As previously described, incumbents win elections in hybrid regimes through a variety of questionable tactics, many of which are unlawful, and are occasionally able to evade liability due to the lack of public admonishment. In Hong Kong, for example, opposition candidates have been disqualified from running for election because they are deemed by the incumbent to not be patriotic enough. In disqualifying these candidates, the government did not offer any opportunity for the

[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.
[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.

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candidates to explain or defend themselves. On procedural fairness grounds, the courts held that the disqualifications were against "the principle of natural justice" as the government had failed to provide the candidates with a reasonable opportunity to respond.[54]

The Ugandan courts' historical record as a referee may be mixed, but there was a "dramatic rise in the accountability functions of the judiciary" during the 2000s, as Siri Gloppen observes.[55] The courts played their referee role in some of Uganda's most well-known cases. A notable one involved a referendum. Prior to 2000, Uganda operated 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 on 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 have been held fairly. The result of the 2000 referendum favored 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 constitutionally 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 in its role as referee differs from democratic accountability. Constitutional legal accountability is based on the idea of determining whether a law or action

[54] *Chow Ting v. Teng Yu Yan Anne (Returning Officer)* [2019] 4 HKLRD 459, para 27. After Hong Kong's electoral system was overhauled by Beijing in 2021, all electoral candidates now have to be vetted by a government-appointed Candidate Eligibility Review Committee and the Committee's decision on a candidate's eligibility is nonjusticiable. See Hong Kong Basic Law, Annex 2, Art. 5.

[55] Siri Gloppen and others, *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.

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violates a constitutional or legal norm, while democratic accountability is based on a principal–agent relationship between the government and the people.[58] The government, as a principal, has a duty to act on behalf of, report to, and justify its decisions to its people. As an agent, the people are empowered to sanction the government through elections and other established political means when the government falls below a certain standard.

However, the benefits of constitutional legal accountability overlap with those offered 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 the 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 regarding the issues being challenged.

Third, on top of providing constitutional legal accountability and partially compensating for the lack of democratic accountability, 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 distorted or ignored to realize the incumbent's self-interested agenda. A constitutional court can help restore the fundamental values of rule of law by showing that rules need to be respected by everyone, including the incumbent. In sports, the referee is "a symbol of fair play, integrity and sportsmanship."[61] A similar symbolic power is at play here, which has potentially far-reaching effects on the constitutional culture of a hybrid regime. The social effects of a constitutional court will be discussed later in this chapter.

[58] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (HUP 2016) chapter 8.
[59] See Jeff King, *Judging Social Rights* (CUP 2012) 60–2.
[60] See Brian Tamanaha, 'Law's Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society' (2018) 95 *Washington University Law Review* 1149.
[61] This is a provision reproduced in many guidelines or codes of conduct for sports referee.

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Finally, the referee role is justifiable when the rules being applied are attractive ones. Sometimes, despite the unambiguous 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 would ensue as a result of a completely neutral application of the referee role. Selective enforcement, however, depends on judges' ability to legitimately carve out exceptions despite the unambiguous language of a rule. Furthermore, the risk of being selective is that the court might be seen as politically biased and ignoring the demands of the law. There is consequently 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 spirit of a referee, this role inevitably requires a constitutional court to sometimes enforce rules with authoritarian effects.

Despite this, the net effect of the referee role is likely to be 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, who are able to act with impunity because of their electoral and political dominance. A rule being the product of an undemocratic process does not mean that it is inherently unattractive. In fact, in an attempt to free-ride on the reputation of liberal democracies, hybrid regimes oftentimes import constitutional provisions and political rules from other democracies.[62] A referee role will revive many constitutional breaks and constrain authoritarian aggrandizement.

4.3.2 Interpretative Role

The first role explains how a constitutional court should approach clear directives. In contrast, the interpretative role discussed here applies 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. I adopt a broad

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

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conception of interpretation, referring not only to how constitutional provisions should be read (such as widening the ambit of a rights provision), but 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 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 for how different constitutional doctrines should be applied. This role, I show, 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 of constitutionality. These are not the only examples of giving effect to the interpretative role, but they illustrate the different possibilities for folding democratic norms into existing jurisprudential techniques.

4.3.2.1 Discretion and Value Judgment

Most problems presented before a constitutional court involve constitutional and/or statutory interpretation. 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 be insufficient to control a legal outcome.[63] A constitutional text that protects freedom of speech, for instance, does not specify 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 which have diverging, and sometimes irreconcilable, conclusions.

A key assumption here is that the law, particularly constitutional law, often accommodates reasonable disagreements. This is partially attributable to the nature of legal language, but, to a greater extent, to the fact that many constitutional cases involve moral and/or policy considerations.

[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."

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The assumption here is not that law is simply politics or the result of judges' personal preferences. The attitudinal model of law, once very popular among political scientists, obscures the legal dimension of a constitutional court and fails to account for interactions and deliberations within the courtroom.[64] Nevertheless, the law is usually not a mathematical equation that renders unequivocally 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.

4.3.2.2 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. Consciously or subconsciously, judges need to choose among competing outcomes based on the norms inherent in the different legally plausible arguments that are available to them.

The difference in judicial treatment of defamation against public officials or public institutions in Hong Kong and Singapore exemplifies how a constitutional right can give rise to almost opposing lines of jurisprudence depending on judicial interpretation. 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 in Singapore. In the first landmark case after the handover, *Ng Ka Ling & Ors v. Director of Immigration*,[65] the Court of Final Appeal in Hong Kong established the approach of giving rights-protective provisions a generous interpretation.[66] This is not 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 does not genuinely hold the view he or she expressed. Departing from the common-law position at the time, the court ruled that the motive of the

[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.
[66] *ibid* para 77.
[67] [2000] 3 HKLRD 418.

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speaker, however improper it may be, became irrelevant. Reiterating its rights-protective interpretative approach, the court held that "the 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 prioritized the prior. In recent years, the defense of fair comment has become especially valuable as Hong Kong witnesses an increased number of defamation claims (or the threat thereof) launched by the incumbent and its allies against the media and dissidents. At the time of writing, none of these defamation claims have eventuated or succeeded, probably because of how difficult it is for a defamation claim to succeed in court as a result of the *Cheng* case.

Contrast this with the Singaporean approach. Scholars observe that defamation suits are routinely weaponized by the authorities to silence critics and censor opposition.[69] The Singaporean courts have adopted a more speech-restrictive position than courts in Hong Kong. Leaders of the incumbent party regularly win in these defamation suits.[70] Such suits are not only brought against individuals, but also the press. Foreign press and online columnists are particularly targeted.[71] 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."[72] While the Hong Kong courts have effectively disarmed the authoritarian in this respect, the Singaporean courts have chosen a path that tilts the balance toward the authoritarian in the name of protecting private reputation. It is well known that 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 made a particularly bold move in 2004 by ruling unconstitutional a law that criminalizes "false news," more

[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.

[70] See e.g. 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.

[71] Tsun Hang Tey, 'Confining the Freedom of the Press in Singapore: A Pragmatic Press for Nation-building' (2008) 30 *Human Rights Quarterly* 876, 898.

[72] *ibid*.

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commonly referred to as fake news.[73] With the rise of social media and the difficulty of detecting false or misleading content, 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 content. The law was challenged in court and eventually struck down. 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 that are typically available 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 that it is possible to find and adopt jurisprudential routes that correspond to constitutional democratic norms more closely.

There might be concerns about what a democratically friendly interpretation is in practice. Different understandings of democracy might affect, on a more granular 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. Rather, one is quite clearly authoritarian in character and defended by the incumbent, while the other is the challengers' route that mitigates the antidemocratic tendency of the law or policy in question.

4.3.2.3 Proportionality Doctrine

The interpretative role affects how doctrines that structure judicial discretion should be applied. Take, for example, the proportionality test,

[73] *Onyango-Obbo and Anor v. Attorney General* [2004] UGSC 81.

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which is arguably the most prominent doctrine in constitutional jurisprudence in recent decades.[74] 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.[75] Providing an "analytical structure,"[76] the doctrine has allowed courts to adjudicate rights cases more systematically, effectively, and transparently. There is an ongoing and robust debate over how the test and its application can be perfected. An oft-repeated observation is that even with the proportionality test, there remains considerable latitude for judicial discretion.[77] 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."[78] 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 relevant goals and interests in conflict and points toward considerations that should be given weight to, but it remains the judges' task to apply the framework and fill in the gaps, which 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 judgments. 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. 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. Heightened scrutiny increases the threshold for deference to the

[74] See Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (OUP 2019).

[75] For normative justifications for the proportionality test, see Paul Craig, 'Proportionality, Rationality and Review' (2010) *New Zealand Law Review* 265, 271–3.

[76] 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.

[77] Finnis (n 8) 20–3.

[78] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *The Columbia Journal Transnational Law* 72, 86–7 note 33.

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government and requires closer inspection of the justifications relied upon by the government in order to ensure that the rights in question are given extra protection.[79] Likewise, courts should give extra weight to rights that are missing or weak in a hybrid regime when engaging in balancing exercises, such as the right to political participation, political equality, freedom of expression, and freedom of assembly.

4.3.2.4 Reducing the Presumption of Constitutionality

An even more ambitious technique that is similar in spirit is to reduce the presumption of constitutionality or validity as applied to all laws and policies being challenged in a hybrid regime.[80] Courts normally presume that the law made by the democratic process is constitutional. This presumption, which manifests in different ways in different jurisdictions, emerges from the separation of powers, which implies that the judiciary ought to respect the legislative function of the political process and the will of the people. Nevertheless, the presumption is tenuous in a hybrid regime, as its political process does not enjoy the same degree of democratic legitimacy. This does not mean that all laws should be presumed to be unconstitutional, but rather 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 policymaking areas and any kind of empty rhetoric.

4.3.2.5 Semi-procedural Review

Another way the interpretative role can be implemented is to use the quality of the legislative debate or the consultative process as grounds for adjusting the level of deference, or even use these as an independent reason to strike down laws. The superior democratic legitimacy of the political branches of government is a commonly cited 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.[81] These

[79] Cora Chan, 'Deference, Expertise and Information-gathering Powers' (2013) 33 *Legal Studies* 598.

[80] 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.

[81] See e.g. Chan (n 79); Alison Young, 'In Defence of Due Deference' (2009) 72 *The Modern Law Review* 554; Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role

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debates have theoretical implications for a hybrid regime, as many laws and policies being challenged lack the same democratic pedigree and democratic approval scholars assume exist in liberal democracies. The argument here is that poor legislative deliberation or 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 approach semi-procedural judicial review.[82] It is semi-procedural because it is substantive in nature (as a court is determining the constitutionality of a law based on its substance), but the examination of the legislative and consultative process (i.e. the procedural look) complements its substantive judgment. Procedural defects are taken to indicate a substantive flaw or the presence of unconstitutional motivations.

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. The latter appears to be the more popular option at present. Nevertheless, this form of review is not as novel as it sounds: 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.[83]

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.[84] 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."[85] Another exemplar is the South African case *Doctors for Life*.[86] The South African Constitutional Court decided that the

in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008).

[82] Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

[83] *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) chapter 19, 385.

[84] *Hirst v. The United Kingdom (No. 2)* (2006) 42 EHRR 41, para 82.

[85] *ibid* para 79.

[86] *Doctors for Life International v. Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

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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 examined the nature and importance of the law in question, as well as its impact on the public.[87] Practical concerns, such as saving time or money, were not accepted by the court as legitimate excuses.[88] "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 wrote.[89] 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.[90] A lack of engagement with the interests of the rights-holders, as evidenced by the congressional record, was used by the Colombian Constitutional Court to justify striking down the law in question.[91]

The political branches in hybrid regimes do not always rubber-stamp legislation, but weak democratic accountability gives good reason to question their decision-making processes. Semi-procedural review promotes 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 thoroughly examined alternative choices, whether lawmakers spent sufficient time and effort reviewing relevant options, whether rights-holders were represented and consulted, whether their views were engaged, and to what extent are those impacted by the law in question were given an opportunity to participate in the decision-making process. These questions are informed by democratic principles such as democratic participation, democratic deliberation, and democratic representation. Courts are developing ways to improve this approach, for example, by proposing minimum standards and experimenting with 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 "possibility for participation."[92] The ultimate goal is not to replace the judgment of the political branches, but to increase the

[87] *ibid* para 128.
[88] *ibid*.
[89] *ibid* para 129.
[90] David Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319, 363.
[91] *ibid* 363–4.
[92] Bar-Siman-Tov (n 82) 297.

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transparency of the political process and weed out substantive flaws and dubious intentions.

Semi-procedural review comes with undeniable costs. It may increase the complexity of cases, with judges having to spend longer examining legislative materials. Some may be worried about a court's lack of expertise. However, courts are accustomed to examining and referring to legislative materials given that they are routinely asked to ascertain the legislative intent of the law. Moreover, 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 the conclusions of Liora Lazarus and Natasha Simonsen, the democratic gains realized by introducing the quality of democratic deliberation as an evaluative criterion outweigh the implementation considerations that others might have.[93] This is especially the case in a hybrid regime, where political rights are weakly protected and political processes deliberately undermine representative and deliberative values.

4.3.3 Participatory Role

The global rise in judicial power has created 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.[94] Instead, the expansion of judicial power opens up an alternative means for 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 used domestic courts and supranational ones to express their opinions and shape policy outcomes.[95]

The general point about courts as complementary participatory channels lends particular credence to a hybrid regime. A central problem of

[93] Lazarus and Simonsen (n 83) 401.

[94] Rachel Cichowski, 'Courts, Rights, and Democratic Participation' (2006) 39 *Comparative Political Studies* 50.

[95] See e.g. Waikeung Tam, *Legal Mobilization under Authoritarianism: The Case of Postcolonial 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.

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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 of political participation because of their ideology and political backgrounds. Voices that challenge status quo are suppressed, muted, or even excluded from the political market. Certain views and interests are consequently not properly or never represented in formal political processes. A hybrid regime may maintain a façade of fair public contestation, but as long as the incumbent and its allies have privileged access to resources, networks, and positions of power, challengers are handicapped or even wholly excluded from the political process.

The participatory role facilitates democracy by providing additional participatory opportunities to those who are disenfranchised in a hybrid regime. The argument is not primarily concerned with a reliance on courts to directly change the outcomes of certain laws and policies. Rather, a court, as a participatory channel, is intrinsically valuable as it expands the space for public participation and breathes life into the voices that are left out in the political market of a hybrid regime.[96] The participatory potential of a court is "grounded in procedural features that are essential characteristics of judicial institutions per se."[97] 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.

Also relevant is the expressive function that comes with the legal process. Legal proceedings and judgments are often public in nature. Interactions within the courtroom, including what is said and argued by the claimant, are reported on 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, formally documenting the different narratives.

By taking advantage of the procedural features of the legal process and its public nature, those who are persecuted and silenced in a hybrid regime can use courts as a platform to make their voices heard. A claimant may

[96] Rosanvallon (n 41) 145. See also Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451.
[97] Alon Harel, *Why Law Matters* (OUP 2014) 192.

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face all sorts of challenges if he or she expresses similar views through other political channels. In fact, opposition and dissidents are often censored or jailed *because* of their political expressions. Typical avenues for political participation may simply be unavailable to certain social groups. Seen in 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. A court's expressive function 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.

4.3.3.1 A Second-best Participatory Channel

As a participatory channel, the legal process is limited in many ways. 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 the claimant wishes to make 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 gap in expertise, there is also a financial barrier. In many jurisdictions, litigation can be costly. On top of lawyers' fees and the costs of case preparation, 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. Accordingly, some might argue that the legal process is self-selecting as it only represents the voices of the wealthy. Finally, due to court backlogs and a high caseload, the legal process in some jurisdictions can be very slow and may not be as flexible as more traditional channels for political participation in adapting to changing circumstances.

Consistent with the theme of this chapter, the argument here is a second-best one. As I made clear at the beginning, the idea here is not for the legal process to replace or replicate the traditional avenues of participation, but to complement them. This complementary effect is especially valuable in a hybrid regime given the lack of participatory opportunities to begin with. For some constituents, the participatory role is more accessible than the political branches of government, and provides a rare opportunity for these social groups to express claims that compete with or counter the regime's. While the legal process is not without its challenges, the hostility posed by the incumbent government through the political channels may be absent from the legal process. The

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court is not a democratic forum, but a court can realize some of the participatory values that are typically instantiated through 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 government is forced to acknowledge the existence of different political ideologies and kinds of reasoning, and address them with the level of respect they deserve by defending against these claims with accepted modes of legal argumentation and facts.

This role, I emphasize, does not depend on the substantive outcome but on the potential of the legal process to descriptively represent different voices.[98] Though the law might ultimately be on the government's side, the legal process can, at the very least, provide a platform for views that would have otherwise been ignored or trivialized by the incumbent in the political arenas. The monopolization of "truth" is one of the most effective ways to maintain authoritarian control. Courts counter this Orwellian nightmare by allowing the people to challenge the incumbent regime's claims. 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 such as a court, but rather by the political market, that is, the people. Courts facilitate the revelation of the "truth" by making the public aware of the lost voices and respecting these voices through formal recognition. These voices, institutionalized by the adjudicative process, may destabilize the dominant narrative so carefully curated by the regime. The court enriches the democratic space by surfacing views that are suppressed or hidden by the authoritarian.

4.3.3.2 Overcoming Barriers

Furthermore, the limitations identified so far do not render the participatory role obsolete. 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 by how legal mobilization movements are prevalent in both common-law (such as Hong Kong, Pakistan,

[98] 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 the court can bring into public existence voices that have existed all along but are suppressed.

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and Uganda)[99] and civil-law (such as Russia, Ukraine, and Turkey) authoritarian jurisdictions.[100] 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 and formulating 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 litigation.[101]

By controlling the fluidity of legal traffic, courts have the tools to mitigate the aforementioned challenges as well. Generally, access to justice rules and constitutional rights 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 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 interpreted broadly, 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."[102]

The Ugandan courts, in contrast, adopted a more cautious and gradual approach to expanding the accessibility of the courts. The infamous Rule 4 of the Constitutional Court Rules (1996) provided that a petition must be filed within thirty days of the alleged constitutional breach. Important

[99] Tam (n 95); John Mubangizi, 'Strategic Litigation in South Africa and Uganda: Shared Perspectives and Comparative Lessons' (2020) 13 *African Journal of Legal Studies* 351; Sahar Shafqat, 'Civil Society and the Lawyers' Movement of Pakistan' (2018) 43 *Law & Social Inquiry* 889.

[100] See Van der Vet (n 95); 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.

[101] 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.

[102] Qazi (n 47) 304.

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constitutional challenges in the earlier days had been time-barred by the thirty-day rule.[103] The justices themselves noticed the "irony" of this: that even applicants involved in a contractual breach or a tort action had "far more time to bring [an] action" than in a constitutional breach.[104] In around half a decade, the courts fixed the problem in incremental fashion, first by construing that the thirty-day period commences after the claimant perceives the alleged breach,[105] and finally declaring that the rule violates the right of access to the constitutional court.[106]

The attitude of the Hong Kong courts is similarly liberal when it comes to legal access rights. To establish standing in judicial review in Hong Kong, 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. In the absence of an obvious or direct interest, courts have also granted standing when the proper context arises.[107] 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 into a judicially enforceable claim.

4.3.4 Quasi-representative Role

The quasi-representative role promotes political representation by applying legal tests favorable to litigants suffering from authoritarian bias or neglect.[108] 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.[109] But, of course, the court is not exactly a political representative, as it lacks the formal

[103] See e.g. *James Rwanyarale and Anor v. Attorney General* [1997] UGCC 1 (18 December 1997); *Ismail Serugo v. Kampala City Council and Anor* [1999] UGSC 23 (11 June 1999).
[104] *Uganda Association of Women Lawyers and Ors v. Attorney General* [2004] UGCC 1 (10 March 2004).
[105] See e.g. *Joyce Nakacwa v. Attorney General and Ors* [2002] UGCC 1 (11 October 2002).
[106] *Uganda Association of Women Lawyers* (n 104).
[107] Karen Kong, 'Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?' (2009) 28 *Civil Justice Quarterly* 327, 341.
[108] The test to be proposed draws on an argument by Jeff King in *Judging Social Rights*, which will be discussed in detail later.
[109] Pitkin (n 31) 209.

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mandate (such as the act of voting) that connects the representee with the representative.

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

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

4.3.4.1 Representation-reinforcing: Ely

In *Democracy and Distrust*, Ely identifies minority discrimination as one of the most notable forms of political malfunction occurring in the United States at the time he was writing, and devotes one whole chapter to explaining how process theory can facilitate the representation of minorities. He explains that political malfunctions can occur because of concentration of powers in the majority groups. In these circumstances, minority groups cannot truly protect themselves even if they are guaranteed an equal vote.[110] His proposal focuses 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.[111] He acknowledges the forensic difficulties of 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.[112]

[110] Ely (n 37) 135.
[111] *ibid* 145.
[112] *ibid* 136–45.

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A main challenge of applying Ely's approach is 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.[113] What this means is that the government will bear a higher burden of proof, or be subjected to 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, 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.[114] Not all forms of stereotyping are impermissible, as stereotyping can simply be a form of generalization. The kind of stereotyping he has in mind is one that results in a significantly higher chance of legislative misapprehension.[115] This kind of stereotyping is more likely when the stereotyping is one that "serves the interests of the decision-makers."[116]

4.3.4.2 Majoritarian Bias or Neglect: King

King has sought to refine Ely's approach by proposing the "particularly vulnerable to majoritarian bias or neglect" test.[117] He argues that the unconstitutional motivation standard sets too high a bar, and that Ely fails to address subtler instances of discrimination, such as neglect.[118] 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."[119] 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 hostility towards the group, or of disadvantage created by unfair preference for the interests of the majority."[120] By adding majoritarian neglect,

[113] *ibid* 145.
[114] *ibid* 155–7.
[115] *ibid* 157.
[116] *ibid* 158.
[117] King (n 59) 181.
[118] *ibid* 180.
[119] *ibid* 182.
[120] *ibid* 182.

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King accounts for 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 of identifying the group in court but argues that these can be addressed. 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.[121] 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."[122] Errors may arise in 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.

4.3.4.3 Quasi-representative Role: Incumbent Bias or Neglect

While King was addressing the adjudication of social rights in a democracy, his approach can be altered 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 provides extra legal protection to social groups that are vulnerable to authoritarian bias or neglect in a hybrid regime. As mentioned, this approach resembles some of the techniques under the interpretative role, but its benefits are directed toward disadvantaged social groups in a hybrid regime.

The first step in adapting King's test to the circumstances of hybrid regimes is to recognize that 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 probable, that an incumbent possesses majority support, that is not always the case, hence the concept of majoritarian bias rarely applies in the current context.

Instead, the concern is incumbent bias. We have already discussed the biases generated by a lack of electoral accountability and democratic oversight. It follows that the typical victims of incumbent bias are not

[121] *ibid* 183.
[122] *ibid* 183.

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necessarily minority groups. Both majority groups (such as the opposition) and minority groups (such as religious groups and sexual minorities) can 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 an equally relevant issue in a hybrid regime. Elections are used by authoritarian incumbents to better gauge public opinion and social sentiment, but elections are poor information-gathering devices if they are unfair and self-selective. A lack of electoral connection to the people means the incumbent may be blindsided by or ignorant to what is happening in society and the views of the less prominent social groups. Unlike the bias situation described in the previous paragraph, neglect here is an unintentional consequence of unfair elections.

Proving (the 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 they can at least compete in the political process. In a hybrid regime, oppressed groups have limited opportunities for political participation, and lack the opportunities to protect themselves through the political channels that exist in a democracy. Given that the views of the incumbent can sometimes go unchecked and unchallenged in a hybrid regime, there is an even greater chance and a potentially higher degree of legislative misapprehension.

A possible response here might be that a lack of democracy might be blamed for many things, and this might give courts a free pass to wield broad judicial review powers. This scenario is not necessarily problematic as long as a court's intervention in each instance can be justified. Additionally, establishing linkage between the harm done to a minority group or groups and the incumbent's bias or neglect will be difficult if the incumbent has engaged in responsive law-making. While some social groups may not have a say through the ballot box, if the incumbent is willing to, there are devices that function as proxies for elections that enable more responsive and representative law-making. Like the political branches of government in democracies, those in hybrid regimes can make use of consultation committees and public opinion polls to compensate for the information loss that results from 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

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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 could be that the incumbent has already proven that it made reasonable efforts to engage with impacted constituents and accurately balanced competing interests. Good policies can occur in nondemocratic settings. Proving linkage between (the risk of) harm and incumbent bias is ultimately a contextual and evidential question.

A final important difference between my approach and King's concerns 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, judges 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 so on. 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, the issuance of stronger remedies, greater leniency toward the claimant with regard to court deadlines, and cost judgments that are more sympathetic to the claimant's motivations. The quasi-representative role alters the power balance in favor of those who are handicapped in the political arenas.

4.3.4.4 Politically Representative Effects?

Earlier, I mentioned that one reason why this role is termed "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 benefiting vulnerable groups in a hybrid regime who are majority groups or represent interests that enjoy majority support.

An illuminating example is the spate 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 past decade consistently find that a majority of people support the protection of the LGBTQ community.[123] LGBTQ rights in Hong Kong are considered more liberal

[123] 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,

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than in many other Asian societies with similar social underpinnings, such as China and Singapore.[124] Hong Kong's courts, as opposed to the political branches of its government, have been a key engine for these developments.[125] Despite popular support for the development of LGBTQ rights, the pro-incumbent parties' voter base has conservative inclinations. Because of pro-incumbent parties' dominance in the legislature and the systemic political advantages they enjoy, ordinary political channels were never productive avenues for developing LGBTQ rights. There was not an openly gay lawmaker in Hong Kong until 2012, and there was, and is, little incentive for the incumbent's allies to invest in these issues.

In contrast, Hong Kong's courts appear 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[126] and legalizing transgender marriage[127] to the recognition of marriage or civil partnership status of same-sex couples for dependent visa purposes[128] and the extension of spousal benefits to same-sex married couples,[129] the signs for social change

gay, bisexual, transgender, and queer (LGBTQ) discrimination issues. MVA Hong Kong Limited, Survey on Public Attitudes towards Homosexual (2006), available at www.cmab.gov.hk/doc/en/documents/policy_responsibilities/public_consultation/public_homosexuals_eng.pdf, last visited November 8, 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 and others, *Support in Hong Kong for Same-Sex Couples' 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).

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

[125] *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.

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

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

[128] *QT v. Director of Immigration* [2018] 4 HKC 403.

[129] *Leung Chun Kwong v. Secretary for Civil Service* [2019] 4 HKC 281.

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through the legal process have been very promising. The local community, international organizations, and multinational corporations have celebrated many of these decisions.[130]

I am not arguing that the Hong Kong courts have decided these cases based on public opinion. Their 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 of Hong Kong people. This represents one of many cases in Hong Kong where the courts appear to have followed public opinion.[131]

A similar pattern can be found in the constitutional development of women's 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.[132] Because of its "non-democratic framework," as Erica Bussey observes, "the 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."[133] As a result, the "only place" where "issues of national importance" can be debated is the courts.[134] Accordingly, women rights organizations such as the Uganda Association of Women Lawyers and Law and Advocacy for Women in Uganda have leveraged the legal process to fight for gender equality.[135] Relying on broadly framed constitutional provisions, the Constitutional Court and the Supreme Court of Uganda have struck down legislation that treated women unfairly on issues of divorce, succession, and adultery, and ruled that the practice of female genital mutilation and the government's

[130] See e.g. Mike Ives, 'Gay Official Wins Court Battle for Spousal Benefits in Hong Kong,' *The New York Times*, June 6, 2019.

[131] Eric C. Ip, 'The Democratic Foundations of Judicial Review under Authoritarianism: Theory and Evidence from Hong Kong' (2014) 12 *International Journal of Constitutional Law* 330.

[132] 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.

[133] Bussey (n 57) 22.

[134] *ibid*.

[135] Mubangizi (n 99).

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nonprovision of basic maternal healthcare were unconstitutional.[136] Again, these cases 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 may create an image of a politically representative court because of the extra legal protection afforded to vulnerable groups who are sometimes representative of majority interests.

4.3.5 *Educative Role*

Finally, the educative role aims to strengthen the constitutional democratic culture of a hybrid regime. This role focuses exclusively on the indirect or "extralegal effects"[137] generated by a constitutional court. Sociolegal scholars have long identified the potential of courts beyond the courtroom.[138] These indirect effects have been called many different names, such as radiating effects,[139] educational effects,[140] ripple effects,[141] and catalytic effects.[142] They highlight the constitutive power of a court, that is, its ability to shape public meanings.[143] 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.[144] Legal and political changes are a function of the many competing claims constantly made by constitutional and political actors.

[136] See Ssenyonjo (n 132); Joseph Oloka-Onyango, *When Courts do Politics: Public Interest Law and Litigation in East Africa* (Cambridge Scholars Publishing 2017) 127–30; *Center for Health, Human Rights and Development (CEHURD) & 3 Ors v. Attorney General* [2020] UGCC 12 (August 19, 2020).

[137] Dieter Grimm, 'Integration by Constitution' (2005) 3 *International Journal of Constitutional Law* 193.

[138] 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* (Longmans 1983); Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law & Social Inquiry* 975.

[139] Galanter *ibid*.

[140] Sadurski (n 13) 286.

[141] Celeste Arrington, 'The Mechanisms behind Litigation's "Radiating Effects": Historical Grievances against Japan' (2019) 53 *Law & Society Review* 6, 7.

[142] Tamir Moustafa, *Constituting Religion: Islam, Liberal Rights and the Malaysian State* (CUP 2018) chapter 1.

[143] *ibid*; McCann (n 138).

[144] Richard McAdams, *The Expressive Powers of Law: Theories and Limits* (HUP 2015).

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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. Moreover, social media and the internet enable the constitutive power of a court to 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, and 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 section explores the wide range of educative effects courts can produce, and underscores a few principles that can guide judges in taking up the educative role.

As argued in this chapter, 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. 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 displays of abuse and impunity create the impression that powers to be can "get away with it." The referee role has a secondary effect of demonstrating to the public that rule of law as an ideal is achievable and is to be taken seriously. The indirect impact of the referee role is to socialize the people and the incumbent into rule-of-law norms.

The words chosen and the reasoning adopted by a constitutional court shape the language used in the constitutional landscape. Judges need to be aware of the potential power of rhetoric, and 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 the 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."[145] 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."[146] Political actors' adoption of a set of constitutional language might lead to their internalization of

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

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constitutional norms. The rhetoric of the court structures the behavior of the incumbent and could potentially 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, oppositional groups and dissidents can learn to transform grievances into rights-based claims. This change of frame – from a narrow political demand to a generalizable right – potentially legitimizes their claims, widening the appeal of their political message and increasing its relevance.[147] 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 of a judicial decision. Case studies have shown how merely granting standing can already endow political claims with credibility and legitimacy.[148] In Pakistan, while anticorruption 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."[149]

The court and its decisions can act as focal points to destabilize the authoritarian as well. The incumbent intentionally makes coordination by the opposition difficult through a range of 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 court's decision that brings constitutional violations to the public's attention could potentially mobilize the public against the incumbent.[150] Legal defeats might also spark public outrage against authoritarian policies.[151] For instance, even though the

[147] Arrington (n 141) 21–2.
[148] Arrington (n 141) 22.
[149] 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.
[150] David Law, 'A Theory of Judicial Power and Judicial Review' (2008) 97 *Georgetown Law Journal* 723.
[151] See Douglas NeJaime, 'Winning Through Losing' (2011) 96 *Iowa Law Review* 941.

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Constitutional Court of Uganda struck out an initial application challenging the government's failure to provide adequate maternal healthcare, the Museveni government decided shortly after to improve hospital conditions and emergency services, possibly because it had to appease growing dissatisfaction of its public healthcare system.[152] Focal points can also be created by other events related to 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."[153]

A constitutional court might also act as a conduit for messages, and a constitutional court can control the reach of 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.[154] 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.

4.3.5.1 Principles in Applying the Educative Role

The examples given so far contain some lessons for how a constitutional court can play this educative role effectively. First and foremost, the court 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 resources and capacities of their various audiences and on the normative orderings indigenous to the various social locations where messages from the courts impinge."[155] 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, their motivations, and potential responses. The coming chapter elaborates further on the importance of courts remaining sensitive to their audiences.

[152] Oloka-Onyango (n 136) 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.

[153] Arrington (n 141) 25.

[154] Yoav Dotan and Menachem Hofnung, 'Legal Defeats–Political Wins: Why Do Elected Representatives Go to Court?' (2005) 38 *Comparative Political Studies* 75.

[155] Galanter (n 138) 118.

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Second, a constitutional court must closely attend 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 wishes to convey, it should aim 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 above reveals an inherent limitation of this role: the creation of meaning is a dynamic process, and courts cannot determine public meaning on their own, at most being able to shape and influence its formation. A court can minimize distortion through careful writing, but how a court's behavior and decisions are interpreted are ultimately left to the audiences external to the courtroom. In most cases, however, decisions do not reach audiences directly. More commonly, "sophisticated intermediaries"[156] such as the press, professional organizations, and the academy interpret the decisions and provide a more layperson-friendly narrative. These intermediaries help "translate" the law and amplify the decision. It then becomes important for the court to nurture friendly relations with these intermediaries, as they directly affect a constitutional court's constitutive power. They are not simply transmission vessels, but powerful middlemen who 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 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 the effective implementation of the educative role. In the penultimate chapter, we will examine more closely the ways in which courts can build 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. This is not because of the intrinsic value accorded by this alternative participatory channel. Instead, a court must be accessible so that its political allies can rely on the legal process to disseminate their messages. Some of the educative effects of a court already discussed are impossible if the legal process is

[156] Law (n 150) 751.

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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.

4.4 Institutional Competence

So far, I have argued that a constitutional court should protect and promote democratic values in a hybrid regime. The five roles discussed in this chapter set out different ways for courts to achieve that goal. The roles sometimes also address 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 perhaps demand more of a constitutional court than what would be expected in a democratic political system, hence institutional competency concerns might be magnified. Constitutional lawyers may question whether a constitutional court has the capacity to perform the democratic roles outlined in this chapter and the extent to which those roles are limited by competency concerns.

While acknowledging the institutional limitations of a constitutional court, I argue 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 the political dysfunctionality associated with this. Questions of institutional competency are relative and depend on the extent to which the political branches of government 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 being disputed or undergoing transition, might require a more creative and activist court, as a court may have "no option" but to transcend the law to preserve the constitutional order.[157] Similarly, what I argue is that some of the risks associated with pushing

[157] See N. W. Barber, and Adrian Vermeule, 'The Exceptional Role of Courts in the Constitutional Order' (2016) 92 *The Notre Dame Law Review* 817.

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the normative boundaries imposed by competency considerations are worth bearing because of the democratic benefits it might yield.

Institutional competency captures the idea that authority is allocated according to the institution's likelihood of reaching good outcomes.[158] Is a question suitable for the court to consider given its institutional qualities? A court is considered legitimately exercising its power if it has the necessary capacity to do so.[159] 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, arrive at a decision based on preexisting legal and constitutional norms and accepted modes of reasoning.

Different questions call for different standards of 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.[160] The focused nature of adjudication does not allow courts to address the more layered issues involved. There are also disputes whose resolution lies beyond the expertise of the professionally trained judges: questions of morality or pure preferences might be best left to the masses for public deliberation and voting, while social distribution problems will benefit from technocratic expertise that judges lack.[161] Judges also may not have 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 their decisions with the possibility of creating unintended adverse effects.[162] Conversely, a legislature, with its ability to consult people and cater for a multitude of interests, is designed for policymaking.[163] Presumably, even legislatures in hybrid regimes can gather more information and have access to better political solutions than the courts. Whether the political branches of a hybrid regime actually use their institutional competence for the betterment of society or for authoritarian entrenchment is another issue that I set aside for now. As discussed, institutional

[158] King (n 59) 130. See also Kavanagh (n 81).
[159] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell 1999) 292.
[160] Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.
[161] Donald Horowitz, *Courts and Social Policy* (Brookings Institution Press 1977).
[162] Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (HUP 2006). See also Yowell (n 7).
[163] N. W. Barber, *The Principles of Constitutionalism* (OUP 2018) chapter 3.

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competence is not necessarily related to regime type, and the same limitations exist in courts in hybrid regimes. Transgressing a court's 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 the court 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 be generally assumed from the political branches' position or the subject matter involved.[164] Not every constitutional case poses the same kinds of obstacles to a constitutional court. The fact that a case's impact may be far-reaching and uncertain, for example, does not automatically justify judicial restraint. Judges lay down legal principles; it is a collateral effect of this duty that these principles will affect many people and relationships beyond the litigants.[165]

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, capacity concerns are least relevant for the referee role and the participatory role. 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, in contrast, begins to blur the line between law and politics by allowing political claims to be expressed through the legal process. While the participatory role calls for a generous interpretation of access rules and constitutional rights, it does not suggest that all political claims should be allowed in the courtroom. As argued in this chapter, those looking to use the constitutional court as a participatory channel must translate a political claim into a legal claim by first 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 efficacy of the participatory role is also independent of substantive outcomes. Its benefits are procedural in

[164] Chan (n 79).
[165] King (n 59) 193.

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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" checks the "acceptability of the justifications put forward for interferences with or denials of interests in question."[166] 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, the standards of the legal community, and the kinds of arguments leveled 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.

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. Drawing 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 impact of incumbent bias or neglect.

The educative role highlights the social effects created by a court, some of which may be considered secondary in nature, but those effects are derived from the adjudicative process. In fact, the educative role is functionally similar 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. As I have previously pointed out, the fact that the effects it creates are far-reaching is not necessarily a problem. The real question is whether the messages the court sends are

[166] *ibid* 97.

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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 their own theory of democracy, but to focus on the elements that would promote democratic values during constitutional adjudication. Last, 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 address problems that occur in hybrid regimes as a consequence of how their political branches are structured. Comparative institutional analysis assesses institutions based on *relative* institutional competence.[167] Neil Komesar explains how comparative institutional approaches should be applied to the study of law.[168] Different institutions are "alternative mechanisms by which societies carry out their goals."[169] 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 pathways to reach a particular goal. Institutions should always be assessed relative to each other against a uniform standard. The fact that an institution seems to be performing suboptimally does not necessarily imply 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."[170]

[167] See Daniel H. Cole, 'The Varieties of Comparative Institutional Analysis' (2013) *Wisconsin Law Review* 383.

[168] 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).

[169] *ibid Law's Limits*, 31.

[170] *ibid* 189.

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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 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 up against the potential gains of the democratic roles and the available alternatives. In the absence 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 of 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 their 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 look 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 may only be a temporary remedy, as opposed to a permanent fix. Holding the court constant, if 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.

4.5 Conclusion

In the first half of the chapter, we considered the extent to which democratic objections against judicial review apply to a hybrid regime. I showed that the democratic objections do not hinder the 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 paved 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 enhancing 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

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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 expressive functions.

This chapter acknowledged the limitations that a constitutional court faces in undertaking these roles, but argued that a constitutional court is an attractive second-best solution, given the democratic deficit in a hybrid regime, and considering the lack of viable alternatives and the positive impact exercising these roles can have on embedding democratic values. 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 themselves.

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 the authoritarian climate of a hybrid regime might affect the application of the democratic roles. These issues will be taken up in the coming chapters.

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