8

Conclusion

Of Judicial Choices

The thesis is ultimately about the choices judges *can* and *should* make in hybrid regimes if they seek to push the constitution closer to the democratic end sustainably. These questions are worth asking because many parts of the world are struggling to democratize or experiencing democratic backsliding, *and* that more and more works are showing that somewhat autonomous and powerful courts can exist in this ambiguous regime-type (Chapter 1).

A hybrid regime is a kind of authoritarian regime, but its semi-competitive elections and claim to be a democracy have significant implications on its constitution and create judicial–political patterns worthy of closer examination (Chapter 2). While courts are not substitutes for an effective democratic process, we should not be too pessimistic about the democracy-enhancing potential of courts in hybrid regimes either. This book adopts "a more realistic model of law and of the judicial process" and recognizes the dynamic role that courts can play in hybrid regimes.[1] Courts are not merely on the receiving end of regime-politics; they are also in a position to make meaningful democratic contributions (Chapter 3). They play a role in refereeing the rules of the political game, shoring up democratic norms, protecting the rights of and providing participatory opportunities to the politically disenfranchised, mitigating the problems arising from an unfair electoral system, and strengthening the democratic culture of a hybrid regime (Chapter 4). Putting into practice these democracy-enhancing roles will win the support of the part of the population that subscribes to democratic norms – the democratic constituency – but it will also risk antagonizing the incumbent and its allies – the authoritarian constituency. The dilemma is that both constituencies are crucial to the maintenance and development of judicial power in a hybrid regime but tell conflicting stories of judicial legitimacy (Chapter 5).

[1] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (YUP 1975) 6.

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To address the practical challenges created by the legitimacy paradox, this book has drawn on interdisciplinary and comparative insights to illuminate a range of options available to committed judges in hybrid regimes to address the goal of sustainable democracy advancement under constraining political spaces. A theoretical framework that seeks to integrate democracy-enhancing adjudicative approaches with judicial strategy was proposed in Chapter 6. It shows that judges are not limited to the simplistic options of applying the law formalistically, lying about the law, or resigning. The reality is much more complex: They should consider when it would be permissible to factor in prudential considerations and tinker with different aspects relating to judicial decision-making to create nuanced strategic effects that address those concerns. Judges may also take advantage of its sociopolitical role to generate political leverage and enhance its institutional position. More specifically, in addition to their adjudicative responsibilities, they may also need to build allies and defuse enemies. The techniques proposed in Chapter 7, the application of which is illustrated in the Appendix, further highlight the socially constructed nature of judicial power in a hybrid regime.

The efficacy of the theories and tools provided in this book ultimately depend on the choices judges make. They might look like legal choices but have significant implications on the democratic health of the constitutional order. They are in substance value choices but rarely in absolute terms (such as maximum fulfilment of democracy versus a total regression to authoritarianism); rather, judges must constantly choose between "incremental furtherance" and "marginal vitiation" of competing values.[2] The choices are complicated by a layer of strategic consideration. Like an "evolving hands of cards," as Aziz Huq puts it, the "tactical options" available to a court would vary depending on how the judicial–political relationship unfolds over time.[3] Since this is a matter of choice, a judge's personality and personal motivations would also influence the extent to which a constitutional court can live up to the democratic roles proposed. Not every judge is convinced by the ideal of democracy, and there may be other judicial beliefs and motivations at play, such as career advancement concerns and jurisprudential thoughts. The risk-tolerance level of each individual judge may also differ.

[2] *ibid* 198.

[3] Aziz Z. Huq, 'Democratic Erosion and the Courts: Comparative Perspectives' (2018) 93 *New York University Law Review Online* 21, 27.

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This book is aware of and reflective of the intricate interplay between moral values, regime politics, and constitutional law. The ideas presented may not resonate with all judges, while some may need a bit more persuading. For judges who are democratically committed, the book has attempted to show how the theories and tools offered can help them build institutional resilience *and* contribute to democratic values. The suggestions by no means guarantee these goals, as there is a limit as to what judges have control over in authoritarian environments. Nevertheless, constitutional courts are often heavily involved in the shaping of constitutional norms and structures. The choices judges make can influence the path of constitutional development, sometimes in subtle and unexpected ways. By pushing beyond the boundaries set by conventional conceptions of the judicial role, the book hopes to have instilled optimism in politically challenging environments and demonstrated how judges who are committed to the democratic cause can improve the chances of survival and success of constitutional courts.

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