1

Hybrid Regimes, Constitutional Courts, and Democratic Principles

1.1 Introduction

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

This chapter first situates my argument in the context of two global phenomena: the proliferation of hybrid regimes and the diffusion of court-centric constitutionalism. I then show why a normative look at constitutional courts in hybrid regimes is an important but overlooked topic in the literature. Next, the operating assumptions of the book are specified, and two basic terms are defined, including constitutional courts and democracy. The chapter concludes by offering a roadmap of the book.

1.2 Proliferation of Hybrid Regimes

The book is set against the backdrop of two intersecting developments. The first is the increased prevalence of hybrid regimes. A hybrid regime is a type of nondemocratic regime that exhibits both democratic and authoritarian characteristics.[1] A hybrid regime aims to create the impression of a functioning democracy, but, with unfair elections and the

[1] A more thorough definition of a hybrid regime will be provided in Chapter 2.

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undermining of democratic institutions, its core remains authoritarian. In contrast with citizens in pure authoritarian regimes, those in hybrid regimes are able to participate in political processes, such as elections, to a limited extent.

Hybrid regimes are one of the main regime-types in today's world, complicating the traditional democracy-versus-pure-authoritarian-regime dichotomy. Freedom House's report in 2023 lists close to a third of the countries as "partly free."[2] According to *The Economist*'s 2022 Democracy Index, 21.6 percent of countries are "Hybrid Regimes"; another 28.7 percent are "Flawed Democracies."[3] One study also finds that "three-quarters of authoritarian states [during the 2000s] permitted more than one party to participate in these elections."[4] However one defines a hybrid regime, it is undeniable that a substantial portion of the global population lives under this ambiguous regime-type.

Hybrid regimes are not new, but their growth is unprecedented.[5] Several factors contribute to this phenomenon. The world's march toward democracy largely stopped after entering the twenty-first century. The third wave of democratization, which began in the late 1970s, has been overtaken by a new wave of autocratization.[6] Over the past decade or so, democratic backsliding has affected states around the world.[7] The optimism over third-wave democracies in the late twentieth century has been shown to be largely misplaced. New democracies at the time, such as Venezuela, Hungary, and Poland, have shown significant signs of decay, and those that were classified as semi-democracies or semi-authoritarian regimes, such as Uganda and Singapore, still struggle with authoritarianism. The rise of authoritarian powers like China and Russia is challenging and displacing global norms of democratic governance, further catalyzing autocratization. Even mature democracies like the United States have

[2] *Freedom in the World* (Freedom House 2023).
[3] *The Economist*, 'Democracy Index 2022: Frontline Democracy and the Battle for Ukraine' (2023).
[4] Dawn Brancati, 'Democratic Authoritarianism: Origins and Effects' (2014) 17 *Annual Review of Political Science* 313, 314.
[5] Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (CUP 2010) 14.
[6] Anna Lührmann and Staffan I. Lindberg, 'A Third Wave of Autocratization Is Here: What Is New about It?' (2019) 26 *Democratization* 1095.
[7] Tom G. Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9; Larry Diamond, 'Breaking Out of the Democratic Slump' (2020) 31 *Journal of Democracy* 36.

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not been immune to corrosion.[8] Unlike regime changes in the past, which were usually triggered by sudden events, like coups, this new wave of autocratization is gradual and insidious.[9] As a result, we have seen an increasing number of regimes stuck in between democracy and pure authoritarianism. And, refuting past assumptions, hybridization is not a transitional stage: hybrid regimes have proven to be very durable.[10]

A particularly interesting feature of this new wave of autocratization is that it tends to have a "legal façade."[11] Scholarship on "autocratic legalism"[12] and "abusive constitutionalism"[13] shows how authoritarians today have discovered ways to consolidate political power and undermine accountability through seemingly lawful means and by hollowing out democratic institutions. By adapting the language and form of constitutional democracy in their favor,[14] authoritarians have made contemporary degradation of the democratic process subtle. Detecting and defending against institutional corrosion that takes place behind a legal façade is a challenge for those who lack the necessary expertise. These circumstances heighten the need for judicial institutions to protect and nurture the democratic aspects of a hybrid regime.

1.3 Court-Centric Constitutionalism in Hybrid Regimes

This leads us to the other phenomenon – the diffusion of court-centric constitutionalism. More than a decade ago, Ran Hirschl observed a trend toward "juristocracy," by which he meant the "transfer [of] an unprecedented amount of power from representative institutions to judiciaries."[15] Juristocracy remains highly relevant today. Constitutional review is included in around 80 percent of the

[8] Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018).
[9] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 *Journal of Democracy* 5.
[10] Leonardo Morlino, 'Are There Hybrid Regimes? Or Are They Just an Optical Illusion?' (2009) 1 *European Political Science Review* 273, 283–5.
[11] Lührmann and Lindberg (n 6) 1104.
[12] Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 545.
[13] David Landau, 'Abusive Constitutionalism' (2013) 47 *University of California Davis Law Review* 189.
[14] See William J. Dobson, *The Dictator's Learning Curve: Inside the Global Battle for Democracy* (Random House 2012).
[15] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP 2004) 1.

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world's constitutions.[16] Hardly a day passes without a constitutional court somewhere in the world deciding on issues traditionally thought to be outside the legal realm. These issues are far from trivial, and are often "mega-political" in nature,[17] or of fundamental importance to the very fabric of a polity. Indeed, there appears to be a tendency for constitutional scholars today to equate constitutionalism with constitutional review.

What defies conventional understanding, however, is that court-centric constitutionalism is not limited to democracies. The consensus used to be that courts in nondemocracies were mere puppets, and that judicialization of politics was impossible outside democracies.[18] The empirical evidence today reveals a more nuanced picture: While constitutional courts in hybrid regimes are weaker and less autonomous than their democratic counterparts, case studies and large-N research both show that "judicializing authoritarian politics"[19] happens all the time. More importantly, constitutional courts in nondemocratic regimes, especially in hybrid regimes, have decided on *and* resisted authoritarianism in important cases.[20] Just as hybrid regimes fall in the middle of the political spectrum, studies find that constitutional courts in hybrid regimes enjoy a measure of judicial independence if one allows that judicial independence is a matter of degree.[21] Judicial powers can be developed outside democracies and constitutional courts in hybrid regimes can be moderately independent institutions.[22]

[16] Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *The Journal of Law, Economics, & Organization* 587, 587.

[17] Ran Hirschl, 'The Judicialization of Mega-politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93.

[18] Tamir Moustafa, 'Law and Courts in Authoritarian Regimes' (2014) 10 *Annual Review of Law and Social Science* 281, 282. Even today, some still argue that it is basically impossible for a meaningful constitutional system to exist in an authoritarian regime. See e.g. Francesco Biagi, *European Constitutional Courts in Transition to Democracy* (CUP 2020) 25–6.

[19] Moustafa *ibid*.

[20] See e.g. Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008); Yasser Kureshi, 'When Judges Defy Dictators: An Audience-Based Framework to Explain the Emergence of Judicial Assertiveness against Authoritarian Regimes' (2021) 53 *Comparative Politics* 233; Eric C. Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (CUP 2019); Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (CUP 2007).

[21] Brad Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy* (OUP 2019).

[22] *ibid* 12.

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1.4 The Normative Turn (Informed by Empirical Analysis)

This book brings these two phenomena together and offers a first attempt at a normative-theoretical approach to constitutional courts in hybrid regimes. Specifically, it seeks to articulate the democratic role of a constitutional court and highlights the practical challenges to realizing this role. It also prescribes normative guidelines for constitutional courts in hybrid regimes to advance liberal democratic norms in a sustainable manner while also maintaining judicial independence in an authoritarian climate.

Normative constitutional theory has largely been preoccupied with constitutional systems and the constitutional courts of democratic systems. Despite the resurgence of authoritarian regimes, normative debates about the role of constitutional courts are largely centered around consolidated democracies,[23] new democracies undergoing consolidation,[24] and democracies that are resisting backsliding.[25] Normative constitutional scholars pay scant attention to authoritarian regimes.[26] On the other hand, political scientists and those who conduct empirical studies have begun to uncover the intricacies of constitutional courts operating under hybrid regimes and pure authoritarian regimes. Their research sheds light on the behavioral patterns and functions of these courts.[27]

[23] See e.g. Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346; Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007); Jeff King, *Judging Social Rights* (CUP 2012); Rosalind Dixon, 'The Core Case for Weak-form Judicial Review' (2016) 38 *Cardozo Law Review* 2193; Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (OUP 2023).

[24] See e.g. Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (CUP 2013); Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (CUP 2015); David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 *Boston College Law Review* 1501.

[25] See e.g. Sujit Choudhry, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment: A Reply to Rosalind Dixon and David Landau' (2017) 15 *International Journal of Constitutional Law* 826; Aziz Z. Huq, 'Democratic Erosion and the Courts: Comparative Perspectives' (2018) 93 *New York University Law Review Online* 21; Tom Ginsburg, 'The Jurisprudence of Anti-Erosion' (2018) 66 *Drake Law Review* 823.

[26] Possible reasons for this gap will be suggested in Chapter 3.

[27] See e.g. Moustafa (n 20); Ip (n 20); Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (CUP 2007); Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (CUP 2005); Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (CUP 2008).

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These studies tend to be devoid of normative content as their goals are descriptive and explanatory, or are only focused on institutional survival.[28] Nonetheless, they provide an important foundation for normative theorizing. This book sits at the intersection of normative constitutional theory and comparative judicial political studies, with a greater emphasis on the normative half of the discussion.

Two operating assumptions underpin this book. As previously mentioned, the first is the fact that a moderately independent constitutional court is a realistic possibility for a hybrid regime. More will be said about the sociopolitical foundation of this phenomenon in Chapter 3. The very fact that there is room for constitutional courts to challenge the incumbent regime motivates this research. It would be meaningless to talk about how judges should play a democratic role in pure authoritarian regimes when (semi-)independent judicial institutions do not exist, or struggle to even survive. Equally, judicial autonomy and judicial power[29] means little if it is unclear how judges should assert their authority. For example, judges of an autonomous court can use their powers for personal gain, or such powers can be wielded recklessly and cause the court to self-destruct. The possibility of judicial autonomy opens the space for much-needed normative discussion of the role of courts in a hybrid regime.

Another operating assumption relates to the constitutions of hybrid regimes. Given the illiberal and antidemocratic practices observed in nondemocratic regimes, it is tempting to conclude that constitutions there are "shams."[30] It is perhaps no surprise that most authoritarian constitutions typically promise more than they can actually deliver.[31] However, the formal elements of a constitution are not the only determinants of a state's constitutional performance:[32] whether effective

[28] For example, it is assumed under Helmke's strategic defection model that judges in Argentina are seeking survival under institutionally unstable environments. Helmke *ibid* 144–5, 170. There are also works that are not necessarily regime-type-specific but explore generally the techniques of institutional survival under harsher political climates. See e.g. Erin F. Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66 *Duke Law Journal* 1; Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wisconsin Law Review* 4, 683.

[29] The idea of judicial power will be further elaborated in Chapter 5.

[30] David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863.

[31] *ibid* 919.

[32] State is used in a sociological instead of legal sense. State, as a legal concept, is a system recognized under international law. Here, state is understood as a complex social group –

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constitutional enforcement mechanisms exist or not is also crucial.[33] The effectiveness of a constitutional court – one of the most important constitutional actors within a constitutional order – also shapes a state's constitutional health. Importantly, a constitutional court's effectiveness partially stems from the formal design of a constitution. To some extent, the constitution determines the latitude possessed by courts. A constitutional court derives its legitimacy from the constitution; provisions relating to constitutional jurisdiction and human rights, for example, offer crucial ammunition for asserting its authority. A constitution that eliminates any meaningful space for constitutional review would render any normative discussion in this area futile.

Fortunately, constitutions in hybrid regimes do tend to offer the raw materials for constitutional courts to potentially play a meaningful role. As noted, the vast majority of constitutions in the world explicitly provide for constitutional courts. Most constitutional courts are expressly endowed with the constitutional authority to decide on constitutional matters. Large-N research also finds that constitutions in nondemocratic regimes formally resemble those in democracies.[34] For example, constitutions in hybrid regimes contain similar numbers and kinds of rights to those of democracies, provisions that define the state as a democracy, and safeguards that give effect to judicial independence. The reason for this partial resemblance stems from hybrid regimes' attempts to capture the reputational gains of adopting democratic constitutional features. Adopting them can be a double-edged sword for authoritarians, who may be tempted to incorporate them to attract

with citizens, bound together by rules (i.e. the constitution) within a territory, interacting with the state, institutions, and one another; a state must be capable of claiming authority over its citizens. For instance, Hong Kong, as a Chinese Special Administrative Region, is not a state under international law, but it is a state sociologically as the Hong Kong government exerts control and asserts legitimacy over its citizens within the territory of Hong Kong. See N. W. Barber, *The Constitutional State* (OUP 2010) chapter 2.

[33] See James Melton, 'Do Constitutional Rights Matter? The Relationship between De Jure and De Facto Human Rights Protection' (2013), available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.375.9784&rep=rep1&type=pdf, last visited April 28, 2023.

[34] David S. Law and Mila Versteeg, 'Constitutional Variation among Strains of Authoritarianism' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2013) 165; Tom Ginsburg, Zachary Elkins, and James Melton, 'The Content of Authoritarian Constitutions' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2013) 141; James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' (2014) 2 *Journal of Law and Courts* 187.

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foreign investors and stimulate the economy, or to shore up popular support for the regime.[35] However, the incorporation of democratic constitutional features brings along constitutional norms that can (and should) be used against the authoritarian when the regime falls short of what the constitution demands. In other words, the constitutional elements borrowed from democracies are standards waiting to be held against the authoritarian. The democratic side of a hybrid regime constitution furnishes a constitutional court with options and grants it leeway to wrestle with a hybrid regime.

At this stage, some readers may feel that this book is overly confident about the democratic potential of constitutional courts in hybrid regimes. While the assumptions set out so far give us good reasons to think normatively about how constitutional courts can further the liberal democratic causes in hybrid regimes, one might point out that constitutional courts in real-life hybrid regimes are inevitably subject to authoritarian pressures. Case studies have shown that many courts are captured by the incumbent and are complicit in authoritarian oppression.[36] Some large-N studies also question the general effectiveness of constitutional courts. Adam Chilton and Mila Versteeg, for example, argue that "constitutional rights do not appear to be better protected in countries with independent courts equipped with the power of judicial review."[37] Instead, their findings suggest that "rights enforcement ultimately falls on citizens themselves."[38]

The book acknowledges the vulnerabilities and weaknesses of constitutional courts in hybrid regimes. Its tone is perhaps best described as cautiously optimistic. A constitutional court alone probably cannot bring about regime change, and political transitions rarely occur inside the courtroom. However, courts are positioned to create more favorable conditions for regime change to occur. Legal constitutionalism and political constitutionalism are not necessarily binary choices, and constitutional courts are able to empower the people and other constitutional

[35] See e.g. Daniel A. Farber, 'Rights as Signals' (2002) 31 *The Journal of Legal Studies* 83; Moustafa (n 20); Rosalind Dixon, 'Constitutional Rights as Bribes' (2018) 50 *Connecticut Law Review* 767.

[36] David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts against Democracy' (2020) 53 *UC Davis Law Review* 1313.

[37] Adam S. Chilton and Mila Versteeg, 'Courts' Limited Ability to Protect Constitutional Rights' (2018) 85 *The University of Chicago Law Review* 293, 297.

[38] *ibid*.

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actors.[39] There are also secondary but meaningful effects produced by the legal decisions of a constitutional court. For example, constitutional courts can cultivate citizens' general understanding of their rights, enable their voices to be heard through the legal process in politically repressed environments, or even trigger mass mobilization by highlighting constitutional violations by the government. These effects are practically and morally significant even though the causal mechanisms behind them are hard to empirically verify. These contributions by constitutional courts may look modest, but can have wide-ranging consequences for hybrid regimes and the lives of citizens under them, especially when these contributions are aggregated over time.

While empirical research downplays the independent influence of constitutional courts in protecting rights and promoting democracy in a general sense,[40] it does not foreclose discussion over how constitutional courts in hybrid regimes should exercise their authority. It may well be the case that many constitutional courts exercise their constitutional authority and powers in ways that fail to maximize their democratic potential in a sustainable manner. Still, some have successfully brought about meaningful change, as we shall see later in this chapter. The paths taken by these examples offer much-needed direction and insights.

Many of the claims made in the book are supported by comparative examples from around the world. These comparative examples mainly come from, but are not limited to, hybrid regimes. There is a growing focus on how comparative constitutional research should be conducted, and the methodologies some constitutional scholars apply in their research have been accused of being inadequate. There is no one-size-fits-all method for comparative constitutional research because the methodology required depends on the research aim. Those seeking to establish causation should adhere to more rigorous standards of social scientific inquiry. My intention here is normative, and my comparative insights play a secondary (but still important) role. As Hirschl points out, "the legal philosopher is interested in formulating moral justifications or principles for best practices at the ought (rather than the is) level, and may thus be forgiven for supporting her insights with a small number of

[39] Some political constitutionalists accept at least a limited role for constitutional courts to play in democracies. See Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 *University of Toronto Law Journal* 1.

[40] Ran Hirschl, 'Epilogue: Courts and Democracy between Ideals and Realities' (2013) 49 *Representation* 361, 363.

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possibly unrepresentative cases."[41] This is not to say that the illustrations I draw upon are particularly odd or exceptional, but that my selectiveness is perhaps forgivable and justified. The comparative evidence is used to strengthen the plausibility of my claims and to showcase the techniques that can be adopted by courts and judges in hybrid regimes.

Three jurisdictions are frequently referenced in the book: Hong Kong, Pakistan, and Uganda. More precisely, there will be a relatively large number of illustrations coming from the courts of post-handover Hong Kong from 1997 to 2019, Pakistan under General Pervez Musharraf from 1999 to 2008, and Uganda after its first national election in 1996. These jurisdictions and periods are singled out for two reasons.

First, although their democratic trajectories turned out to be quite different, these jurisdictions during the aforementioned time periods are widely considered by experts to have been hybrid regimes.[42] A more thorough account of a hybrid regime will be offered in the next chapter, but what these polities had in common was semi-competitive electoral systems, and their intention and efforts to mimic a constitutional democracy. They are full of contradictions, and their diverging impulses of democracy and authoritarianism have led to their ambiguous outlook. I now briefly describe the relevant periods of these jurisdictions.

While Hong Kong is a Chinese city, it operates under the "One Country, Two Systems" principle. Under this constitutional principle, Hong Kong retains its own political, economic, and legal systems. The Basic Law, Hong Kong's de facto constitution, simultaneously expresses China's assertion of its sovereignty over Hong Kong and its tolerance of the city's autonomy. Hong Kong aspires (or pretends) to be democratic, as the Basic Law specifies universal suffrage to be the ultimate method of

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

[42] For Hong Kong as a hybrid regime, see Brian C. H. Fong, 'State–Society Conflicts under Hong Kong's Hybrid Regime: Governing Coalition Building and Civil Society Challenges' (2013) 53 *Asian Survey* 854; Ngok Ma, 'Hong Kong's Democrats Divide' (2011) 22 *Journal of Democracy* 54; Julius Yam, 'Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts' (2021) 46 *Law & Social Inquiry* 153. For Pakistan as a hybrid regime, see Aqil Shah, 'Pakistan's "Armored" Democracy' (2003) 14 *Journal of Democracy* 26; Larry Diamond, 'Elections without Democracy: Thinking about Hybrid Regimes' (2002) 13 *Journal of Democracy* 21, 31. For Uganda as a hybrid regime, see Aili Mari Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime* (Lynne Rienner Publishers 2010); Valérie Arnould, 'Transitional Justice and Democracy in Uganda: between Impetus and Instrumentalisation' (2015) 9 *Journal of Eastern African Studies* 354; Sandrine Perrot and others (eds), *Elections in a Hybrid Regime: Revisiting the 2011 Ugandan Polls* (Fountain Publishers 2014).

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electing the city's leader and lawmakers. Like other hybrid regimes, elections exist in Hong Kong, but are far from free and fair. The electoral system is plagued with institutionalized biases that favor pro-Beijing parties. Nevertheless, at least prior to the passage of the National Security Law in 2020 and the overhaul of the political system in 2021, Hong Kong civil society was reasonably active and the prodemocratic opposition had won a considerable number of seats in previous parliamentary and local elections. There were modest democratic reforms over the years, but these required Beijing's consent. It should be noted that Hong Kong is arguably no longer a hybrid regime, for it took a sharp, authoritarian turn in 2020. In response to the anti-extradition bill protest – the largest protest movement in post-handover Hong Kong's history – China launched a series of crackdowns, jeopardizing the city's reputation as an international financial center. With the enactment of the National Security Law, electoral reforms, rampant disqualifications and arrests of opposition lawmakers and candidates, and state-instigated attacks on civil society, political space for opposition is close to being completely eliminated.

Pakistan has a troubled history of military dictatorships, and Musharraf's Pakistan is one such example. In 1999, Pervez Musharraf overthrew then-Prime Minister Nawaz Sharif via a military takeover. After the bloodless coup, Musharraf proclaimed to be the president and formally took office in 2001. Local and national elections were held under his tenure. Freedom of press and information improved during this time as well,[43] but elections were far from free and fair. Describing Pakistan as a hybrid regime under Musharraf, Aqil Shah writes, "[Pakistan's] elections are not completely without meaning, but the principles of civilian rule and constitutionalism are honored far more in the breach than in the observance."[44] Election monitors documented the many irregularities of those elections, for example the misuse of state resources to support the incumbent's campaign, and the incarceration and intimidation of opposition figures.[45] Musharraf's presidency was extended for another five years after a controversial referendum staged in 2002, and the constitution was

[43] Marta Bolognani, 'Virtual Protest with Tangible Effects? Some Observations on the Media Strategies of the 2007 Pakistani Anti-emergency Movement' (2010) 18 *Contemporary South Asia* 401, 403.

[44] See Shah (n 42) 27.

[45] See Human Rights Watch, 'Elections since General Pervez Musharraf Took Power in 1999' (2008), available at www.hrw.org/legacy/pub/2008/asia/Elections_Under_Musharraf_1999-2007.pdf, last visited April 28, 2023.

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amended to empower himself and the military.[46] As Musharraf approached the end of his presidency, he attempted to extend his tenure further by declaring a state of emergency and suspending national elections. These moves, together with the removal and arrest of judges, triggered a public uproar. His party was eventually defeated in the 2008 elections. With impeachment looming, he resigned, went into exile, and passed away in Dubai in 2023. His electoral defeat is a testament to the distinctiveness of a hybrid regime: Although elections are often rigged to favor the incumbent, opposition success remains possible.

Finally, another country with a checkered history of military dictatorship is Uganda. Taking power after a coup in 1986, Yoweri Museveni is the longest-serving president of postindependence Uganda, as well as one of the world's longest-serving leaders. He held his first national elections in 1996. Before the 2006 elections, Uganda operated as a "no-party democracy." Coined by Museveni himself, this system did not allow multiparty competition, and any opponents could only run as independent candidates. The system was packaged as a way to promote political inclusiveness and reduce party-political conflicts. Multiparty politics was eventually introduced in 2005 after a referendum. Once described as a "beacon of hope" by then-US Secretary of State Madeleine Albright,[47] Uganda made tremendous improvements economically and democratically under Museveni's leadership, especially in comparison with his predecessors. Like elections in Pakistan and Hong Kong, however, Uganda's electoral system is rife with irregularities. Corruption is widespread and electoral regulation is ineffective.[48] The incumbent party is routinely accused of using public funds to finance electoral campaigns.[49] Opposition candidates have been charged and kept in pretrial remand so as to limit their ability to campaign. Most controversially, Museveni amended the constitution a number of times to lift the age of retirement and presidential term limit. With an internet blackout before voting day,

[46] Husain Haqqani, 'History Repeats Itself in Pakistan' (2006) 17 *Journal of Democracy* 110, 111.

[47] Madeleine K. Albright and Yoweri Museveni, 'Joint Press Availability' (Kampala, Uganda, December 10, 1997), available at https://1997-2001.state.gov/statements/971210b.html, last visited April 28, 2023.

[48] The Inspectorate of Government, The Republic of Uganda, *The Third Annual Report on Tracking Corruption Trends in Uganda: Using the Data Tracking Mechanism* (December 2012) 33.

[49] See Julie K. Faller, 'The System Matters: Corruption and Vote Choice in Uganda' (2015) 53 *Commonwealth & Comparative Politics* 428.

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the imprisonment of the main opposition presidential candidate and a large-scale crackdown on opposition protests, the most recent election in 2021 saw the lowest voter turnout rate in Uganda's history, and was described by a commentator as "one of the most violent in recent memory."[50] Through tactics of patronage and violence (both real and the threat thereof), Museveni remains undefeated in the ballot box.

Aside from all being hybrid regimes, the second reason for picking these jurisdictions is that they have courts with prolonged spells of successfully challenging the regime. The track records of these courts are not spotless, and they have suffered varying degrees of attacks from the incumbents. But, all things considered, the general consensus is that they are success stories despite the harsh political climates they operate in. The Hong Kong judiciary, as Eric Ip puts it, is "the only political organ that has ever succeeded in continually resisting Beijing in the constitutional history of the People's Republic of China."[51] Pakistan's Supreme Court "remained an active and organized democratic enclave under the military rule of Pervez Musharraf from 1999 to 2008."[52] The High Courts of Uganda are similarly described as a "vocal, assertive judiciary valiantly attempting to maintain its power and independence,"[53] which "consistently resisted government meddling in verdicts, efforts to ban the right to bail, and countless other attempts to limit its authority."[54]

One might observe that Pakistan is the only of the three that has arguably democratized (or headed down a more democratic route).[55] The fact that Hong Kong and Uganda went the other way or remain hybrid regimes, however, does not detract from the accomplishments of their respective courts. After all, transitioning to democracy, and regime change more broadly, is a complex process involving many actors within and beyond the polity. There is a tendency to reduce democratization to

[50] Sophie Neiman, 'Will the U.S. Still Back Uganda's Museveni Despite Another Sham Election?' *World Politics Review*, January 25, 2021, available at www.worldpoliticsreview.com/articles/29376/after-uganda-elections-will-the-u-s-still-back-museveni-s-brutal-regime, last visited April 28, 2023.

[51] Eric C. Ip, 'Constitutional Competition between the Hong Kong Court of Final Appeal and the Chinese National People's Congress Standing Committee: A Game Theory Perspective' (2014) 39 *Law & Social Inquiry* 824, 825.

[52] Bruce Gilley, 'Democratic Enclaves in Authoritarian Regimes' (2010) 17 *Democratization* 389, 393.

[53] Rachel L. Ellett, 'Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda' (PhD thesis, Northeastern University 2008) 408.

[54] Mari Tripp (n 42) 87.

[55] Other recent examples of hybrid regime incumbents losing in elections include Yahya Jammeh in The Gambia and Barisan Nasional in the 2018 Malaysian general election.

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discrete events, and glorify those who play a prominent role in them. The reality, though, is that democratization is the logical outgrowth of a long, arduous struggle between the incumbent, the people, and other political actors, including the courts. Understanding democratization as a process as opposed to a single event helps us better appreciate what can be offered by constitutional courts. As the book later shows, the decisions and actions of judges may not always lead to a democratic transition, but they can certainly support democratic practices and structures, as well as forestall the erosion of democratic norms.

Courts from these three jurisdictions have made lasting contributions to advancing democratic causes. Courts in Hong Kong, for instance, time and again ensured fair and proper trials for dissidents, and promoted the development of civil rights. Regarded by the local community as the "guardian of the people's interests,"[56] the Pakistani Supreme Court "challenged the foundations of General Musharraf's regime in a series of landmark decisions"[57] and subsequently triggered the democratization movement in Pakistan. Notable feats of Ugandan judges include ruling unconstitutional a referendum that was allegedly rigged and going on strike to protest against attacks on the rule of law. Resisting a military dictator or one of the most powerful political parties in the world is no easy task. The successes of these judges can, to a large extent, be attributed to their vision of cultivating judicial independence and judicial power, their acumen in choosing the right battles to fight and their dedication to the values of constitutional democracy. These stories illustrate the normative claims I develop in subsequent chapters and demonstrate the potential for courts to play a modest democratic role in hybrid regimes. The techniques these judges have used may also inspire their peers in similarly repressed political environments.

1.5 Constitutional Court

This section and the next define two core concepts used in this book: constitutional court and democracy. The aim is twofold: to clarify what I mean when deploying these concepts, and to highlight some of their salient features, which will help develop arguments later in the book.

[56] Ayaz Amiz, 'My Lord the Chief Justice Takes Notice,' *Dawn*, May 5, 2010, as quoted in Asher A. Qazi, '*Suo Motu*: Choosing Not to Legislate Chief Justice Chaudhry's Strategic Agenda' in Moeen H. Cheema and Ijaz Shafi Gilani (eds), *The Politics and Jurisprudence of the Chaudhry Court 2005–2013* (OUP 2015) 305.

[57] Kureshi (n 20).

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The account of a constitutional court proposed here is what I call "the standard account." It is uncontroversial and should accord with a common understanding of a constitutional court. Nevertheless, there are other ways of defining a constitutional court, and the standard account does not pretend to be a complete account. Under the standard account, there are three dimensions to a constitutional court: constitutional, political, and legal.[58] I discuss the crucial features of each dimension. In the following chapters, we will look at the salience of each dimension in a hybrid regime.

Beginning with the constitutional dimension, a constitutional court is a court that enjoys constitutional jurisdiction. These courts enjoy constitutional adjudicative powers to enforce the constitution, with access to a range of unique tools.[59] Of course, a constitutional court is not the only constitutional actor, as the people, political representatives, and political parties also have roles to play in defining, interpreting, and applying the constitution. Unlike these other actors, a constitutional court has more direct access to the constitution. Its authority over the constitution is especially strong because it derives a legal mandate from the constitution to interpret and enforce it. It is a powerful constitutional actor as well, because constitutional amendment requirements tend to be stringent. The harder it is to amend the constitution, the more constitutionally durable a constitutional court's decision becomes.

It should be emphasized that the term "constitutional court" as used in this book encompasses all models of constitutional court, including the centralized constitutional court (also known as the Kelsenian or European model) *and* the decentralized constitutional court (also known as the American model). Constitutional courts under these two models display important differences in terms of, inter alia, breadth of jurisdiction, form of constitutional review, length of judicial tenure, position within the judicial hierarchy and docket load.[60] Many suggestions proposed later in the book regarding how judges should advance democratic norms in hybrid regimes are contingent upon the institutional features of a constitutional court, and the specific *kind* of constitutional court at stake naturally affects how and the extent to which some of

[58] The standard account is inspired by Dieter Grimm's account of a constitutional court. Dieter Grimm, *Constitutionalism: Past, Present and Future* (OUP 2016) chapter 9.

[59] Some of the tools will be discussed in Chapter 4.

[60] For a comparison of the two models of constitutional review, see Alex Stone Sweet, 'Constitutions and Judicial Power' in Daniele Caramani (ed), *Comparative Politics* (OUP 2008).

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the suggestions play out. For instance, centralized constitutional courts under the Kelsenian model and apex courts under the American model tend to have greater access to resources and support than the lower courts; accordingly, centralized constitutional courts and apex courts will have relatively more latitude when it comes to judicial strategizing. The arguments made in this book are relevant to all kinds of courts with constitutional jurisdiction. Issues common to constitutional courts are highlighted and addressed throughout the book, even though the extent to which they apply may vary depending on how a constitutional court is institutionally structured.

Because of a constitutional court's jurisdiction over constitutional issues, a constitutional court also has a political dimension. It has become fashionable for constitutional scholars, especially political scientists, to describe constitutional courts as political actors or political institutions. While one should apply this label carefully, as it may give an overly simplistic impression of how constitutional courts actually work, there is some truth in this characterization. A constitutional court is necessarily political because of its origin and impact. Constitutional courts are instituted by the constitution, and constitutional judges are appointed by political representatives. Both processes are political in nature because they involve political actors and depend on the distribution of political powers. More importantly, a constitutional court deals with constitutional issues, which often involve fundamental norms of a polity. A constitutional court regulates how political powers are exercised and checks to see if laws and policies are constitutionally valid. In addition to constitutional review powers, many constitutional courts possess ancillary powers, such as the power to issue advisory opinions, the power to correct legislative omissions, and the power to adjudicate electoral disputes.[61] Some would argue that these powers are beyond a constitutional court's role of a "negative legislator." Nevertheless, these functions are commonly found in today's constitutional courts and further enhance their political impact. A constitutional court is political in nature because its targets are political and the issues they face have strong political overtones.

What differentiates a constitutional court from the political branches of government is its legal dimension. It is legal in several senses. Unlike elected representatives, a constitutional court is not *directly* accountable

[61] Tom Ginsburg and Zachary Elkins, 'Ancillary Powers of Constitutional Courts' (2009) 87 *Texas Law Review* 1431.

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to the people. Instead, judicial independence is the hallmark of a constitutional court. It is not a constitutional court's duty to track the preferences of the people; rather, its purpose is to give life to the constitution according to constitutional legal principles. The independent exercise of the constitutional court's functions is fundamentally important to the court's identity, because the demands of constitutional justice may run contrary to the views of the people and its representatives. The court's institutional isolation, especially compared to other political institutions, helps promote the values of impartiality and fairness. Despite the political significance of a constitutional court, what differentiates it from a statesperson is the fact that it *must* apply a legal methodology when executing its functions.[62] Constitutional judges must express their judgments in the language of the law. They must rely on constitutional-legal principles such as *stare decisis*[63] or canons of interpretation to decide cases. Judicial discretion still exists within the boundaries of the law, but the legal methodology considerably constrains judicial decision-making. Constitutional judges cannot reach an outcome simply because of pressure from an interest group, for instance. The legal methodology defines how a constitutional court should perform its duties. The principled nature of a constitutional court completes the standard account of a constitutional court.

While the book focuses on constitutional courts, the insights offered are potentially relevant to ordinary courts in hybrid regimes. Constitutional courts are singled out because their very nature brings them into close proximity with the constitutional politics of hybrid regimes. However, ordinary courts dealing with criminal trials of dissidents or adjudicating a private dispute between competing political factions, for instance, can also be constitutionally relevant and/or politically significant. Ordinary judges can be similarly committed to democratic principles *and* impacted by authoritarian pressures as well. Therefore, the normative and sociological discussions later in the book do, to some degree, apply to courts generally in hybrid regimes. The practical guidelines to be offered may also be helpful to ordinary judges.

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

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

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The relevance of the book extends beyond constitutional courts or courts generally in hybrid regimes. Democracies, hybrid regimes, and pure authoritarian regimes are not hard categories, and a degree of fluidity exists among them. This is especially true today. As mentioned already, democratic backsliding has been a striking global development over the past decade or so, and authoritarianism is creeping into all types of regimes.[64] Contemporary processes of degradation of democratic institutions are usually gradual and subtle. Courts under other types of regimes may face similar challenges to hybrid regimes as a result. It is hoped that lessons imparted in the book will inspire not only courts in hybrid regimes but also those in democracies resisting erosion, as well as in post-authoritarian states struggling to institutionalize democratic ideals.

1.6 Democracy

Given the book is about the democratic role of a hybrid-regime constitutional court, it is necessary to define democracy. I conceptualize it in normative and not descriptive terms. We need to know what democracy means in order to evaluate whether a court is enhancing democratic norms. A normative account of democracy articulates the principles that are relevant to a constitutional court playing a democratic role. Like the definition of constitutional court put forward in this chapter, the account of democracy offered does not aspire to be a complete account, but aims to be enough for this book.

The theoretical framework I offer can accommodate robust accounts of democracy, but the book adopts a relatively minimalist conception of democracy. This is sufficient to animate the discussion and facilitate critical evaluation in the later chapters. The account of democracy adopted here is borrowed and adapted from Aziz Huq and Tom Ginsburg. In *How to Save a Constitutional Democracy*,[65] the authors identify three requirements for a democracy: periodic free and fair elections; the protection of first-generation or liberal rights such as freedom of speech, assembly, and association; and the rule of law. These "system-level properties . . . intertwine and interact closely"[66] to form a particular conception of democracy: liberal constitutional

[64] Daly (n 7); Diamond (n 7).
[65] Huq and Ginsburg (n 8).
[66] Aziz Z. Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, 87.

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democracy. Accordingly, democracy is defined as pluralistic political competition within constitutional boundaries. Their account is well suited to the aims of this book, because the legal and institutional focus of the three components orients discussion about the moral qualities that inform how judicial power should be exercised. Next, I elaborate upon the three requirements, making some adjustments for the purposes of this book.

Free and fair elections are central to a democracy. Huq and Ginsburg follow Joseph Schumpeter by defining free and fair elections in relation to regularity in the transfer of power. That is, a free and fair election allows for "a genuine possibility of alteration in power."[67] The topic of how to determine whether elections are free and fair will be revisited in the next chapter. What I emphasize here is the guiding principle behind this element. Political equality is the foundational value of a democracy. There are many ways to justify this value, from equal respect[68] to nondomination.[69] Regardless of its many justifications, political equality is based on the idea that individuals are of equal moral worth, and a system of government should be designed to protect and promote people's equal political liberty. Disagreement among reasonable persons occurs in every social group, and the challenges polities face is finding a method to resolve disagreements without undermining the equality principle. Meaningful elections not only enable the peaceful transfer of power, but allow political equality to be realized amid disagreement. As a set of procedures for selecting political representatives, a free and fair electoral process instantiates people's equal right to participate in the political process. In institutional terms, the system must confer on every person an equal right to vote and to run for election, and establish fair rules for the conduct of elections and the transfer of power.

A democracy is not only about the moment of voting, however. Equal and universal suffrage would mean little if, for example, people were barred from exchanging or expressing their views freely. In addition to free and fair elections, the enforcement of liberal rights, or what might be called first-generation rights, is another important condition of democracy. These rights – including, but not limited to, freedom of speech, association, and assembly – guard against state interference with individual liberties and give people the power to influence politics. They

[67] Huq and Ginsburg (n 8) 10.
[68] Jeremy Waldron, *Law and Disagreement* (OUP 1999).
[69] Bellamy (n 23).

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guarantee the communicative context necessary for the realization of political equality and the proper functioning of a democracy.[70] Huq and Ginsburg rightly acknowledge that the three rights specified do not exhaust the list of rights necessary for a democracy. The right to freedom of the press and the right to information are clearly extensions of the right to freedom of expression. People need to be sufficiently informed to have a meaningful exchange of ideas. Press freedom and freedom of information enable the realization of freedom of expression and ensure that people can make informed political decisions. Parliamentary immunity – that is, lawmakers' legal immunity for what they say during parliamentary proceedings – and the right to form political parties derive from the freedom of expression and the freedom of association respectively.[71] The authors also suggest a more novel example: the right against unreasonable search and seizure in the United States. This may not initially appear to be a liberal right, but it can and has been exercised in defense against state efforts to stifle political speech and association.[72] This second component of democracy (i.e. liberal rights) can encompass a wider range of rights and entitlements that serve to maintain the integrity of and conditions necessary for a democratic political process.

The final component is the rule of law. Its distinctive contribution is to define how powers should be structured and exercised in a democracy. Huq and Ginsburg argue that rule of law is "functionally necessary to allow democratic engagement without fear or coercion."[73] The authors follow Lon Fuller's famous institutional requirements, which state that the legal regime of a democracy must be public, transparent, predictable, and stable, among other things. Constitutionalism, as a form of institutionalized constraint, is commonly regarded to be the manifestation of rule of law. "A measure of institutionalization and legalized routines"[74] create "even-handedness and apolitical administration."[75]

Democratic politics can only take place in an environment that respects the formal demands of the law, and the institutional requirements of rule of law seek to minimize the chances and space for arbitrary power. Accordingly, the rule of law is, as Martin Krygier constantly reminds us,

[70] Robert Post, 'Democracy and Equality' (2006) 603 *The Annals of the American Academy of Political and Social Science* 24, 28–9.
[71] Huq and Ginsburg (n 8) 12–13.
[72] *ibid* 12.
[73] Huq and Ginsburg (n 66) 87.
[74] Huq and Ginsburg (n 8) 13.
[75] *ibid*.

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a "response to a problem, often described as arbitrary power."[76] Power is commonly viewed as arbitrary when it is uncontrolled and unpredictable, and when it is exercised in a way that lacks due respect for its subjects.[77] Arbitrariness is a particular problem that characterizes authoritarian regimes. Aside from limited or nonexistent political pluralism, authoritarian regimes, including hybrid regimes, are said to have "ill-defined limits,"[78] a "pretense of accountability,"[79] and "arbitrary governmental authority."[80] Indeed, contemporary usage of the term "authoritarianism" tends to reference illiberal and oppressive political practices.[81] This is, of course, not incidental: that authoritarian regimes are prone to arbitrariness is a consequence of their unchecked powers.

While democracy depends on rule of law, as a democratic principle, rule of law cannot be fully satisfied without competitive elections. Aside from minimizing arbitrariness and creating a favorable environment for democratic interactions, rule of law seeks to ensure the law's purpose as *intended by a democratic legislature*. "The rule of law," as Nick Barber writes, "requires that law make the differences it purports to make."[82] Under a democracy, the difference the law purports to make is decided by the people. It is the consent of the people that gives law its legitimate authority. The spirit of a democracy is self-governance. Democracy seeks to create a system that is made for the people and by the people. Rule of law connects this democratic aspiration with reality by ensuring that democratically made laws are taken seriously. Without competitive elections, the contents of the law and the political system more broadly are easily manipulated by an unchecked power.[83] Rule of law would be significantly less valuable if it simply inscribed the will of the authoritarian in the law. Rule of law's relationship with democracy is, consequently, a mutually dependent one: rule of law is necessary to

[76] Martin Krygier, 'What's the Point of the Rule of Law' (2019) 67 *Buffalo Law Review* 743, 746.
[77] See Martin Krygier, 'The Rule of Law and State Legitimacy' in Wojciech Sadurski, Michael Sevel, and Kevin Walton (eds), *Legitimacy: The State and Beyond* (OUP 2019).
[78] Juan J. Linz, 'An Authoritarian Regime: The Case of Spain' in Erik Allardt and Yrjö Littunen (eds), *Cleavages, Ideologies and Party System* (Westermarck Society 1964) 255.
[79] Lee Morgenbesser, 'The Menu of Autocratic Innovation' (2020) 27 *Democratization* 1053.
[80] Gábor Attila Tóth, 'Constitutional Markers of Authoritarianism' (2019) 11 *Hague Journal on the Rule of Law* 37, 47.
[81] Marlies Glasius, 'What Authoritarianism Is . . . and Is Not: A Practice Perspective' (2018) 94 *International Affairs* 515.
[82] N. W. Barber, *The Principles of Constitutionalism* (OUP 2018) 85.
[83] See *ibid* 107–12.

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protect the people's choices in a democracy, but a lack of meaningful elections would also undermine the efficacy of rule of law.

Together, the three components – free and fair elections, the protection of liberal rights, and the rule of law – form the concept of democracy that is used throughout this book. This is by no means the only way of conceptualizing a democracy (and rule of law). But, under this conception, a constitutional court emerges as a crucial actor in safeguarding democratic principles. Constitutional courts are needed to adjudicate on the propriety of an election, safeguard liberal rights, and to ensure that the incumbent administration is governing according to rule-of-law principles. The book later explores the democracy-enhancing functions of a constitutional court in a hybrid regime, and the analysis will be informed by this conception of a democracy.

1.7 Roadmap

The rest of the book is organized as follows. Chapter 2 presents an account of a hybrid regime and sets out its constitutional features. The chapter offers neither a thorough survey nor a critique of the debates within the field of regime classification. Rather, taking its cue from existing definitions, a hybrid regime is defined according to its efforts to create the impression of a democracy and its semi-competitive political system. This definition is broad enough to accommodate different institutional contexts and legal traditions, but specific enough to meaningfully distinguish a hybrid regime from a democracy, as well as from other kinds of authoritarian regimes. The constitution is shaped by the features of a hybrid regime, resulting in incoherent political legitimacy, an ambiguous institutional outlook, and a two-level constitutional dynamic that is constantly in flux. How these constitutional aspects of a hybrid regime are related to a constitutional court will also be highlighted throughout the chapter to set up the discussions later in the book.

Chapter 3 situates a constitutional court in a hybrid regime context by evaluating two common ways of understanding a constitutional court in an authoritarian context: the Pessimistic Model and the Optimistic Model. They are not categories of real-world courts, but different ideal types of a hybrid regime constitutional court, grounded in two different bodies of literature. A constitutional court is a very weak constitutional actor under the Pessimistic Model. That model sees

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a constitutional court as an instrument of the regime. In contrast, the Optimistic Model depicts a constitutional court as a democracy-builder, capable of, and tasked with, transforming a hybrid regime into a democracy. The two models reveal important insights: the prior calls attention to the empirical realities of authoritarian judicial politics, while the latter emphasizes the moral responsibility of judges in hybrid regimes. Nevertheless, I argue that both are incomplete. Reconciling the two models, I advance a more attractive account of a constitutional court under a hybrid regime – the Realistic Model – which recognizes what a constitutional court can realistically achieve. The Realistic Model informs the discussions of the subsequent chapters.

Chapter 4 examines the democratic role of a constitutional court in a hybrid regime. I begin by considering the counter-majoritarian difficulty or democratic objections against judicial review in the context of a hybrid regime. It has been argued by many that courts with constitutional review powers are democratically illegitimate because their exercise of such powers involves unelected judges exercising policymaking powers and deciding against the democratic will. These objections, I argue, are severely blunted as a result of the democratic deficit of a hybrid regime, which allows us to consider more closely how a constitutional court can uphold democratic ideals in a hybrid regime. Specifically, five different kinds of democracy-enhancing roles are proposed: (1) the referee role, (2) the interpretative role, (3) the participatory role, (4) the quasi-representative role, and (5) the educative role. As emphasized before, these roles do not substitute for the political process, but instead rely on familiar aspects of a constitutional court, and are responses to various kinds of democratic failures in a hybrid regime. These roles are limited, and one such limitation relates to constitutional courts' lack of competence to realize these roles. I argue that some of these concerns are answerable, and that a certain degree of departure from the normative boundaries imposed by competency considerations is also justified given the potential to advance democratic causes by these roles.

Chapter 5 looks at a practical problem a hybrid regime constitutional court faces: the legitimacy paradox. A hybrid regime constitutional court must be sensitive to the views of two different constituencies: the democratic constituency and the authoritarian constituency. The two constituencies are natural extensions of a hybrid regime. The problem, however, is that the two constituencies subscribe to fundamentally opposing ideologies and tell incompatible stories of judicial

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legitimacy. The different ways in which the two constituencies shape judicial power in a hybrid regime are then illustrated. Failure to accommodate either or both constituencies destabilizes a court's constitutional position and renders the normative discussion of its democratic roles redundant. The chapter draws on a sociological conception of judicial legitimacy and an audience-based framework to better understand the nature of the dilemma and its practical implications for a constitutional court.

Chapters 6 and 7 address the tensions arising from the application of the democracy-enhancing roles (Chapter 4) in the face of the legitimacy paradox (Chapter 5). More specifically, Chapter 6 proposes an adjudicative theoretical framework that systematically integrates democratically informed judging with judicial strategy. The framework involves two steps: identifying the "ideal position" with an institutional blindfold on (or, forming an initial view of what the law requires under the democracy-orienting approach proposed in Chapter 4) and lifting the blindfold to check whether – and, if so, how – the ideal position should be supplemented by judicial strategy. The framework helps judges determine when it is permissible to allow prudential considerations to impact judicial decision-making. The chapter also documents a wide range of adjudicative judicial strategies and describes how they can and should be deployed to accommodate authoritarian pressures and/or improve the judiciary's institutional strength. The goal of the adjudicative framework is a meaningful and sustainable realization of the judges' democracy-enhancing roles in hybrid regimes.

Chapter 7 discusses the non-adjudicative techniques judges can and should use to protect the judiciary and reinforce its democracy-enhancing roles. The chapter extends the audience-based framework proposed in Chapter 5 and draws attention to what judges can and should do outside the courtroom to create allies and defuse enemies. It highlights the institutions capable of protecting the court, and the techniques that judges can apply to build relations with these institutions. It also discusses the ways in which judges can address hostile parties, as well as more drastic measures they can resort to when the court or the polity faces an existential crisis. The tools discussed in this chapter may seem at odds with the traditional conception of the judicial role. Nevertheless, the fact that constitutional protection of the court tends to be relatively weak in a hybrid regime offers a justification for judges taking on a more socially

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prominent role. Focusing on the relations between judges and other political actors underscores the socially constructed nature of judicial power, especially in a hybrid regime. The Appendix illustrates how the techniques introduced in Chapter 7 can be applied using the case of Hong Kong.[84]

[84] This Appendix was not in the original manuscript. It was, however, part of the article, Julius Yam, 'Judging Under Authoritarianism' (2024) 87 *Modern Law Review* 4, 894–925, which was published subsequent to the completion of the monograph and was partly based on Chapter 7 of this book.

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