5

The Legitimacy Paradox

5.1 Introduction

In the previous chapter, we explored ways in which a constitutional court can and should contribute to democratic values in a hybrid regime. Toward the end of the chapter, I also highlighted the extent to which questions of competency might limit the democracy-enhancing roles of a constitutional court. While democratic theory may justify the roles suggested, we must also engage with another question: whether it is *feasible* for a constitutional court to play those roles under the political climate of a hybrid regime. Empirical evidence, as laid out in Chapter 3, generally shows that constitutional courts in hybrid regimes enjoy some degree of judicial autonomy. Those findings give us prima facie reasons to believe that the democratic roles are possible. This chapter takes a closer look at how the hybridity of a hybrid regime impacts the conditions under which a constitutional court exercises its powers and applies the roles. This issue is explored through the lens of perceived legitimacy.

This chapter argues that courts in hybrid regimes face a legitimacy paradox: An activist court risks attracting backlash from the authoritarian, whereas a deferential court may undermine the trust of a democracy-supporting population. The paradox emerges from the competing ideologies of a hybrid regime mentioned in Chapter 2. Consequently, the way the judiciary navigates politically salient cases will have huge effects on its institutional health. As explained later in the chapter, the nature of the dilemma is philosophical, but this problem has practical implications for courts.

One of the earlier scholars to identify the legitimacy paradox was Martin Shapiro.[1] Relying on sociological theories of judicial legitimacy and a relational framework, this chapter develops and unpacks Shapiro's

[1] I borrow the term from Shapiro. See Martin Shapiro, 'Courts in Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008) 334–5.

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legitimacy paradox in a hybrid regime. A court must be able to navigate the legitimacy paradox to play the democratic roles effectively and sustainably. Guidelines regarding how the challenges posed by the paradox can be addressed are discussed in subsequent chapters. This chapter aims to identify and understand the paradox, as well as highlight the challenges it brings.

Legitimacy is conceptualized in either sociological or philosophical/moral terms. This chapter focuses on the sociological conception of judicial legitimacy, or what I refer to as "perceived legitimacy." In the words of David Beetham, the topic of legitimacy is curiously "suspended between two separate bodies of literature."[2] Social scientists focus on the descriptive and empirical dimensions of legitimacy, while political and legal theorists are interested in its moral conditions. The discussion in the previous chapter addressed many questions relating to the normative legitimacy of a constitutional court in a hybrid regime.[3] There are some overlapping concerns between the two conceptions of legitimacy – sociological and normative – since they both relate to the broad concept of legitimacy.[4] Nevertheless, they need to be distinguished, especially since there is a tendency in our daily usage to conflate normative legitimacy with perceived legitimacy. While normative legitimacy relates to the actual justifications of the court as an institution and its actions, perceived legitimacy describes whether people believe and treat a court as if it were legitimate. Perceived legitimacy echoes Max Weber's notion of legitimacy as well as what Joseph Raz terms "de facto authority."[5] The utility of perceived legitimacy is commonly understood to be closely connected to the electoral incentives of democratically elected representatives.[6] As will become evident later, however, the hybridity of

[2] David Beetham, *The Legitimation of Power* (Palgrave Macmillan 1991) 7.

[3] In particular, it engaged questions of democratic legitimacy and institutional legitimacy of a constitutional court.

[4] They are not contrary conceptions of legitimacy as they approach the topic from different angles and can inform one another. Perceived legitimacy is conceptually parasitic on normative legitimacy. Perceived legitimacy describes people's belief of legitimacy. We must at least be aware of what people's normative views of legitimacy are in order to describe this social fact. Perceived legitimacy can also feedback into normative legitimacy. A widely held perception that a court is legitimate suggests that the court at least has some capacity to coordinate society effectively. This perception gives us a reason, though not a decisive reason, to regard it as actually legitimate.

[5] Beetham (n 2); Joseph Raz, *The Morality of Freedom* (OUP 1988) chapter 2; Arie Rosen, 'The Normative Fallacy Regarding Law's Authority' in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013) 75.

[6] See Georg Vanberg, *The Politics of Constitutional Review in Germany* (CUP 2005); Clifford James Carrubba, 'A Model of the Endogenous Development of Judicial Institutions in

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a hybrid regime forces us to rethink how regime-type should affect how we understand the concept of perceived legitimacy.

While judicial power and perceived legitimacy are closely connected concepts, they remain analytically distinct. Judicial power broadly refers to the consequentiality of a court as an actor within the constitutional order.[7] A powerful court is one that has social impact, which means its decisions or opinions are obeyed and respected by the relevant parties. Power can, of course, be used in different ways, and the previous chapter offered direction regarding how that power, if gained, should be exercised. A common function of judicial power is the formal powers enjoyed by a court. For instance, the Polish, Hungarian, and Ugandan constitutional courts are empowered to address legislative omissions, while the South African and Kenyan constitutional courts can issue nonbinding advisory opinions in the absence of a dispute.[8] The range of formal powers courts enjoy is only part of the equation, however.[9] Other factors that shape judicial power include, for example, the formal authority granted by the constitution, the extent to which the political culture is committed to rule-of-law norms, how political powers are distributed, and the perceived legitimacy of a court. The latter is the central focus of this chapter. As such, maintaining perceived legitimacy is not just for the sake of popularity; this perception helps the court maintain its effectiveness. Although perceived legitimacy is only one factor affecting judicial power, it is a particularly salient one in a hybrid regime. More importantly, as the next two chapters demonstrate, judges have some degree of control over its perceived legitimacy.

The rest of the chapter is divided into two parts. Section 5.2 lays out the conventional view of perceived legitimacy, including the mechanisms behind it and its utility. The conventional view is premised upon the political dynamics of a democracy; this requires modification in order to be applicable to a hybrid regime.

Section 5.3 then takes on this task by introducing a relational angle. An audience-based framework is shown to help us identify the key audiences that are relevant to judicial legitimacy in different regime-types. The

Federal and International Systems' (2009) 71 *The Journal of Politics* 55; Gregory A. Caldeira and James L. Gibson, 'The Etiology of Public Support for the Supreme Court' (1992) 36 *American Journal of Political Science* 635.

[7] Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?' (2018) 29 *Duke Journal of Comparative and International Law* 1.

[8] See Adem Kassie Abebe and Charles Manga Fombad, 'The Advisory Jurisdiction of Constitutional Courts in Sub-Sahara Africa' (2013) 46 *George Washington International Law Review* 55.

[9] And formally strong courts are not always substantively strong.

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audience-based framework is then applied to a hybrid regime to set out the legitimacy paradox. The paradox is a logical outgrowth of the irreconcilable ideologies that define a hybrid regime. The effects of the paradox are practical, as exemplified by the tensions between the expectations different political actors within a hybrid regime have of a constitutional court. It will be explained how these conflicting expectations create challenges for judicial maneuvering in a hybrid regime.

5.2 Perceived Legitimacy: The Conventional View

5.2.1 The Court and the Public

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

Perceived legitimacy matters because it reflects people's deference to a court's decisions and affects its ability to command authority.[12] This is especially so for constitutional courts. As James Gibson and his colleagues note, "since judges often make decisions contrary to the preferences of political majorities, courts, more than any other political institution, require a deep reservoir of good-will."[13] Constitutional courts' inevitable involvement in politics and their potential to decide against the people and political representatives opens them to attacks and public scrutiny. Courts lack the sword and the purse, and do not have the coercive power or resources to ensure compliance. Perceived legitimacy is an important asset of the court, as it "helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging their wants."[14]

[10] Caldeira and Gibson (n 6).
[11] James Gibson and others, 'The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-based Experiment' (2011) 64 *Political Research Quarterly* 545, 546.
[12] Tom R. Tyler, *Why People Obey the Law* (YUP 1990).
[13] James L. Gibson, Gregory A. Caldeira, and Vanessa A. Baird, 'On the Legitimacy of National High Courts' (1998) 92 *American Political Science Review* 343.
[14] Caldeira and Gibson (n 6) 637.

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

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

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

[15] Tom S. Clark, *The Limits of Judicial Independence* (CUP 2010) 262.
[16] Caldeira and Gibson (n 6) 635.
[17] Richard Fallon, *Law and Legitimacy in the Supreme Court* (HUP 2018) 6.
[18] David Easton, *A Systems Analysis of Political Life* (John Wiley 1965) 275.

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

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

[19] Caldeira and Gibson (n 6) 637.

[20] Vuk Radmilovic, 'Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond' (2010) 43 *Canadian Journal of Political Science* 843, 845.

[21] Some courts that are elected or with shorter tenure may have mechanisms similar in function to the political branches in replenishing legitimacy.

[22] There are factors affecting diffuse support that are beyond the control of the court, such as the public's general level of confidence in the political system. A decline in the public's trust in the government may have spillover effects on the judiciary.

[23] Caldeira and Gibson (n 6); Tyler (n 12).

[24] Robert Dahl, 'Decision-making in a Democracy: The Role of the Supreme Court as a National Policy-maker' (1957) 6 *Journal of Public Law* 279.

[25] Dahl *ibid*; Clark (n 15) 73–5.

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independent decision-making body, the Court must in fact pay close attention to what will be deemed acceptable by the populace and sometimes yield from any neutral perspective to avoid overstepping the bounds imposed by perceptions of what is legitimate."[26] As uncomfortable as the conclusion might be, the conventional view described sets out a convincing case about how public opinion indirectly shapes judicial power.

5.2.2 *Outside Democracies?*

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

This assumption very often holds in democracies.[30] In nondemocratic regimes, however, the nexus between public opinion and electoral pressure is severely weakened, if not completely broken. The conventional view would certainly be inapplicable to a pure authoritarian regime. The lack of electoral competition suggests that the public cannot discipline the incumbent at the ballot box in the same way as democratic publics do. In cases where the authoritarian fully controls the press and the flow of information, the public cannot even monitor the incumbent's behavior.[31] Nor may there be a strong enough opposition to credibly challenge the

[26] Clark *ibid* 22.
[27] Vanberg (n 6) 14.
[28] *ibid*; Carrubba (n 6).
[29] Vanberg (n 6) 14.
[30] Vanberg makes it clear that his theory is limited to advanced democracies. *ibid* 20.
[31] *ibid* 21.

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incumbent either.[32] When the public cannot threaten the incumbent's power, it becomes much easier for the incumbent to control its courts, even if the courts command public support. Hence, the role of public opinion in protecting the courts is drastically reduced in a pure authoritarian regime.[33]

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

5.3 Perceived Legitimacy in a Hybrid Regime

The conventional view is appropriate for mature democracies where democratic norms are entrenched and the political rules are clear and well established. In a hybrid regime, however, elections are less competitive, and informal and authoritarian political norms play a larger role in everyday politics. Given some of the limitations of the conventional view outside democracies, this part develops an audience-based framework to better understand the political foundation of perceived legitimacy in a hybrid regime. The audience-based framework maintains some of the insights of the conventional view but supplements it with a relational angle.

[32] Brad Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy* (OUP 2019) 129.

[33] This does not mean the public is irrelevant. Rather, it means that the public may have to incur greater costs in order for it to have an impact.

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

5.3.1 An Audience-Based Framework

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

It seems increasingly clear that judges are aware of those who pay attention to their actions, that is, audiences, and that the regard of these

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

[35] Björn Dressel, Raul Sanchez-Urribarri, and Alexander Stroh, 'Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics Outside Western Democracies' (2018) 39 *International Political Science Review* 573, 575.

[36] Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review* 61, 80.

[37] Beetham (n 2) 11.

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audiences directly or indirectly shapes judicial norms and preferences. As mentioned earlier in this chapter, an avenue of research looks at how the decision-making patterns of courts sometimes actually tracks with public opinion. These works examine public attitudes by treating the public as a monolithic entity. In practice, many judges are sensitive to a variety of social groups, and their attentiveness to actors outside the courtroom can be far more nuanced. A survey on judges from common-law apex courts reveals that judges do regard actors other than litigants, such as government agencies and the international community, as part of their audience.[38] More importantly, the results of the survey indicate that some judges consciously respond to their audiences' attitudes when writing their judgments.[39]

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

The works outlined in previous paragraphs rely on an audience-based approach to partially explain how judges *actually decide* in real life. An audience-based approach can also be used to theoretically explain the political foundation of a court's perceived legitimacy. An audience-based approach complements the conventional view of judicial legitimacy by disentangling the roles of the different kinds of audiences faced by a court. With various audiences creating different expectations, the

[38] Brian Flanagan and Sinéad Ahern, 'Judicial Decision-making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 *International & Comparative Law Quarterly* 1, 15.

[39] *ibid*.

[40] Lawrence Baum, *Judges and Their Audiences* (Princeton University Press 2009). Similar in spirit, Nuno Garoupa and Tom Ginsburg argue that judges are responsive to reputational mechanisms and that these internal and external mechanisms can explain judicial behavior. See Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015).

[41] Yasser Kureshi, 'When Judges Defy Dictators: An Audience-Based Framework to Explain the Emergence of Judicial Assertiveness against Authoritarian Regimes' (2021) 53 *Comparative Politics* 233.

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audience-based approach enables us to trace whose perception matters to the court and how linkages to certain audiences affect how a court *should* decide.

A court faces various audiences, including the public, the government, lawyers, the legal academy, and the business sector. Not every audience's perception contributes equally to the legitimacy of a court. For instance, in polities with outspoken academics whose opinions can sway public opinion, academia becomes an audience that the court ought to be sensitive to if judges want their decisions to penetrate society. In highly internationalized jurisdictions or states under the support of international aid, courts may also need to consider the opinions of foreign states and the international community, as the functioning of the judiciary in these states are directly or indirectly shaped by foreign actors.

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

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

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matter. Let us apply the audience-based framework to compare the political foundations of perceived legitimacy in democracies and pure authoritarian regimes. The utility of the framework is further illustrated when it is extended to a hybrid regime later.

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

On the other hand, political power is centralized in a pure authoritarian regime. The general public's view of the court is of no direct relevance, not because public opinion is morally insignificant, but because the incumbent and its allies are the main audiences under this political configuration. Perceived legitimacy is mainly measured from the authoritarian leadership's angle. The extent to which courts are legitimate depends on how successful and faithful courts are in implementing the authoritarian will. An important, if not principal, aim of authoritarians is to maintain political control, and courts are expected to help realize this aim.[42] Courts help authoritarians establish social control, legitimize controversial decisions, and manage lower-level administrative agents.[43] Rule-of-law principles such as procedural justice are barriers to achieving authoritarian goals expediently. Incompetent, disobedient, or overreaching courts are illegitimate and put

[42] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction Publishers 2001) 29–52.

[43] Tamir Moustafa and Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008) 4–11.

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themselves at risk. The interests of other audiences, such as the general public or the international community, matter only if there are instrumental reasons for the authoritarian to consider them. Authoritarian regimes committed to economic development, for example, may care about what the business sector has to say. Public mobilizations that can potentially destabilize the regime can also give reason to comply with an unfavorable decision. The interests of audiences besides the authoritarian leadership may sometimes be given consideration, but their interests will always remain secondary to the authoritarian's.

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

5.3.2 *The Paradox: Rival Stories of Judicial Legitimacy*

The key to understanding the nature of perceived legitimacy in hybrid regimes is to first identify two stories of judicial legitimacy that are necessarily present in a hybrid regime. As discussed in Chapter 2, a hybrid regime is defined by two incompatible constitutional ideologies – democracy and guardianship. We also saw how this ideological conflict manifests in many aspects of a hybrid regime, from the structure of its legal system to its political dynamics. From these two incompatible ideologies emerge rival stories of judicial legitimacy, which describe what is expected of courts in hybrid regimes.

On the one hand, we have the democratic story, which views a constitutional court as the "necessary completion of constitutionalism."[45] This is essentially the liberal democratic story of courts many of us are accustomed to. Supporters of this story "appreciate the benefit of checks and balances in a system of government."[46] According to this view, courts should

[44] The audience-based framework will be further developed in Chapter 7 to understand the potential of the social role of judges.

[45] Dieter Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) 4 *NUJS Law Review* 15, 17.

[46] Carrubba (n 6) 65.

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be independent and principled arbiters, guardians of constitutional rights, the bulwark against authoritarian encroachment, and sometimes even the engine of constitutional change.[47] Judges are the personification of justice. A "good" constitutional court in a hybrid regime is held to be one that is committed to fighting against authoritarianism and upholding rule-of-law and liberal democratic values. A more progressive version of the liberal democratic story might even expect an activist court to abandon its fidelity to the law and decide cases in ways that transcend the four corners of the law when the legal context is an unjust one.[48]

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

The previous paragraphs present stylized, rivalling accounts of judicial legitimacy in a hybrid regime. The democratic story sees the court as a constraint on arbitrary power and crucial for the protection of rights, while the authoritarian story sees the court as merely a tool of the ruler. These stories are also archetypal: how they are told in practice depends on sociopolitical context and culture. Authoritarians have, for instance, asserted their authority over judges in the name of populism (e.g. Hungary), nationalism (e.g. Mainland China and Hong Kong), and the divine right to rule (e.g. Thailand). Similarly, the democratic story can be justified by specific constitutional texts as well as the historical struggles experienced by a country. Because these stories are social claims, any

[47] See Tom G. Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-builders* (CUP 2017).
[48] Jeffrey Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging* (OUP 2010).
[49] As quoted in Rachel Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Routledge 2013) 147.
[50] Nonet and Selznick (n 42) 29–52.

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flaws or incoherence are largely irrelevant for our purposes, so long as the stories resonate with the political communities in a hybrid regime. Common to the stories told across hybrid regimes is the existence of these two strands of narratives about what courts should and should not do, with one narrative corresponding to democratic values, and the other to guardianship principles.

From a philosophical perspective, there is no way for the two stories to be reconciled, as they derive from fundamentally incompatible political ideologies. Many of the judicial qualities that flow from the two stories are contradictory. For example: independent versus subservient, principle-based versus outcome-oriented, and constitutionalism versus arbitrariness. For this reason, the legitimacy challenge faced by courts in hybrid regimes is best described as a paradox. The fact that a court is the subject of a legitimacy paradox should not come as a surprise: this is another manifestation of the hybridity of a hybrid regime.

5.3.3 The Democratic and Authoritarian Constituencies

The ideological conflict underlying the legitimacy foundation of courts in hybrid regimes is not only philosophically interesting, but also affects how a court should position itself. What distinguishes a hybrid regime from a democracy and a pure authoritarian regime here is the existence of two audiences espousing conflicting stories of legitimacy in a hybrid regime, *and* the critical importance of both audiences to the legitimacy of a constitutional court. Let us call the audience that subscribes to the democratic story the democratic constituency, and the other the authoritarian constituency.

In a pure authoritarian regime, a democratic constituency might exist, but, as previously explained, it is impotent given that the public or the opposition cannot effectively discipline the incumbent. In a democracy, even if there is an authoritarian constituency, their stories would have negligible impact on constitutional discourse because democratic norms are deeply entrenched.

In a hybrid regime, the voice of the authoritarian constituency needs to be heard because of their political dominance. The incumbent and the elites take most key political decisions and, ultimately, can determine the institutional structure of its judiciary. When dissatisfied with a constitutional court's performance, the authoritarian constituency could reverse the judges' decisions or even pack the court. The constitutional court's survival depends largely on the regard of the authoritarian

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constituency, given the disproportionate amount of political power that constituency enjoys.

The authoritarian constituency and the democratic constituency are not on equal footing: the former enjoys the upper hand due to the systematic inequalities within the system. Unlike a pure authoritarian regime, however, the democratic constituency in a hybrid regime remains of critical importance as it can provide a power base for the court and public confidence in the court is valued by the regime. The two reasons for this go back to the defining characteristics of a hybrid regime. First, a hybrid regime needs to preserve its democratic appearance by ostensibly respecting democratic norms. The incumbent relies on the existence of the democratic constituency to ensure that a hybrid regime looks like a democracy. The incumbent must, to a certain extent, play along with the views of the democratic constituency. Otherwise, an image of democratic pluralism would not be credible. Relatedly, a hybrid regime wants the court to have public legitimacy as this bolsters the overall credibility of the government.

Second, the democratic constituency in a hybrid regime is not entirely incapacitated. Peaceful change of powers are unlikely but still possible in a hybrid regime, as took place in Pakistan and the Gambia. As previously argued, the uncertainty that comes with a semi-competitive election is sufficient to constrain an incumbent, who is forced to take seriously the democratic constituency's demands in order to maintain stability.[51] Voting is also not the only way for the democratic constituency to threaten the incumbent. The democratic constituency can organize protests and resort to mass mobilization to counter the authoritarian constituency. The costs of interfering with a court that enjoys the support of a democratic constituency is much higher in a hybrid regime than an authoritarian one. In turn, a court that is backed by the democratic constituency enjoys greater latitude to challenge the incumbent, and its decisions are more likely to be respected by the authoritarian constituency.

The account given in the previous paragraphs explains why and how the perceptions of these two constituencies matter to a court in a hybrid regime. A hybrid regime's authoritarian core suggests that the expectations of the authoritarian constituency cannot be ignored because of its fundamental control over the judiciary. The democratic constituency can potentially counteract the authoritarian constituency's pressure on the

[51] See Epperly (n 32).

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courts. Like the public's role under the conventional view, the democratic constituency can provide institutional cover for a hybrid regime's constitutional court by threatening to undermine the stability and power of the incumbent.

What does this tell us about institution-building and judicial empowerment? Given the importance of the democratic constituency, it becomes particularly useful for a court to enlist the help of the democratic constituency in a hybrid regime. A common feature of the successful hybrid regime courts discussed in this book is their enjoyment of a democratic constituency's support. While the opposition has never won a majority in the Hong Kong legislature, it had obtained a majority of votes, and had effectively vetoed government policies through filibustering and street protest. With its impartial image and many liberal rulings, the judiciary is consistently rated the most trusted public institution in Hong Kong.[52] Even under pressure from the largest authoritarian force in the world, virtually all Hong Kong courts' decisions, including those that rule against the government, have been respected. The support of the democratic constituency has made attacks on courts politically costly.[53]

The Chaudhry court in Pakistan has gone a step further by actively mobilizing the democratic constituency. The Chaudhry court garnered public support in its first few years of tenure through a progressive use of *suo moto* actions and its direct confrontation with the Musharraf regime.[54] In 2007, the suspension and dismissal of the Supreme Court by Musharraf sparked nationwide antigovernment protests. Dubbed the Lawyers' Movement, the protests were led by a democratic constituency consisting of the opposition, lawyers, retired judges, and civil society organizations. Fully aware of the support it commanded, the judiciary refused to take a new oath under the emergency law and continued to defy the incumbent. Musharraf ultimately lost power in 2008, a result of the backlash from his attempt to undermine a popular court, which was eventually reinstated after the election.

[52] See Julius Yam, 'Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts' (2021) 46 *Law & Social Inquiry* 153. The political developments since 2019 have, however, taken a toll on the judiciary's reputation.

[53] See Eric C. Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (CUP 2019).

[54] Asher A. 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).

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

The examples of Hong Kong, Pakistan, and Uganda demonstrate the importance of a democratic constituency in a hybrid regime in maintaining judicial power. While a democratic constituency cannot always immunize a constitutional court, it provides an invaluable bulwark against authoritarian attacks by acting as a buffer between the authoritarian constituency and the court. In all three examples, the constitutional courts established a close relationship with the democratic constituency by deciding in ways and creating political conditions that protected the democratic constituency and helped further the democratic cause. In turn, the active support of the democratic constituency (through, for instance, public pressure, boycotts, and mass protests) gave the constitutional courts greater room to support democratic ideals without fear of political backlash. The next two chapters discuss the ways in which judges can build support among institutions that can protect the court, as well as how judges can potentially expand the size of the democratic constituency.

However, what was just described forms only half the story. The support of the democratic constituency protects a constitutional court, but that support can sometimes be a curse. A court that is too popular among the democratic constituency risks arousing the suspicion of the authoritarian constituency. It must be remembered that the two constituencies tell rivalling stories of legitimacy. In many politically salient questions, a democratic constituency's "right" is an authoritarian constituency's "wrong," and vice versa. The protection of democratic rights,

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

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for example, implies curtailing the powers of the authoritarian constituency, while promoting authoritarian aggrandizement encroaches upon the interests of the democratic constituency. A democratic constituency is able to provide temporary cover for a court by increasing the political costs of court-curbing actions. A change of political dynamics, however, may present opportunities for the authoritarian to act out on the hostility accumulated throughout the years.

The Hungarian experience of the 1990s, recounted in Chapter 3, reminds us of the long-term dangers of overplaying a court's hands in the face of an authoritarian constituency. The Hungarian constitutional court was widely championed as the most democratic institution in Hungary during the early years of the country's transitional days. Authoritarian populist Viktor Orbán's assumption of office in 1998 was a game-changer in Hungary's judicial political dynamics. Pre-1998, the court's activist role created a long list of political enemies who "never forgave" the court.[57] Learning from the mistakes of the past, the newly elected government coalition decided not to renew the terms of all sitting judges, and the constitution was swiftly amended to limit the court's jurisdiction. The Hong Kong courts are also beginning to suffer the side-effects of the liberal democratic approach it adopted in the first two decades after the handover. The passing of the national security law has essentially eliminated the space for meaningful opposition in Hong Kong. The COVID-19 pandemic also made mass protest challenging, if not impossible. With semi-competitive elections eliminated and a crackdown on civil society, Hong Kong judges have lost the protection once offered by the democratic constituency. State-controlled media have orchestrated waves of attacks against some of the courts' decisions, and national security laws are immune from constitutional review. There has also been increasing debate about appointing loyalist judges onto the bench and removing those believed to be associated with the democratic constituency. The authorities have taken a renewed "interest" in some of the courts' older judgments, arguing that the courts in the past failed to give effect to the true meaning of the city's mini constitution.[58]

[57] Kim Lane Scheppele, 'Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments' in Adam Czarnota, Martin Krygier, and Wojciech Sadurski (eds), *Rethinking The Rule Of Law After Communism* (Central European University Press 2005) 53.

[58] Hong Kong has arguably shifted to a pure authoritarian regime, and the political backlash it is suffering now does not necessarily undermine the approach it had adopted during

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

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

A conundrum begins to reveal itself: the two constituencies are crucial to the perceived legitimacy of a court, but it is unclear how a court should proceed given how the two constituencies hold opposing beliefs. The court is responsible for implementing the constitution and at the forefront of patrolling the ideological boundaries between the two constituencies. The clash in ideologies creates many zero-sum problems for the constitutional court to resolve. The practical implications of the legitimacy paradox are most obvious when the cases confronting the court touch on issues that deeply matter to both constituencies. To establish a "lowest common denominator of agreement"[60] under these circumstances is challenging, to say the least. Describing the challenges divided societies present to a constitution, Tarun Khaitan writes, "straightforward accommodation in the face of deep disagreement creates a new problem as it solves another, because accommodation of one group is likely to anger

Hong Kong's hybrid regime era. Nevertheless, developments in Hong Kong illustrate how weak courts can be once the democratic constituency is disabled.

[59] Shapiro (n 1) 334.

[60] Radmilovic (n 20) 859.

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another. Taking everyone along requires a fine balancing act, one that offers enough sops to the dissenters, but not so many that their detractors in turn feel tempted to jump ship."[61] This is analogous to the classic dual agency scenario, where an agent is accountable to two principals with conflicting interests. The court is an agent of the democratic and authoritarian constituencies, with responsibilities to both. In private law, an agent can and should withdraw when there is a conflict of interest. Withdrawal is not always available to a court; even if it is, it is not necessarily a "neutral" option that satisfies both constituencies. Withdrawal can also be interpreted as retreat by those wanting a court to take action.

Another way to express the challenges posed by the legitimacy paradox is to use Lee Epstein, Jack Knight, and Olga Shvetsova's model of "tolerance interval."[62] We have here two sets of actors – the democratic constituency and the authoritarian constituency – subscribing to opposing ideologies. Each set has its own expectations of courts, and in each case presented to the court, each has its own preferred outcome. The space of the preferred position is called the "tolerance interval." Each set of actors' regard toward the court depends on the extent to which the court's judicial decision-making patterns fall within its zone of tolerance. The judicial political dynamic described under this model is not one-off, but involves sequential interactions. Deviating from the tolerance interval increases the chances of a hostile reaction from the group; repeatedly staying within the interval helps expand the zone. Accordingly, the decision-making patterns of a court have cumulative effects on its legitimacy.[63]

A court should ideally stay within the overlapping tolerance intervals of the democratic and authoritarian constituencies. This is possible if the tolerance intervals of the two constituencies intersect. For example, it might be in the interest of both constituencies to tackle corruption, under the assumption that the destabilization of patronage networks does not fundamentally undermine the incumbent's control and might even improve its governance. Because these two groups tell rivalling stories of judicial legitimacy, their tolerance intervals are more likely to be

[61] Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16 *International Journal of Constitutional Law* 389, 408.

[62] Lee Epstein, Jack Knight, and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law and Society Review* 117.

[63] *ibid* 131.

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mutually exclusive in politically salient decisions. Halfway-house decisions in these instances please no one. As I explained, the consequences of deviating from the two constituencies' tolerance intervals are different. The authoritarian might pack the court, while the democratic constituency will gradually withdraw its support. The consistent absence of overlapping tolerance intervals and the absence of a dominant strategy present grave risks to the legitimacy of a court.

5.4 Conclusion

Using an audience-based framework to conceptualize judicial legitimacy, this chapter describes a legitimacy problem faced by hybrid regime courts. The hybridity of a hybrid regime requires a constitutional court to be sensitive to the views of both the democratic constituency and the authoritarian constituency. Courts in hybrid regimes have an advantage over those in pure authoritarian contexts, insofar as political elites in hybrid regimes must pay at least some attention to public opinion. Given the nature of the paradox, a constitutional court needs to marshal the support of the democratic constituency *and* avoid triggering the authoritarian constituency. The challenge lies in the fact that the two constituencies subscribe to fundamentally opposing ideologies and tell rivalling stories of judicial legitimacy. Failure to accommodate either or both constituencies destabilizes a court's constitutional position.

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

Second, the legitimacy paradox is only really relevant to a court which is committed to liberal democratic values, as judges who are determined to serve the authoritarian incumbent have no reason to consider the views of the democratic constituency. However, should a court decide to take up a democratic role, as suggested in the previous chapter, it must figure out how to navigate the political minefield presented by the paradox. Also, the chapter leaves open the possibility that the legitimacy

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paradox, or traces of it, can be found outside hybrid regimes, especially in democracies with polarized political communities and pure authoritarian regimes that have recently transitioned from a hybrid regime. Regardless, this chapter shows that the legitimacy paradox is a central feature of a hybrid regime and must be addressed by a constitutional court.

This leaves us with the question of how a democratically committed court should approach the legitimacy paradox. There is no easy answer to this question. "A fine balancing" is required, as Khaitan rightly pointed out. However, is it possible to provide more guidelines to the court? There is a glimmer of hope: Comparative experiences around the world provide insights regarding how to address some of the challenges described in this chapter. The next two chapters offer theoretical and practical solutions that would enable hybrid regime courts to undertake those democratic roles identified in Chapter 4 in a sustainable manner.

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