6

Democratic Judging under Authoritarianism

6.1 Introduction

Five democracy-enhancing roles that courts in hybrid regimes can and should assume were outlined in Chapter 4. A problem generated from those roles is that they will result in confrontations with the authoritarian constituency. So in Chapter 5, we saw that courts in hybrid regimes face a legitimacy paradox, and failing to satisfy the authoritarian to some degree will destabilize the court.

Regime politics is not the only determinant of the fate of the judiciary, however. Judges are also in a position to create conditions favorable to the development of their roles. For judges to navigate the number of complexities that arise in trying to enhance democracy in the face of the legitimacy paradox, they have to take the political context of a hybrid regime seriously. How should judges committed to democracy conduct themselves when they are under authoritarian pressure? This question will be addressed in this chapter and the next. The tools to be offered in these two chapters are divided into what judges can and should do inside *and* outside the courtroom. This chapter proposes an adjudicative framework (which can be referred to as "Sustainable Democratic Adjudication") that allows judges to systematically incorporate both constitutional legal principles and judicial strategies, while Chapter 7 moves beyond the adjudicative context and considers how judges can create allies and defuse enemies using non-adjudicative strategies. These two chapters argue that judges who hope to give effect to their democracy-enhancing roles have no choice but to find creative ways to accommodate authoritarian pressures. Turning a blind eye to threats to the judicial institution will inevitably lead to its demise. The salient question, then, is not whether judges in authoritarian contexts *should* be sensitive to their political environment (as I will argue, the answer is that they must), but rather *how* they should account for authoritarian pressures if they aim to fulfil their democratic roles sustainably.

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The framework proposed in this chapter is designed for hybrid regimes in which judges *have a role* in imposing meaningful constraints on authoritarian rulers. In particular, this chapter focuses on judges with constitutional jurisdiction who see themselves as constitutional guardians. These judges are most proximate to matters of political significance, and, consequently, are most likely to clash with the incumbent regime. The law in some authoritarian regimes leaves little or no space for judges to play such a role. In these cases, the proposed framework will be irrelevant (or of limited relevance). However, as we have seen in previous chapters, judges in hybrid regimes are not necessarily puppets,[1] and some actively defend the constitution and constrain authoritarian action. This chapter offers practical guidance to judges who seek to embody this role, and advises them on how to evaluate and decide between their options given the challenges raised by authoritarianism.[2]

While focused on hybrid regimes, the following discussion might also benefit judges in democracies, some of whom sit on judicial panels in nondemocratic jurisdictions as foreign judges, and are occasionally asked to decide on constitutionally salient issues.[3] More importantly, institutional resilience is a concern of judges regardless of regime-type.[4] Democracies are not immune to authoritarian forces and their judges can be subjected to political capture and executive attacks. The threats to judges in democracies might differ in degree and kind from those in authoritarian regimes, but some of the institutional challenges those judges face may be similar in nature to those identified later in this

[1] See e.g. Steven D. Schaaf, 'When Do Courts Constrain the Authoritarian State? Judicial Decision-Making in Jordan and Palestine' (2022) 54 *Comparative Politics* 375; Alexei Trochev and Peter H. Solomon, 'Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State' (2018) 51 *Communist and Post-Communist Studies* 201; Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (CUP 2007).

[2] Readers might object that committed judges should resign in protest, as remaining on the bench legitimizes an authoritarian regime. This chapter leaves aside the question of whether or when judges should resign, and focuses on what judges should do *if* they are able and intend to constrain authoritarianism. Moreover, resigning can be counterproductive: Vacant offices will likely be filled by regime-loyalists, thereby accelerating the pace of constitutional deterioration. See Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law Is Under Attack* (Springer 2016) 267–70.

[3] For example, judges from the United Kingdom and South Africa have sat on courts in Hong Kong and Brunei, and Eswatini respectively. See Anna Dziedzic and Simon Young (eds), *The Cambridge Handbook of Foreign Judges on Domestic Courts* (CUP 2023).

[4] See Rosalind Dixon, 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change' (2020) 59 *Columbia Journal of Transnational Law* 298; Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (CUP 2013).

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chapter. The adjudicative framework I propose can potentially be adapted to a democratic political context, and hopefully shape the conduct of judges in democratic states as well.

The rest of the chapter proceeds in three parts. Section 6.2 outlines the two steps involved in the Sustainable Democratic Adjudication framework, the goal of which is the long-term, sustainable realization of the democracy-enhancing roles of judges in the face of authoritarian pressure. First, judges need to form an initial view on what the law requires under the democracy-orienting approach proposed in Chapter 4. During this step, they must apply a presumption of "institutional blindfold,"[5] ignoring the possible influence of prudential considerations such as political pushbacks and backlashes, and considering only the relevant law and facts of the case as informed by constitutional democratic principles. I term the tentative conclusion reached at this stage the "formal legal position." The term "formal" here is not used to denote "legal formalism" or a formalistic account of constitutional adjudication, but instead to describe the position that results from the court's application of the law without factoring in prudential considerations. The second step involves judges lifting the blindfold to check whether, and if so how, the formal legal position should be supplemented with or adjusted by strategic considerations. These are questions determined by the level of risk incurred by maintaining the formal legal position.

The level of risk is a function of the severity of the anticipated adverse consequence of maintaining the formal legal position and its likelihood of eventuating. I identify four scenarios: If the risk level is (1) *negligible or nonexistent*, judges should consider how judicial strategy can enhance the impact of their decision or bolster the institutional position of the court without fundamentally altering the formal legal position and increasing the level of risk. If the risk level is (2) *high*, judges will need to examine how much strategic deviation from the formal legal position is necessary to accommodate authoritarian pressure. There might be instances where such pressure cannot be accommodated, because the required level of accommodation either (3) *crosses a moral baseline*, or the risk level is so high that the threat is (4) *unavoidable*. The last two scenarios, I suggest, justify maintaining the formal legal position. While the first two scenarios encompass a spectrum of risk and should not be treated as

[5] This term is borrowed from Roni Mann's "non-ideal theory." See Roni Mann, 'Non-ideal Theory of Constitutional Adjudication' (2018) 7 *Global Constitutionalism* 14.

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determinate categories, the latter two should be treated as different in kind, as they are subsets of the high-risk scenario.

Drawing on insights from interdisciplinary studies and illustrating with comparative examples, Section 6.3 of this chapter examines the strategies that judges can deploy during the adjudicative process. These are organized into four groups based on different dimensions of the adjudicative process: Outcome, reasoning, language, and timing. These strategies can be used not only to accommodate prudential considerations, but also to build support for the judiciary and to enhance the effectiveness of the formal legal position. The social effects of these strategies and how they might be relevant to the four contexts described will be explored. Concluding remarks are offered in Section 6.4.

6.2 Sustainable Democratic Adjudication

The challenges posed by the legitimacy paradox beg the question of how judges ought to exercise their authority if they wish to promote constitutional democratic norms sustainably. This part proposes a two-step adjudicative framework to address this question. The first step of the framework requires judges to form an initial view of what the law requires under the democracy-orienting approach proposed in Chapter 4, and without regard for the possible adverse consequences they might face as a result of maintaining their fidelity to constitutional democratic norms. During the second step, judges need to carefully anticipate the potential ramifications of their democratically informed interpretation of the law, and address those prudential concerns using judicial strategies. The first step is based on the legal merits of a case and guided by constitutional democratic principles, but reasons at the first step may be defeated at the second step after an evaluation of the broader implications of their verdict. In other words, the second step may require judges to deviate from the democracy-enhancing roles. Such deviations, I argue, are justified when they enable judges to conserve their institutional strength. Exceptions to this will also be explored.

The approach outlined in this chapter will involve occasionally compromising on constitutional democratic norms, which may at first sight appear to go against the arguments in Chapter 4. Counterintuitively, at least under authoritarian regimes including hybrid regimes, such norms may sometimes have to give way to prudential considerations in the short term if we are serious about the *long-term promotion* of these norms. As Jeff Goldsworthy points out, "just as a violation of one human right might

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enhance the protection of human rights overall ... so too a one-off violation of the rule of law might advance the cause of justice or good government, or even strengthen the rule of law in other respects and overall."[6] That is, of course, not to suggest that judges should always bow to the pressures levied by incumbent authoritarians, but we must be realistic about what they can achieve. Given that it is virtually impossible for judges in hybrid regimes to consistently give the fullest effect to their democracy-enhancing roles, the second-best option that judges should aim for is *approximating constitutional democratic norms as much as is practically possible*.

The approach adopted here requires the judicial consideration of prudential reasons, and some might rightly notice a tension with the individual interests of some litigants. Courts are tasked to settle legal disputes between parties through an impartial application of the law. The adjudicative framework proposed in the chapter appears to create injustice, as parties to litigation may sometimes win or lose for reasons that have nothing to do with the law. There is, however, no guarantee that a legally sound but politically insensitive judicial decision will be enforced by an authoritarian government, especially one that runs contrary to its interests. Furthermore, committed but tactless judges will probably eventually be replaced by those loyal to the regime, who lack the motivation to defend the constitution. The legalistic approach, which initially appears more morally sound, may inadvertently promote the further consolidation of authoritarian power to the detriment of constitutional democratic norms. However, the framework proposed does acknowledge that there are some kinds of individual interests that simply cannot be surrendered. These situations will be discussed in detail later in this chapter.

Another possible set of objections to judicial consideration of prudential reasons is that judges lack political acumen. This presumption can be challenged on several fronts. First, most judges share a social and cultural context with their fellow citizens, and are therefore likely to have a good grasp of political culture, contemporary social issues and cleavages, as well as the significance of past events.[7] Any gaps in their understanding of the motivations of different audiences and/or the potential consequences of their decision(s) can be filled via independent research, possibly

[6] Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law & Jurisprudence* 305, 306.

[7] Anna Dziedzic, *Foreign Judges in the Pacific* (Hart Publishing 2021) chapter 5.

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supported by their clerks in certain jurisdictions. The submissions made and evidence produced in the courtroom can also be instructive, as courtroom interactions sometimes reflect power dynamics outside the courtroom. Most importantly, judges might be privy to certain channels of information. Judges are government officials, and the judicial appointment process directly or indirectly involves political actors. Their proximity to certain political networks means that they might be particularly attuned to the potential reactions of groups close to the incumbent.[8]

For those who remain skeptical of strategic approaches, my ultimate response is that, at least in authoritarian contexts, judges often have *no choice but to make political and strategic calculations*. They have to play the hand that they are dealt. A politically insensitive court is doomed to fail in a hybrid regime; its demise accelerates autocratization. Tackling authoritarianism requires taking authoritarian realities seriously. A dose of pragmatism that properly accounts for the institutional position of a court, or a "combination of principle and pragmatism,"[9] becomes necessary when existential threats to the judiciary are unexceptional occurrences.

Not only does the adjudicative framework help constrained judges systematically evaluate the options presented to them, it also highlights the importance of judicial agency. Much of the pessimism about the potential of judges in authoritarian regimes is rooted in the assumption that judicial politics is conditioned and limited by regime-type politics.[10] This assumption is so widely held that we tend to overlook the *choices* that judges can make even under authoritarian pressure.[11] These choices reflect judges' potential to instigate meaningful change. Raymond Wacks and Ronald Dworkin have argued that judges in apartheid South Africa and Nazi Germany could have instilled legality to oppressive laws, exercised discretion in ways that were friendlier to human rights, or lied about or bent the law.[12] Or, as Hans Petter Graver suggests, "there was judicial scope for the protection of fundamental rights" even under the

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

[9] Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106, 108.

[10] See Donald W. Jackson and C. Neal Tate (eds), *Comparative Judicial Review and Public Policy* (Greenwood Publishing Group 1992); C. Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (NYU Press 1995).

[11] See also Dixon (n 4) 302; Roux (n 4) 93–104.

[12] See Raymond Wacks, 'Judges and Injustice' (1984) 101 *South African Law Journal* 266; Ronald Dworkin. *Law's Empire* (HUP 1986) 105.

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Third Reich.[13] The choices judges make may have significant implications for the constitutional order and their institutional position, so we ought to consider how these choices should be made.[14]

6.2.1 *Step 1: Ascertaining the Formal Legal Position with the Blindfold On*

The first step of the adjudicative framework entails ascertaining what the law requires if the judges were to assume the democracy-enhancing roles suggested in Chapter 4, while blindfolded from prudential factors such as potential pushbacks and backlash from the public and political elites. It is often argued that the integrity of the law depends on judges' ability to uphold the law. Allowing prudential factors to influence the adjudicative process is inconsistent with the demands of justice and blurs the distinction between law and politics, thus threatening to undermine the rule of law. The first step of the framework flows naturally from our common understanding of the judicial role. The formal legal position of a case can only be revealed if judges interpret the law and facts in accordance with established constitutional legal principles, independently of the potential social and political consequences that the legal position might attract.

The framework does not prescribe what the law should be in each case and accommodates a range of adjudicative theories. While the chapter fills the framework with the democracy-enhancing roles developed earlier, any normatively sound theory of adjudication that takes constitutionalism seriously – from the conventional common-law model to more demanding and democratically oriented approaches such as Dworkin or Ely's interpretative theories – is sufficient to activate the first step and provide the content for this framework. There can be disagreements under this step, so long as those disagreements are reasonable, informed by constitutional democratic principles, and arise from questions of law and legal or constitutional interpretation.

[13] Graver (n 2) 269–70.

[14] The adjudicative framework proposed in this chapter arguably resembles rational choice models, as both are agent-focused and concerned with utility maximization, broadly defined. See 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. However, my approach takes the role of law seriously. It assumes that getting the law right and the promotion of constitutionalism are among the most important goals judges seek to realize, and that judges are bound by legal norms in their reasoning.

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It should also be emphasized that the framework does not apply when the legal position arrived at during the first step is *anti*constitutionalist, such as when the conclusion legitimizes the arbitrary application of discretionary power or leads to a reduction or elimination of checks on the authoritarian ruler.[15] This flows from the assumption stated earlier: that the arguments proposed only apply when judges have a role in promoting constitutionalism and constraining authoritarian abuses of power. Situations where room for meaningful judicial enforcement of the constitution has been completely eliminated are less common than one might think, however, especially if one adopts the widely shared view that legal texts alone do not determine a legal outcome. Even under authoritarian regimes, the constitution will, in many cases, leave sufficient room for judges to interpret the law and facts in ways that correspond with constitutional norms. In any event, even when the framework is inapplicable, judges may have alternatives other than simply endorsing an unattractive legal position. For example, they can lie about the law or resign in protest. The normativity of these options is beyond the scope of this chapter, but the judicial strategies outlined in the next part are of general relevance to adjudicative courses of action.

The blindfold confers several advantages on judges operating in hybrid regimes. Modern authoritarians, as Erin Jenne and Cas Mudde observe, "bend or break" the law because they are able "to get away with it."[16] This step maximizes the number of opportunities to hold authoritarians accountable to the constitutional democratic norms. In the face of constant pressure, judges in authoritarian regimes are often conditioned to "respond with anticipatory obedience."[17] Critical thinking is easily abandoned as a result. This habit leads judges to surrender to political pressure *more than they should*, causing them to miss opportunities to work toward a more constitutionally compliant and democratic state. This step reminds us of the basic tenets of being a judge: to arrive at fair and just outcomes based on legal and constitutional principles, and of the distinct moral responsibilities that comes with being a judge in a hybrid

[15] Aside from "constitutionalist" and "anti-constitutionalist," a formal legal position can also be constitutionally neutral, for instance, when the nature of the legal dispute does not involve constitutional norms. The framework will apply not only to a constitutionalist legal position, but also to a constitutionally neutral one, as even such a position can antagonize the authoritarian.

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

[17] Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (OUP 2018) 184.

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regime. Because opportunities to promote constitutional democratic norms can sometimes be subtle and occur at unexpected times, judges should strive to inspect each case with the blindfold on first. Whether the formal legal position will be eventually compromised is a separate matter, but the blindfold reveals the normative potential of every opportunity presented to a judge.

6.2.2 *Step 2: Supplementing and/or Adjusting the Formal Legal Position*

Step two requires lifting the blindfold to check whether, and if so how, the formal legal position should be supplemented with and/or adjusted by judicial strategies. Maintaining the formal legal position can attract a variety of adverse reactions that may justify a strategic response. The framework proposed here recommends that judges always lift the blindfold and be prepared to act strategically, but does not require that they depart from their initial position in every instance.

One might question the importance of the first step, given the eventual lifting of the blindfold. The benefits of the first step exist independently of the second step. Without going through step one, judges would remain unaware of the sacrifices made by accommodating strategic concerns. Furthermore, lifting the blindfold does not always result in a departure from the formal legal position. It requires judges to consider the pragmatic implications of their rulings, but does not mandate that judges should always act on those considerations and modify the formal legal position. Later, we will review scenarios that would justify retaining the formal legal position after a careful assessment of the risks involved. Moreover, strategizing sometimes produces only cosmetic changes to a decision without fundamentally altering the formal legal position. In these circumstances, strategies leave the core of the formal legal position intact.

To act strategically does not mean abdicating the constitutional responsibilities of being a judge. Instead, it highlights judges' capacity to devise solutions beyond the law to address prudential concerns. This is imperative in hybrid regimes where judicial authority tends to be weak and judicial-political dynamics are volatile. The social authority and institutional health of a court are *not* ends in and of themselves. Rather, these qualities are necessary in order to sustainably give effect to constitutional democratic norms. Moreover, as mentioned, hybrid regimes today are relatively durable; resisting authoritarian encroachment is

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a long-term battle. Precisely because judges are in for the long haul, it is necessary to adopt a strategic approach that accounts for the importance of the judiciary's institutional health.

The second step involves evaluating the institutional position of the court and the potential consequences of maintaining the formal legal position. When deciding whether to supplement and/or adjust the formal position with judicial strategy, judges should consider three factors: (1) The nature and extent of any negative outcome if the formal legal position is maintained; (2) the likelihood that a negative outcome will eventuate; and (3) the amount of deviation from the formal legal position required to remove or mitigate the expected risk. The first two factors define the expected level of risk associated with the formal legal position. As explained later, this approach is more sympathetic toward the circumstances faced by judges in hybrid regimes, and leaves judges the room to tailor their solutions to a wide range of often unexpected situations.

6.2.3 Risk Assessment

Before deciding whether, and if so how, the formal legal position needs to be supplemented by judicial strategies, judges must first assess the risks of maintaining the formal legal position. This, as mentioned, involves two factors: (1) The nature and severity of a negative reaction, and (2) the likelihood of such a negative reaction materializing.

In thinking about possible negative reactions to maintaining the formal legal position, it is helpful to first identify their likely *form*. Domestic courts commonly encounter four types of unfavorable responses: Negative publicity, noncompliance or reversal, institutional reform, and actual violence.[18] These four categories are arranged in ascending order of severity: Negative public discourse often has no real bite, but might at times portend future problems; noncompliance or reversal directly undermines the efficacy of a court; institutional reform is a severe kind of counterattack, which reverses a court's institution-building efforts; and outright violence, which endangers judges' lives.

[18] My typology draws on the work of Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 *International Journal of Law in Context* 197.

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6.2.3.1 Negative Publicity

High-profile judgments draw media attention and are likely to attract criticism from a range of social groups. Detractors are not always politically motivated; some may have constructive and legitimate comments. Even unfair criticism is sometimes valuable, as it spotlights subtler issues relating to the judiciary or legal system that may merit closer scrutiny.[19] The legitimacy of these critiques aside, the impact of negative publicity on a court's social authority depends on where the critique originates from and what it signifies. In this instance, it is useful to distinguish between different kinds of critics, including government officials, political elites, the legal community, academia, civil society organizations, the business community, international organizations, and sometimes even foreign officials. How much weight a court should give to these responses depends on the relative standing of the critic.

While negative publicity may at first seem rather harmless, there are two reasons why it deserves closer attention. First, it may be an early signal of possible retaliatory action. If the critic is one with substantial power over the court, their reaction may foreshadow court-curbing actions. Second, negative public discourse may mobilize other constituencies, creating more leverage for those who plan to attack the court. State officials' public denouncements, for example, not only directly pressurize judges, but also reflect the state's attempt to manipulate the public's perception of the judiciary. Similarly, the legal and/or academic community's publicly expressed disappointment in a decision may weaken the public's and other constituencies' confidence in the judiciary. Thus, although the immediate effects of negative public discourse may seem negligible, persistent negative publicity can lead to a loss of public support, weaken the court's authority, and trigger other more severe responses.

6.2.3.2 Noncompliance or Reversal

Enforcing judicial decisions relies on the cooperation of the political branches and ordinary citizens, both of whom may elect to disobey the court's decision(s). Those with political power may respond with laws or constitutional amendments that effectively annul a decision. Defiance (including noncompliance and reversal) limits the efficacy of the court, and can have long-term effects on the court's reputation and its judicial

[19] See Scott Stephenson, 'Are Political "Attacks" on the Judiciary Ever Justifiable? The Relationship between Unfair Criticism and Public Accountability' (2023) 71 *American Journal of Comparative Law* 748.

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authority. As Jeffrey Staton and Georg Vanberg argue, defiance, especially by the government and other visible actors, has "corrosive effects": "noncompliance by a policy maker today may begin to undermine the general perception that court decisions must be respected, and thus induce more and more noncompliance as citizens and political elites become less likely to react when policy makers fail to adhere to judicial rulings."[20]

One-off instances of defiance may, over time, become habitual, gradually eroding the social legitimacy of the court. Ultimately, it can become an existential threat by contributing to a culture of cynicism and giving enemies of the court the political ammunition to take down the judges.

6.2.3.3 Institutional Reform

Institutional reform, which includes court-curbing actions and court-packing, is usually the worst kind of institutional response that a court can attract, for it tends to cause long-term damage to the judiciary as an institution. It diminishes the power of a court in a way that is often irreversible (at least in the near term) and makes judicial maneuvering much harder. Institutional reform changes the rules of the game of judicial politics and fundamentally disrupts the calculus of judges. It includes appointing loyal judges or removing defiant judges; impeachment; redesigning the structure of the court, such as its size; amending court procedures, such as access rules or the number of votes required to render a decision; changing the formal powers of the court, such as carving out the court's jurisdiction or disabling judicial review; and diminishing the court's budget.

6.2.3.4 Actual Violence

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

6.2.4 A Holistic Assessment

The typology set out in the previous paragraphs captures most kinds of adverse reactions faced by domestic courts. By pinpointing the kind(s) of

[20] Jeffrey Staton and Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions' (2008) 52 *American Journal of Political Science* 504, 507.

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resistance that can emerge, judges should be in a better position to anticipate the severity of the negative political outcome(s) of maintaining the formal legal position. It should be emphasized, though, that these categories are only heuristics for thinking about the question of severity. While, for example, institutional reform tends to be more drastic than reversal, some kinds of institutional reforms are relatively mild, such as reducing the retirement age of judges by one year. Judges might also reasonably expect resistance from multiple sources, which may have a cumulative effect when combined.

After estimating the severity of the negative outcome, judges need to have a sense of the likelihood of it occurring. This is not a scientific exercise, and uncertainty around any kind of political forecasting is unavoidable. Even the savviest judges can get it wrong. Case studies of authoritarian judicial politics offer several generalizable lessons to help judges in this regard. First, the likelihood (and severity) of a negative reaction is often correlated with the salience of the issue confronting the court. Antiregime decisions that touch on matters fundamental to the incumbent's survival will most probably trigger an immediate and negative reaction.[21] Second, macropolitical events outside the courtroom might explain variation in the likelihood of political attacks occurring. The regime's tolerance of an uncooperative judiciary will naturally be at its lowest when the incumbent perceives that political circumstances threaten its own existence.[22] Third and relatedly, court-curbing threats or actions cannot always be traced back to a specific judicial decision. They might sometimes be the result of accumulated past incidents. The second and third lessons imply that a holistic and longitudinal assessment of relevant judicial political dynamics helps to predict the likelihood and severity of political attacks more accurately.

In sum, the risk assessment considers factors relating to severity and likelihood. Again, the "formula" proposed is not a mathematical equation. Rather, it is an analytical tool to help judges under authoritarian regimes carefully consider the political consequences of maintaining a formal legal position by distilling the factors they ought to be paying attention to. Judges are not asked to produce an exact estimate, but

[21] See Yasser Kureshi, 'Selective Assertiveness and Strategic Deference: Explaining Judicial Contestation of Military Prerogatives in Pakistan' (2021) 28 *Democratization* 604; Julius Yam, 'Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts' (2021) 46 *Law & Social Inquiry* 153.

[22] Epstein, Knight, and Shvetsova (n 14).

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instead ascertain whether the risks of pushbacks and backlash are *sufficiently high* to warrant strategic considerations.

6.2.5 *Deciding Whether and How to Supplement the Formal Legal Position*

After gauging the level of risk exposed to a court, judges will need to determine the amount of deviation from the formal legal position required, if any, to address the expected risk. Different risk exposure levels warrant different kinds of strategic responses. The low-risk and high-risk scenarios discussed in this section are not hard categories, while the baseline and unavoidable scenarios differ in kind and overlap with the high-risk scenario.

6.2.5.1 Low-Risk Scenario

In some situations, the risk level might be so low that there is no need to deviate from the formal legal position ("the low-risk scenario") because, for example, the likelihood of any backlash is very remote. Even in these situations, judicial strategy may still be relevant. As I will explain, some strategies are cosmetic, by which I mean that whatever changes they result in leave the core of the decision (or the formal legal position) untouched. For example, judges can consider deploying strategies to improve the social impact of the decision or the social authority of the court. Strategies may also be applied to run-of-the-mill cases to entrench constitutional legal principles, which over time can be used to justify far more consequential decisions. Such approaches to a low-risk context are acceptable, so long as they do not materially increase the risk level (and keep the formal legal position intact).

6.2.5.2 High-Risk Scenario

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

First, the priority is to whittle the available options down to those with manageable levels of risk. It may be impossible or excessively costly to completely neutralize all risk. Self-preservation, again, is not the goal, but a court needs to be sufficiently confident of its institutional survival if it wants to realize its constitutional role sustainably. Second, among the

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options that present tolerable levels of risk, judges should select a path that preserves as much of the normative content of the formal legal position as is practically possible.

It may be that the deviation from the formal legal position required does not allow any constitutional substance to be salvaged. If so, the third principle requires judges to choose an option that minimizes the authoritarian effects of deviating from the formal legal position. This is particularly important because a court can entrench authoritarian norms as easily as it can embed constitutional legal norms. This is the flip side of a court's rule-of-law potential.

6.2.5.3 Baseline Scenario

There are two scenarios in which maintaining the formal legal position is justified *despite* risk levels being high. The first exception to the high-risk scenario is when a departure from the formal legal position crosses a moral baseline ("the baseline scenario"). As suggested, attempts to avoid political backlash might sometimes lead to the adoption of a position with authoritarian effects. While one of the principles proposed just now requires minimizing such effects as much as practically possible, there are times when *any* deviation from the formal legal position would lead to an evil or profoundly immoral outcome. The moral costs might in these cases be too high to justify any kind of strategic deviation. For example, questions about whether slavery or genocide are constitutional are undisputable. I confine this exception to moral evils such as when what is at risk is people's lives or security. Strategic deviation is morally impermissible here, as the individual interests at stake are too important. In these cases, if a judge can temper an evil system, he or she should do so, and strategies should be used for ends other than mere institutional preservation, such as increasing the reach and impact of the decision.[23]

6.2.5.4 Unavoidable Scenario

A second exception is when the likelihood of a severe political backlash is so high that no practical amount of strategizing is able to mitigate the risk ("the unavoidable scenario"). In other words, an existential threat to the judicial institution is inescapable and judicial strategy is immaterial. "Living to fight another day"[24] only makes sense if "another day" exists.

[23] Another option judges may consider is resigning in protest when there are outcomes that none can in good conscience reach.

[24] Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) 4 *Wisconsin Law Review* 683.

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Our assumption about courts adopting a long-term horizon does not hold here, as the court itself will soon cease to exist. Judges facing such dire circumstances should stand firm and execute their democracy-enhancing roles to the best of their abilities until the court is dissolved. Not only is this the right thing to do, but the court's refusal to admit defeat may mobilize domestic and international support by highlighting abuses of authoritarian power. Strategic deviation in this instance will not save the court, but strategies can nonetheless be used to undermine the authoritarian's plans.

Figure 6.1 summarizes the Sustainable Democratic Adjudication framework in the form of a flowchart.

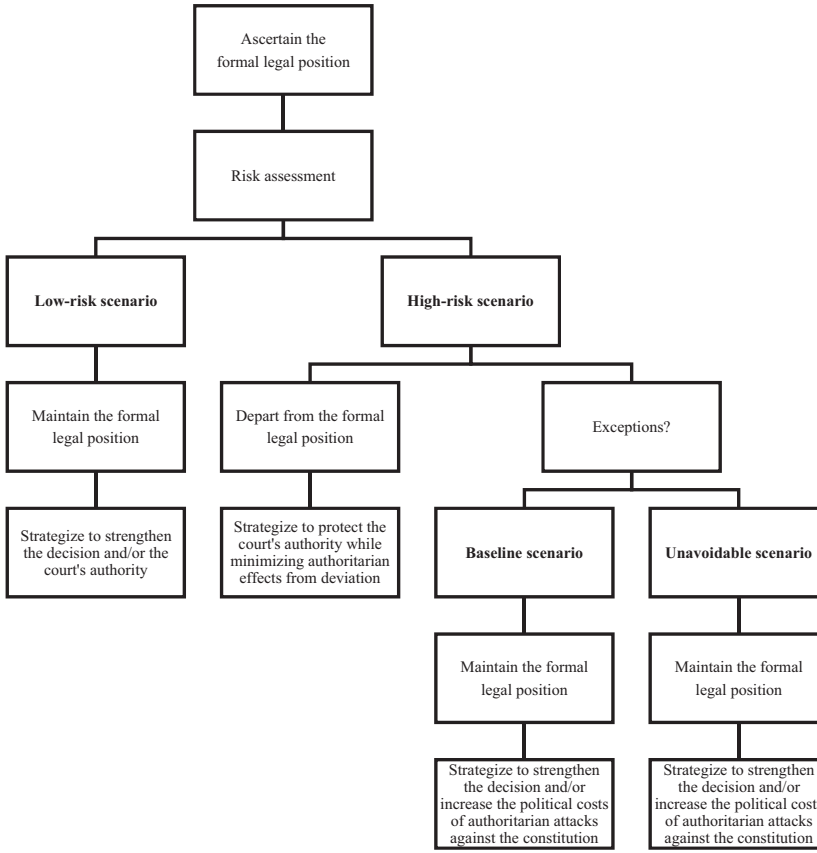


Figure 6.1 Sustainable Democratic Adjudication flowchart.

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6.3 A Menu of Strategies

We have discussed *when* judges should consider judicial strategies, and *how* judges should integrate judicial strategies into the adjudicative process to accommodate authoritarian pressures. Two important questions remain: *What* kinds of judicial strategies are available, and what are their functions?

Effective strategizing relies on a judge's ability to make legally and politically sensible assessments suitable to the environment they operate in. Simply highlighting the importance of strategizing would be "anti-theory," as it leaves everything to judicial statesmanship.[25] To balance judicial agency with insights from the judicial strategy literature, I focus on the aspects of the adjudicative process with potential consequences for the institutional status of judges and identify the conditions under which each technique may be salient. The virtue of this approach is that it shows judges when and where strategic opportunities may arise, and their practical implications, while leaving room for judges to select strategies most appropriate to the specific contexts they face. After all, based on different judges' reading of the situation, there can be multiple ways to address their strategic needs.

Drawing on international and comparative examples from various regime types, this part presents a catalogue of the strategic opportunities relevant to a domestic court. The strategies introduced in this section are by no means exhaustive. As will become clear, some strategies may be more effective in certain kinds of hybrid regimes, depending on, for instance, the extent to which the regime grounds its legitimacy in legality, or whether it cares about the regard of international audiences. The judicial-legal culture within which judges operate will inevitably influence the range of options available to them. The objective here is to highlight strategies that are generally relevant to judges in hybrid regimes facing authoritarian pressure. The effects of these strategies will vary depending on which of the four scenarios judges face. In a low-risk scenario, judicial strategies may further entrench constitutional democratic norms and enhance a decision's social impact. In a high-risk scenario, judicial strategies are needed to mitigate the risks generated as a result of the formal legal position, and may involve departing from the formal legal position. Even in the baseline and unavoidable scenarios,

[25] Mann (n 5) 32.

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strategies may help consolidate the formal legal position and increase the political costs of pushback by the authoritarian.

For our purposes, there are four dimensions of judicial decision-making along which judges can factor in strategic considerations: (1) Outcome, (2) reasoning, (3) language, and (4) timing.[26] How the strategic opportunities arising from each dimension may become relevant in each of the four scenarios will also be discussed.

6.3.1 Outcome

Given that the final outcome of a case can have profound, immediate effects on the litigants and those related to the decision, it is often the most strategically significant aspect of the adjudicative process. For similar reasons, altering the outcome is arguably the most contentious strategic response among the options discussed here. However, as suggested, it may be necessary to let the authoritarian win at least parts of the judgment in order to defuse an institutional crisis, especially in a high-risk context. Furthermore, in what follows, I argue that outcomes can be adjusted in nuanced ways to preserve certain normative aspects of a formal legal position while mitigating the more pressing authoritarian risks.

6.3.1.1 Binary and Multitiered Outcomes

A judicial decision is often thought to involve a binary outcome: Someone wins, and someone loses. Judges need to be aware of the expectations of different and potentially conflicting judicial audiences, as well as how their judgments might impact these stakeholders.

While outcomes often look binary, judges can sometimes create multitiered outcomes by disaggregating the issue at stake. One side, for instance, can win on the first and third grounds, while the other may take the second and fourth grounds. These are what might be called halfway-house or "win–win" decisions, whereby an outcome is split into several parts in order to try and satisfy the expectations of various social groups.[27] These decisions may also help preserve parts of the formal legal

[26] Rosalind Dixon and Yvonne Tew have also written about the different techniques of judicial statecraft that would enhance the perceived legitimacy and judicial power of a constitutional court. While substantively different to the proposals here, the dimensions they focus on are similar. See Dixon (n 4); Yvonne Tew, 'Strategic Judicial Empowerment' (2024) 72 *American Journal of Comparative Law* 170.

[27] Yam (n 21) 170.

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position while lowering the risk of authoritarian backlash to manageable levels. To illustrate this technique, Wen-Chen Chang uses the examples of constitutional courts in South Korea and Taiwan, whose judgments allowed "everyone [to] obtain . . . some portion of what he or she desires, just not all of it."[28]

The feasibility of this technique depends on the nature of a case. It might be impractical in cases that are too preoccupied with a single, narrow issue that cannot be carved up further. In some instances, any attempt to draw finer distinctions will have minimal or even counterproductive social effects, even if these distinctions are legally significant. For example, the Hong Kong Court of Final Appeal's attempt to please the prodemocracy and pro-China camps by imposing a lenient sentence on a democracy leader while issuing harsher sentencing guidelines for future cases in *HKSAR v. Wong Chi Fung* triggered pushbacks from both sides, as each perceived the other half of the outcome to be unfair or biased.[29]

6.3.1.2 Remedies

Judicial remedies introduce additional subtleties to the notion of outcomes. Traditionally, courts with constitutional jurisdiction are vested with the power to strike down laws and executive actions that are inconsistent with the constitution. The same courts, however, have begun to develop an extensive array of remedies. These remedies might be considered novel because they push the constitutional boundaries of a court and sometimes lack constitutional and/or statutory authorization.[30] Some examples include constitutional damages, engagement orders that oblige the government to engage with victims of constitutional violations, suspension orders coupled with read-in provisos that automatically take place if the government does not respond in time, and remedial interpretations.[31]

Aside from their ability to address complex legal questions, these remedies also have strategic effects and give judges the tools to express themselves in nuanced ways. Engagement orders, for instance, can soften the blow of a judgment on the government. They position the court as deferring to the incumbent regime, even as its ruling admonishes the incumbent's actions, by engaging them in a collaborative partnership. A clever use of remedial interpretation may also appear to superficially

[28] Wen-Chen Chang, 'Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences' (2010) 8 *International Journal of Constitutional Law* 885, 900.
[29] [2018] 2 HKLRD 657.
[30] See Po Jen Yap (ed), *Constitutional Remedies in Asia* (Routledge 2019).
[31] See Po Jen Yap, 'New Democracies and Novel Remedies' (2017) 1 *Public Law* 30.

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preserve the constitutional authority of the government while injecting constitutional legal substance into unattractive laws.

6.3.2 *Reasoning*

The reasoning is the flesh of a decision, and varying aspects of judicial reasoning can have strategic implications. Reasoning is salient in all four scenarios. It may help address the political dangers in a high-risk scenario, fortify a formal legal position adopted in a low-risk or baseline scenario by amplifying certain parts of the judgment, or increase a decision's symbolic effects in the unavoidable scenario. Some of the techniques outlined in the following paragraphs may result in a departure from the formal legal position; others are cosmetic, and are used to communicate and develop relationships with the court's audiences.

6.3.2.1 Depth and Breadth of Reasoning

Not only are judges in control of how to divide the issues at hand, but they exercise discretion over which issues to address and the amount of coverage given to each issue. A shallow ruling that leaves foundational questions undecided may be appropriate in a high-risk scenario.[32] This approach would draw conclusions based on rationales that already command wide support, or build consensus by avoiding matters that are likely to provoke disputes. A court that seeks to limit the precedential value of its decision (perhaps because of the authoritarian effects arising from strategic deviation) may also consider particularizing a decision based on the facts of the case.

A minimalist approach is not always successful in defusing political risks, though. Tensions are sometimes so high that common ground cannot be feasibly established. Or, both sides might demand that judges engage with deeper constitutional questions; in these circumstances, failing to do so would impair the court's legitimacy and prolong social tensions. In such situations, judges might have to consider a more maximalist approach by giving their opinions on the core issues involved. This may seem strategically counterintuitive, as deeper rulings can create more points of contention. However, a more thoroughly reasoned judgment also allows judges to clarify their positions, which reduces the room

[32] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (HUP 2001).

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for misinterpretation, distortion, and the uncertainty that might otherwise follow.

The depth and breadth of reasoning can also be adjusted to increase the court's social impact. When a risk is reduced to a tolerable level, judges may engage in deeper reasoning to lay the foundations for future decisions that are conducive to the advancement of constitutionalism. Similarly, in a low-risk context, it may be preferable to issue broad decisions in order to capitalize on favorable political conditions and develop meaningful principles. This may include, for instance, adopting an expansive reading of a constitutional right. The baseline and unavoidable scenarios are also relevant in this regard. When there is only one morally acceptable answer, or when the inevitable is near, judges should seize the opportunity to point out and explicate unconstitutional and unjust developments. The aim is to undermine the legitimacy of the incumbent regime and increase the political costs of authoritarian attacks against the constitution.

6.3.2.2 Legal Methodology

Deciding how to justify an outcome affects the persuasiveness of a decision. A court may need to adopt a kind of reasoning that resonates with its intended audience. Judges may, for instance, ground a decision in guardianship or "Schmittian" logic if they want to convince their authoritarian readers. They may also adopt a legal methodology that is favored by their audiences, just as how conservative groups in the United States might prefer originalism. To use Robert Hume's words, the objective here is to "choose a legal grounding that will advance their relationship with the audience that they are most interested in targeting based on the conditions presented in each case."[33]

The distinction between procedural review and substantive review is illuminating, as, beyond their technical differences, they broadly reflect two different ways of grounding a decision. Substantive review involves deeper scrutiny of the merits of the case and the validity of the arguments put forth by the parties. Procedural review involves checking whether the parties have complied with established rules and procedures during legal proceedings. Procedural review appears to leave less space for judicial discretion, given that rules and procedures are usually drafted in more

[33] Robert J. Hume, 'Courting Multiple Audiences: The Strategic Selection of Legal Groundings by Judges on the US Courts of Appeals' (2009) 30 *Justice System Journal* 14, 17.

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unequivocal terms. I say "appears to" because interpretative room is a matter of degree, and judges can sometimes still find the space to creatively construe procedural provisions.

Relying on procedural grounds to dispose of a case may help preserve a court's neutral appearance. There is a shared belief that the administration and interpretation of procedural rules is part and parcel of a judge's duty.[34] A commitment to procedural justice through an impartial use of procedural review not only lowers the political risk of a supposedly controversial position, but can also help bolster judges' professional image.[35] Hume makes a similar argument, finding that American appeal courts in the administrative law context can more effectively deflect scrutiny from higher court judges and other political actors by confining their analyses to the facts of the case and avoiding engagement with the substantive points raised by the litigants.[36] Nevertheless, it should be noted that when the underlying procedures are widely perceived as unfair, an unwavering commitment to a formalistic vision of proceduralism is likely to damage a court's legitimacy. In other words, it may sometimes be impossible for judges to appear neutral when the very rules that they are asked to interpret lack social authority. Hence, the procedural approach is not necessarily foolproof.

6.3.2.3 Strategic Citation

Citations in a judgment affect how judges are perceived. To use legal precedents to justify an argument is the essence of common-law reasoning and an accepted practice in many civil-law jurisdictions. Studies have found that when judges anticipate pushbacks when laying down a new doctrine, they tend to argue more carefully and cite more extensively.[37] This increases the chances of acceptance by the legal community. Not only are judicial citations used to convince legal actors, their strategic effects can reach those outside the legal field as well. Olof Larsson and his colleagues, for example, find that the Court of Justice of the European

[34] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction Publishers 2005) 58, 66.

[35] Tom Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375.

[36] Hume (n 33).

[37] David Walsh, 'On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases' (1997) 31 *Law & Society Review* 337; Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413.

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Union tends to embed its decisions in caselaw when ruling against European governments in order to persuade them of the legal quality of its decisions.[38] The fact that these governmental actors are, strictly speaking, neither lawyers nor jurists is irrelevant, as they have legal experts who can help policymakers appreciate the significance of the legal justifications.

The selective use of precedents can liberate judges from tight spaces. This is especially so for apex-level courts that are not bound by precedents. This point is best illustrated by the strategic use of comparative jurisprudence, which includes foreign and international law. The extent to which comparative citation is available to judges as a strategic tool depends on preexisting institutional rules and legal norms, for example, whether the law explicitly sanctions this practice, or whether there is a history of doing so.[39] Even without explicit authority, however, there are many constitutional courts that cite comparative law "voluntarily."[40] Some judges have been candid about how selective their approach is when it comes to the use of comparative citation.[41]

The kinds of comparative jurisprudence cited reflect the image that a court wants to project. Just as authoritarian regimes may attempt to pass themselves off as democratic, courts under pressure from authoritarian rulers may wish to "defer" to foreign practice by citing precedents decided by the more "canonical" group of courts.[42] This technique may help establish links with reputable overseas courts. For instance, the Ugandan courts do not enjoy explicit constitutional authority to refer to foreign and international jurisprudence, but foreign and international laws have played an important role in the country's constitutional legal developments. Johanna Kalb argues that comparative citations have been used to strengthen the authority of antiregime decisions and to improve the judiciary's reputation in the eyes of domestic and international NGOs and donors.[43] Furthermore, citing foreign and international jurisprudence is

[38] Olof Larsson and others, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2017) 50 *Comparative Political Studies* 879.
[39] Yam (n 21) 171–2.
[40] Ran Hirschl, 'In Search of an Identity: Voluntary Foreign Citations in Discordant Constitutional Settings' (2014) 62 *American Journal of Comparative Law* 547.
[41] Anthony Mason, 'The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 *Hong Kong Law Journal* 299, 306.
[42] Hirschl (n 40) 564.
[43] Johanna Kalb, 'The Judicial Role in New Democracies: A Strategic Account of Comparative Citation' (2013) 38 *The Yale Journal of International Law* 423, 446–8.

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a way of signaling respect to allies abroad. A court can also refrain from referring to "unattractive" jurisdictions or lines of jurisprudence, even if these might be legally relevant, in order to avoid associating itself with "the wrong crowd." Given the plethora of comparative jurisprudence in existence, selective use of comparative citation is a technique that serves ideologically diverse outcomes.

Aside from domestic and comparative precedents, judges may cite nonbinding secondary materials in their judgments to persuade nonlegal actors.[44] These materials may include legal dictionaries, works by prominent jurists and philosophers, statements by political figures, and treatises. This technique is based on a psychological phenomenon called priming, which describes how exposure to certain stimuli, such as the prestige or legitimacy of the cited materials, might unconsciously affect how a judgment and the court are perceived.[45] Unlike the citation of legal precedents, however, these materials lack legal authority and do not increase the legal persuasiveness of a decision. Still, this technique improves the standing of the court and enhances the persuasiveness of its decisions in the eyes of audiences who can appreciate the secondary materials being cited.

6.3.3 Language

The language used in a judgment is crucial for effectively communicating legal ideas. It can also shape the social authority of the decision and judicial audiences' attitudes toward the court. Language-related techniques tend to be more cosmetic, and there can be multiple ways to linguistically frame the same legal position. The techniques covered in the following paragraphs can be applied in all four scenarios, but how they should be applied depends on whom judges are trying to communicate with.

6.3.3.1 Natural Language or Legal Language?

There is an ongoing debate about what sort of language – natural language or legal language – judges should use in their opinions. These debates are, to some extent, conditioned by societal expectations. For those pushing for legal accessibility, using natural language may help

[44] Robert J. Hume, 'The Use of Rhetorical Sources by the U.S. Supreme Court' (2006) 40 *Law & Society Review* 817.
[45] *ibid* 821.

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legitimize the court by "bringing the author down nearer to the human level of the litigants" and "humaniz[ing] . . . the judicial process."[46]

This choice has strategic implications. The traditional law and politics divide suggests that legal language is peculiar to the legal field, and its use purports to obscure the role of politics in law. Judges, it is argued, can conceal their intentions and the political substance of the case behind the "mask" of the law.[47] As Michael Blauberger and Dorte Martinsen put it, "politically unwelcome case law can only be challenged on its own legal terms."[48] Framing a judgment in technical legal terms creates a mythical aura that shields judges from attacks by laypersons. The decisions of the German Constitutional Court have been described as "dry" and "technical,"[49] but its self-presentation as a technocratic court has helped build its reputation for impartiality. This technique may be particularly useful in divided societies seeking reintegration, as it may help downplay the political saliency of contentious topics. Judges may also plant the seeds of progressive doctrinal development by inserting legal justifications into their decisions that require deciphering. These can be "unlocked" in the future when the conditions are right.

Natural language offers its own set of advantages. A more layperson-friendly approach allows ideas to travel to a wider range of audiences. Judges can only create attractive soundbites when the general population finds the judgment to be accessible. This technique is especially relevant when judges are trying to educate the public, or when they want to make a strong statement, as in the baseline and avoidable scenarios.

Judges hoping to reduce the likelihood of noncompliance – which, as suggested, is a common type of adverse response they face – should also consider using natural language. Those asked to comply with a judgment cannot use ignorance as an excuse for disobedience when that judgment is clearly and simply expressed. Judges may also deploy affective terminology or value-laden language to persuade lay actors to abide by their decisions. A study of World Trade Organization panels by Marc Busch and Krzysztof Pelc found that the extent to which the panels used "words

[46] Patricia M. Wald, 'The Rhetoric of Results and the Results of Rhetoric: Judicial Writings' (1995) 62 *The University of Chicago Law Review* 1371, 1417.

[47] Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41, 72.

[48] Michael Blauberger and Dorte Sindbjerg Martinsen, 'The Court of Justice in Times of Politicisation: "Law as a Mask and Shield" Revisited' (2020) 27 *Journal of European Public Policy* 382, 384.

[49] Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 *The American Journal of Comparative Law* 527, 551.

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denoting overt positive or negative sentiment" in their rulings depended on the political sensitivity of the issues involved.[50] Courts looking to have their rulings enforced and followed must be able to communicate effectively, and, as the authors argue, affect offers the necessary discursive resources to persuade public audiences.[51]

6.3.3.2 Strategic Vagueness

Another rhetorical resource that judges can utilize is specificity. Highly specific language aligns the outcome with the judges' intentions by making deviations from the law easier to detect.[52] Judges should be specific when asserting themselves and attempting to make their point clear. Conflict aversion or covert resistance, however, may necessitate toning down on the specificity of the decision's language.[53] For example, judges may establish a new constitutional principle but underspecify the context in which it applies. Points of contention can be suppressed by using fuzzy language. However, vagueness can be abused by judicial audiences, since judges rarely have the opportunity to correct a widespread misinterpretation of their writings. Any side-effects of strategic vagueness may be long-lasting as a result.

6.3.3.3 The Power of Narrative

Judges also control the narrative of the judgment. This relates to, but goes beyond, our previous discussion on the choice of language. A distinction here needs to be made between narration, which appeals to emotion, and argumentation, which appeals to logic.[54] Argumentation relies on accepted modes of reasoning with the help of evidence to justify legal claims, whereas narration involves framing the flow of events and the relevant characters. Narration helps audiences create experiences. Legal scholars and lawyers typically focus on the argumentative elements of a judgment, such as the admissibility of the evidence, the appropriateness of the adopted mode of interpretation, and the relevance and authority of

[50] Marc L. Busch and Krzysztof J. Pelc, 'Words Matter: How WTO Rulings Handle Controversy' (2019) 63 *International Studies Quarterly* 464.

[51] It is worth mentioning that World Trade Organization panels aim to persuade national governments rather than domestic audiences directly. The authors originally argue that the discursive resources are offered to governmental actors in order to persuade their citizens.

[52] Lee Epstein and Tonja Jacobi, 'The Strategic Analysis of Judicial Decisions' (2010) 6 *Annual Review of Law and Social Science* 341, 354.

[53] Staton and Vanberg (n 20).

[54] This distinction can be traced back to Aristotle's work *Rhetoric*.

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the cited precedents. The strategic importance of argumentation has already been highlighted in the earlier discussion on reasoning.

Which narrative the court adopts can significantly influence the attitude of certain audiences toward the court and determine the social impact of a decision. Courtrooms are often described as battlegrounds for litigants to assert their preferred narratives. A judge imparts a narrative by adopting a particular vocabulary, portraying certain actors as protagonists and antagonists, recounting events in a particular sequence, and selectively foregrounding particular principles or factual elements. The choices made by judges in telling the "story" of the case can construct and reconstruct historical events as well as create new frames for interpretation. The power of narrative is perhaps best displayed by the Indian and Pakistani courts, both of which are famous for their populist rhetoric.[55] Their strategies involve using natural language, but they go further by actively attempting to connect with "the people" through appeals to public sentiment and appropriating the vocabulary of politicians. The Indian Supreme Court has even quoted poetry in its judgments.[56] Courts in these countries are sometimes denounced as populist and politicized, but their ability to mobilize the public by deploying narratives cannot be understated.

6.3.4 *Timing*

A consensus among students of judicial strategy is that timing is always a factor at play. This chapter assumes that interactions between the court and political actors persist over an extended period. The importance of being sensitive to timing is built into the two-step framework and is relevant in all four scenarios, as judges are required to evaluate their current and future political circumstances, drawing partially on past experience. However, what does "good timing" mean?

Timing is "right" in the sense that a case is decided at a moment with optimal effects for judicial empowerment and/or the legal position they wish to advance.[57] For instance, the *Obergefell v. Hodges* decision in the

[55] Anuj Bhuwania, 'Courting the People: The Rise of Public Interest Litigation in Post-emergency India' (2014) 34 *Comparative Studies of South Asia, Africa and the Middle East* 314; Yasser Kureshi, 'What Is Judicial Populism and How Does It Work in Pakistan?' Dawn, February 1, 2019, available at www.dawn.com/news/1461194 [https://perma.cc/389V-6AMH], last visited January 10, 2026.

[56] Hailbronner (n 49) 552.

[57] David Fontana, 'Docket Control and the Success of Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

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United States to recognize the right to same-sex marriage is considered well-timed because it coincided with increasingly liberal attitudes toward gender issues.[58] The landmark *Ng Ka Ling & Ors v. Director of Immigration* case decided by the Hong Kong Court of Final Appeal to establish its power of judicial review in the early days of the handover was also well-timed from an *institutional* perspective as the court found and exploited the political opportunities present during the early post-handover period to effectively entrench its powers, when China was still under close international scrutiny.[59] From a *policy* or *legal* perspective, however, the decision was badly timed, as the decision to broaden the right of abode in the same case was eventually "overruled" by the Chinese authorities. The judges did not anticipate how unpopular their decision would be, considering immigration was a hugely controversial topic at the time.[60]

6.3.4.1 Timing in Three Stages

Timing is important. But, more crucially, judges have opportunities to control issues relating to timing. These opportunities are best understood through "the life cycle of a case"[61] – the ex-ante stage of deciding whether to hear a case, the in-medio stage of hearing a case, and the ex-post stage of the release of the judgment. Each stage presents different opportunities for judges to exercise their agenda-setting powers. Judges have three options when it comes to time-related opportunities: To delay, to avoid, or to engage. Judges may want to delay or avoid politically risky cases when the conditions are not ripe, and engage with those cases when conditions are favorable. The opportunities described in subsequent paragraphs draw attention to how judges can adapt the timing of their decisions to take advantage of their surrounding circumstances.

Crucial to a court during the ex-ante stage is its docket control power, that is, its power to decide whether to hear a case or not.[62] The docket control power of courts vary in practice. In some countries like India and Pakistan, judges enjoy *suo moto* powers to pursue an action of its own

[58] *Obergefell v. Hodges* 576 U.S. 644 (2015).
[59] *Ng Ka Ling & Ors v. Director of Immigration* [1999] 1 HKLRD 315.
[60] See 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, 832–3.
[61] This framework is borrowed from Erin F. Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66 *Duke Law Journal* 1, 5.
[62] Fontana (n 57) 625.

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accord, and can actively control their own agenda and the pace of the judicial process. Most courts lack such powers, though. For them, the docket control power depends to a large extent on the supply of cases. Some, such as the United States Supreme Court, have complete discretion as to whether to hear a case brought by applicants. More intricately, as Theunis Roux observes, the South African Constitutional Court's expansive jurisdiction over public law matters coincided with its strict approach to determining which cases it hears.[63] The strategy allows the court to "measure the political temperature" of cases directly brought by applicants before deciding whether to accept the petition.[64] In most systems, the discretionary power to decide whether to hear a case is subject to a number of legal principles and rules. In many common-law jurisdictions, an applicant must demonstrate that the case is of sufficient public importance or meets a merits test. Constitutional courts in civil-law jurisdictions are often mandated by the law to hear almost every case, though in practice they still enjoy considerable discretion. For instance, judges can interpret procedural and standing rules to control the flow of the cases, and allocate their time and effort efficiently through a more strategic allocation of judge panels.[65]

The strategic importance of docket control power is best illustrated by its absence. A passive court will be at the mercy of external actors when it comes to when and what kinds of cases are to be heard. This is particularly troublesome in judicialized polities, as a passive court will have no choice but to confront all sorts of highly controversial cases. Those looking to undermine judicial authority may even manipulate the agenda of defenseless judges by deliberately launching claims that are likely to lead to unpopular outcomes. Docket control power provides much-needed flexibility to the court to cope with shifting circumstances. Judges can exercise their discretion to pick attractive cases, delay others to the future when the political conditions are favorable, and avoid engaging in high-risk scenarios. Again, the extent to which a court can utilize its docket control power for strategic purposes is limited by preexisting rules that govern its behavior.

There is also room for strategic maneuvering in the next two stages. In particular, during the in-medio hearing and trial stage, judges first get to

[63] Roux (n 4) 377–83.
[64] *ibid* 366.
[65] Christoph Engel, 'Does Efficiency Trump Legality? The Case of the German Constitutional Court' in Yun-chien Chang (ed), *Selection and Decision in Judicial Process around the World* (CUP 2019).

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decide when to hear a case. Second, they have a say with regard to the amount of time dedicated to the trial. Third, and most importantly, judges can be selective about what issues to address. As discussed previously, a narrow focus enables the discussion of certain issues to be delayed, though this is impossible if the controversy the court is seeking to avoid forms the crux of the case.

The final stage is when the judgment is released. The social effect of the decision takes place once the judgment is published. Finding the right time to issue the decision is of great strategic importance, and judges can time the releasing of their decisions to shape their image and public discourse. This is an area limited by case management norms. Each jurisdiction has its own practice in this regard, but authoring judges usually retain some room for discretion. For example, a common reason to expedite a case is when it involves matters of significant public importance. Despite a huge backlog of pending cases, the Supreme Court in Pakistan has often prioritized such cases.

A more substantive temporal element regarding the final stage is remedies. We have discussed how choosing between different remedies allows for varying degrees of intrusiveness. Remedies can also be analyzed temporally. Some remedies take place immediately, such as the nullification of a provision, but other effects might be intentionally delayed. What a suspension order does, for instance, is to effectively suspend the declaration of unconstitutionality for a period in order to allow political actors the time to comply with the decision. Engagement orders have similar delaying effects, as they give political actors considerable discretion over how best to implement the aspirations specified in the decision. Normatively, delayed remedies are often justified on grounds of democratic legitimacy.[66] They are a humble judicial technique to engage the political branches of government in constructive dialogue. Strategically, delayed remedies may reduce the risk of immediate backlash by effectively pushing trickier questions of implementation to a later date, or by signaling respect for the incumbent regime by engaging its members in a collaborative relationship.

6.3.4.2 Incrementalism

A time-related theme that is worth highlighting is incrementalism. In some ways, strategy is by definition incremental – it is a plan, or steps in a plan, to realize a long-term, overarching goal. As mentioned, the

[66] See Delaney (n 61).

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framework proposed here assumes a long-term horizon: the benefits of applying it are not always immediate, and the goals of building institutional strength and the advancement of constitutionalism are continuous. This is consistent with the understanding that regime change, or democratization, is a gradual and often uneven process.[67]

Incrementalism refers to the idea of achieving progress through small, successive steps. Incrementalism is best contrasted with a revolutionary approach that seeks to align reality with certain goals immediately through large-scale transformations. Incrementalism has been applauded by constitutional scholars for its normative benefits: It tends to reduce error cost as a result of competency limitations of a court, offers more possibilities for judges to adapt to changing and complex circumstances, and is more respectful of democracy because it leaves more room for judges to collaborate with the political branches.[68]

From a strategic perspective, judicial incrementalism is often a more sensible approach as well, for two reasons. First, the objective here is the entrenchment of constitutional norms, as evidenced by a change in how things are done politically and the attitudinal shifts in the public and within the government. All things being equal, it is unrealistic to expect these changes to happen overnight via revolutionary action. Second, courts are vulnerable institutions, and a backlash may cause irreparable damage. Losing the court means closing down one of the few avenues for positive constitutional change in a hybrid regime. A revolutionary approach might be warranted in the unavoidable and baseline scenarios. Outside those cases, incrementalism seems to be preferred. Finally, incrementalism may help hone judges' political intuitions. Through each successive step, a court is expected to incorporate and consider feedback from society. This dynamic process provides an opportunity for judges to gain a better understanding of their local context.

6.3.5 *Combining the Techniques*

It is important for judges to remember that these techniques can and should be combined. For example, the Ugandan courts have upheld allegedly fraudulent elections to confirm Museveni's electoral victory,

[67] See Tom Gerald Daly and Dinesha Samararatne (eds), *Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways* (OUP 2024).

[68] See e.g. Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16 *International Journal of Constitutional Law* 389; Jeff King, *Judging Social Rights* (CUP 2012) chapter 10.

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yet in their reasoning also acknowledged electoral malpractice and the compromise of citizens' political rights. The court had let the authoritarian prevail while endorsing liberal constitutional norms in their judgment.[69] Some readers may be reminded of the *Marbury* decision, where a proregime outcome coincided with reasoning that was supportive of judicial power. Additionally, a court does not have to adopt the same language and tone throughout its judgment. Countless combinations exist, but the general lesson here is that the techniques can and should be combined to create multidimensional and complex social effects that fit the strategic aims of constrained judges.

6.3.6 *Sensitivity to Audiences*

The last point to be discussed is one that has been emphasized throughout this chapter and the previous one: Judges need to be sensitive to their audiences if these strategies are to be deployed effectively. The social authority of a court rests primarily on their audiences' regard for them.[70] Many of the strategies outlined in this chapter should be deployed in ways that account for the characteristics and interests of the relevant audiences. Populistic rhetoric, for instance, would not fit systems that are more accustomed to a legalistic language, despite the theoretical payoffs explored earlier. The importance of audience sensitivity is not limited to language, either: Strategic citations and other reasoning techniques can be catered to different kinds of audiences as well.

Audience sensitivity involves not only knowing the background and culture of relevant audiences, but also understanding and exploiting their preferences and priorities. The Pakistani courts, for example, have been able to assert themselves successfully outside the prerogatives of the military.[71] Similarly, the Hong Kong courts showed consistent deference in cases that concerned the interests of local and Chinese authorities, such as over national sovereignty and electoral reform, but developed their powers and human rights jurisprudence outside those areas.[72] A similar pattern is found in Uganda, as liberal constitutional developments there

[69] See Jude Murison, 'Judicial Politics: Election Petitions and Electoral Fraud in Uganda' (2013) 7 *Journal of Eastern African Studies* 492.

[70] See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2009); Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015).

[71] Kureshi (n 21).

[72] Yam (n 21) 153.

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coincided with "consistent defer[ence]" by the courts over issues that may have fundamentally undermined Museveni's power.[73] These courts have been able to discriminate between questions that impinge upon the core interests of the authoritarian – which are typically out of bounds, given the political risks involved – and those where the political stakes are lower. Their use of judicial strategies reflects their savviness and sensitivity. In addition, audiences' preferences may change over time. As the incumbent regime becomes more connected to the West or internationalized, for instance, certain domestic audiences may become more tolerant of liberal-constitutional norms. This creates new opportunities for a democratically committed court to build alliances and acquire leverage. The effective deployment of judicial strategies requires judges to discern their audiences' motivations and remain alert to how ongoing political changes might affect the preferences of their audiences.

6.4 Conclusion

This chapter considered how judges in hybrid regimes can give effect to their democratic roles sustainably. It proposed the two-step Sustainable Democratic Adjudication framework that integrates judicial strategy with principled adjudication. The framework is designed to guide judges in hybrid regimes who play a role in imposing meaningful constitutional constraints on authoritarian power. To better understand how judges can accommodate prudential concerns during the adjudicative process, this chapter outlined a wide range of judicial strategies, described their social effects, and specified the conditions under which the strategies may be salient.

It bears repeating that the goal of strategizing is not simply institutional preservation, but to enable judges to more fully embody their constitutional role. While constitutional democratic norms take priority over institutional preservation, a court must be institutionally resilient in order to advance those norms effectively. Difficulties arise when trade-offs have to be made between these two sets of values. The framework captures these complexities and offers guidance on how to navigate them. It thereby provides a structure for the strategic assessments that judges in

[73] Joseph M. Isanga, 'African Courts and Separation of Powers: A Comparative Study of Judicial Review in Uganda & South' (2009) 2 *Northwestern Interdisciplinary Law Review* 69.

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hybrid regimes must make and ameliorates the uncertainty involved in judicial strategizing.

To fully understand the full range of options available to judges and their potential to fulfill their democracy-enhancing roles, we must not ignore their *social* capacity. In the next chapter, we move away from the adjudicative context and explore what democratically committed judges can do outside the courtroom to strengthen their institution. While the non-adjudicative techniques to be proposed might sit uncomfortably with conventional conceptions of the judicial role, we will discuss how judges can take advantage of the social tools they have to establish and maintain relationships with external actors, as well as to fend off attacks.

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