
Hybrid Regimes, Constitutional Courts, and Democratic Principles

1.1 Introduction

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

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

1.2 Proliferation of Hybrid Regimes

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

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

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

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

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

² *Freedom in the World* (Freedom House 2023).

³ *The Economist*, 'Democracy Index 2022: Frontline Democracy and the Battle for Ukraine' (2023).

⁴ Dawn Brancati, 'Democratic Authoritarianism: Origins and Effects' (2014) 17 *Annual Review of Political Science* 313, 314.

⁵ Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (CUP 2010) 14.

⁶ Anna Lührmann and Staffan I. Lindberg, 'A Third Wave of Autocratization Is Here: What Is New about It?' (2019) 26 *Democratization* 1095.

⁷ Tom G. Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9; Larry Diamond, 'Breaking Out of the Democratic Slump' (2020) 31 *Journal of Democracy* 36.

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

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

1.3 Court-Centric Constitutionalism in Hybrid Regimes

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

⁸ Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018).

⁹ Nancy Bermeo, ‘On Democratic Backsliding’ (2016) 27 *Journal of Democracy* 5.

¹⁰ Leonardo Morlino, ‘Are There Hybrid Regimes? Or Are They Just an Optical Illusion?’ (2009) 1 *European Political Science Review* 273, 283–5.

¹¹ Lührmann and Lindberg (n 6) 1104.

¹² Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 85 *The University of Chicago Law Review* 545.

¹³ David Landau, ‘Abusive Constitutionalism’ (2013) 47 *University of California Davis Law Review* 189.

¹⁴ See William J. Dobson, *The Dictator’s Learning Curve: Inside the Global Battle for Democracy* (Random House 2012).

¹⁵ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP 2004) 1.

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

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

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

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

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

¹⁹ Moustafa *ibid*.

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

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

²² *ibid* 12.

1.4 The Normative Turn (Informed by Empirical Analysis)

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

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

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

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

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

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

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

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

Two operating assumptions underpin this book. As previously mentioned, the first is the fact that a moderately independent constitutional court is a realistic possibility for a hybrid regime. More will be said about the sociopolitical foundation of this phenomenon in Chapter 3. The very fact that there is room for constitutional courts to challenge the incumbent regime motivates this research. It would be meaningless to talk about how judges should play a democratic role in pure authoritarian regimes when (semi-)independent judicial institutions do not exist, or struggle to even survive. Equally, judicial autonomy and judicial power²⁹ means little if it is unclear how judges should assert their authority. For example, judges of an autonomous court can use their powers for personal gain, or such powers can be wielded recklessly and cause the court to self-destruct. The possibility of judicial autonomy opens the space for much-needed normative discussion of the role of courts in a hybrid regime.

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

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

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

³⁰ David S. Law and Mila Versteeg, ‘Sham Constitutions’ (2013) 101 *California Law Review* 863.

³¹ *ibid* 919.

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

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

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

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

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

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

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

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

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

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

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

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

³⁸ *ibid.*

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

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

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

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

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

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

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

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

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

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

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