The Rise of Hybrid Constitutionalism

INTRODUCTION

Constitutional review, or the competence of courts to review legislation and administrative acts for consistency with constitutional norms, has spread to every inhabited continent since its birth in the United States in the early nineteenth century. Politically consequential constitutional courts have arisen in nascent democracies from South Korea to Brazil, and courts in entrenched parliamentary democracies in the Commonwealth have assumed greater power to protect individual rights and nullify government policies. As a result, the democratic world has experienced a profound “judicialization of politics.” Courts all over the world are regularly petitioned to protect individual freedoms from governmental encroachment, regulate campaign finance, resolve electoral disputes, remove elected officials, and mediate conflicts between government bodies. The political importance of courts has come to transcend the resolution of particular issues. For all practical purposes, courts now make and unmake

1 Rosalind Dixon & Tom Ginsburg, The Forms and Limits of Constitutions as Political Insurance, 15(4) Int’l J. Const. L. 988, 988 (2017) (“Constitutional review has spread all over the world in recent decades, to the point where some three-quarters of all constitutional systems have it in some form.”)
2 Two well-known models of constitutional review exist: the American “decentralized” review model by ordinary courts, and the Continental European model of “centralized” review by a specialized constitutional court. See Albert H.Y. Chen & Miguel Poiares Maduro, The Judiciary and Constitutional Review, in Routledge Handbook of Constitutional Law 97 (Mark Tushnet et al. eds., 2015). This book uses the term “constitutional court” broadly to encompass both specialized constitutional courts and apex courts in decentralized review systems.
3 Diana Kapiszeswiki et al., Introduction, in Consequential Courts: Judicial Roles in Global Governance 1, 1 (Diana Kapiszeswiki et al. eds., 2013).
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public policy\(^6\) by way of standard, authoritative interpretations of constitutional
texts, clothed in the imprimatur of the law,\(^7\) that have gradually altered the
former meaning of constitutional norms and adapted statutory and adminis-
trative acts to ever-changing circumstances, mostly absent meaningful popular
participation.\(^8\)

It is now a truism in constitutional scholarship that independent constitutional
review is a precondition of a nation’s entitlement to global respect;\(^9\) a credible
signal to foreign and international actors of a regime’s commitment to property
rights;\(^10\) and an essential characteristic of democratic constitutionalism,\(^11\) good
governance, and the rule of law, under which political power is subject to genuine
legal accountability and judicial checks.\(^12\) Constitutional review by judicial bodies
has become a dominant, nearly universal trait of liberal democracies.\(^13\) It is no
surprise that the spread of constitutional review in the last three decades of the
twentieth century coincided with the so-called third wave of democratization,\(^14\)
which hit much of Africa, Asia, Latin America, and the Eastern bloc.\(^15\) Since the
Portuguese Carnation Revolution of 1974 and until 2004, the number of formally
liberal democratic regimes has doubled worldwide.\(^16\)

\(^6\) Robert M. Howard & Amy Steigerwalt, Judging Law and Policy: Courts and
Policymaking in the American Political System 177 (2012).

\(^7\) Haig Patapan, Leadership, Law, and Legitimacy: Reflections on the Changing Nature of
Judicial Politics in Asia, in The Judicialization of Politics in Asia 219, 223 (Björn

\(^8\) Julio Ríos-Figueroa, Constitutional Courts as Mediators: Armed Conflict,

\(^9\) Tom Ginsburg & Robert Kagan, Introduction: Institutionalist Approaches to Courts as Political
Actors, in Institutions and Public Law: Comparative Approaches 1, 5

\(^10\) See Nuno Garoupa and Maria Maldonado, The Judiciary in Political Transitions: The Critical

\(^11\) See generally David Robertson, The Judge as Political Theorist: Contemporary

\(^12\) See Aylin Aydin, Judicial Independence across Democratic Regimes: Understanding the Varying
Impact of Political Competition, 47(1) Law & Soc’y Rev. 105 (2013); Carlo Guarneri, Judicial
Independence in Authoritarian Regimes: Lessons from Continental Europe, in Judicial
Independence in China: Lessons for Global Rule of Law Promotion 234, 235
(Randall Peerenboom ed., 2010).

\(^13\) Georg Vanberg, Constitutional Courts in Comparative Perspective: A Theoretical Assessment,

\(^14\) Ran Hirschl, The Strategic Foundations of Constitutions, in Social and Political

\(^15\) Kelly M. McMann, Economic Autonomy and Democracy: Hybrid Regimes in

\(^16\) The resilience of the third wave of democratization is unprecedentedly in international history. See
Andreas Schedler, The Logic of Electoral Authoritarianism, in Electoral Authoritarianism:
The Dynamics of Unfree Competition 1, 2 (Andreas Schedler ed., 2006).
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Not all are liberal democratic in substance: elite accession to a constitutional instrument does not guarantee its observance in actual governmental practice.\(^{17}\) It is hardly disputed that the prevalence of liberal democratic ideology after the downfall of Communism has incentivized many of the ruling politicians who seized power in the aftermath of single-party dictatorships and military juntas across Africa, Eurasia, and Latin America during the close of the Cold War, to take up democratic mantles and showcase multiparty elections notwithstanding their lack of commitment to the liberal democratic ideal.\(^{18}\) In brief, new regimes prefer speaking the language of liberal democracy,\(^{19}\) and coupling plebiscitarianism with authoritarianism “in an astounding rate,”\(^{20}\) to committing themselves to contested, free, fair elections, enabled by civil and political rights.\(^{21}\) By the early twenty-first century, no less than half of all countries, from Azerbaijan to Zimbabwe, from Russia to Singapore, from Belarus to Cameroon, from Egypt to Uzbekistan, can be said to have regimes that adhered at least superficially to these political patterns.\(^{22}\)

A sizeable part of the “third wave” of democratization was thus a “dramatic trend” toward a new kind of authoritarianism, variously branded “hybrid regime,”\(^{23}\) “semi-democracy,”\(^{24}\) “semi-authoritarianism,”\(^{25}\) “electoral authoritarianism,”\(^{26}\) “competitive authoritarianism,”\(^{27}\) “democratically


\(^{22}\) McMANN, supra note 15, at 174.

\(^{23}\) Larry J. Diamond, *Thinking about Hybrid Regimes*, 13(2) *J. Democracy* 21, 27 (2002). For the sake of clarity, the term “hybrid regime” will be used throughout this book.


\(^{26}\) Schedler, supra note 16, at 1.

\(^{27}\) Levitsky & Way, supra note 18, at 4.
disguised dictatorship,” 28 “the gray zone,” 29 and so on. Ironically, this authoritarianism spread much more rapidly than actual liberal democracy during the third wave, and has become the most common form of authoritarianism, above absolute monarchies, single-party regimes, and military dictatorships. 30 The hybrid has even spilled over to the local level, such that subnational authoritarian enclaves can be found in federated countries, liberal democratic or not, such as Argentina, Brazil, Mexico, India, and Russia. 31 The considerable diversity of terms used to describe hybrids at both national and subnational levels 32 implies that neither a satisfactory definition nor a standard way to classify them exists. 33 Nevertheless, it is safe to say that hybrid regimes generally lack either of two, but not both, components of liberal democracies or else they would have been fully fledged closed authoritarian regimes, 34 and could be called, with more generality, “illiberal democracies” 35 or “liberal autocracies.” 36 As noted above, there are competing ways in political science to conceptualize hybrid regimes. 37 This book will not engage in that debate. It suffices to summarize the
state of research in two methods of classification – namely a continuum with liberal democracy on one extreme and fully fledged authoritarianism on the other, with electoral democracy, hybrid ambiguous regimes, hybrid competitive authoritarian regimes, and hybrid hegemonic electoral authoritarian regimes in between. Regardless of their differences, hybrid regimes tend to be officially civilian and provide electoral channels for the Opposition legally to contend for official positions, albeit disadvantagedly, in that electoral institutions are “heavily skewed” in favor of incumbent rulers. Opposition political parties, civil society organizations, an independent press, and political debate are intermittently tolerated, provided that they do not directly threaten regime security.

It is coming to be recognized that hybrid regimes are “a persistent and unique regime form” that cannot be presumed to be trending in a democratic direction. Belarus and Russia have become more authoritarian, Malaysia and Singapore remain fairly stable, and formerly liberal democratic Venezuela and Turkey have slipped into hybrid authoritarianism. It is no longer in serious dispute that the hybrid regime is a type in its own right, and not transitional between closed authoritarianism and liberal democracy. It follows that hybrids are not necessarily by-products of failed attempts to establish either closed autocracies or liberal democracies. They may be intentionally designed by elites to extract the bona fides and international goodwill of liberal democratic institutions, while reducing the risk of losing political control at home. Elections can be used by rulers as a cost-effective mechanism to reveal crucial information about popular preferences and

38 Wong, supra note 18, at 95; Diamond, supra note 23, at 26.
40 Levitsky & Way, supra note 18, at 5.
41 Schedler, supra note 16, at 3.
43 Levitsky & Way, supra note 18, at 4.
45 McMann, supra note 16, at 174.
46 Ottaway, supra note 25, at 7.
48 Robertson, supra note 39, at 12.
regime support, enabling incumbents to coopt the opposition and segments of the electorate, and to modify policies that are not central to the regime.\textsuperscript{49}

Liberal democratic constitutional texts are drafted by authoritarian elites to elicit “an enthusiasm for and loyalty to the constitutional order and [they] have more to do with rhetorical appeal than with practical efficacy, more to do with symbols than with reality, more to do with their ability to raise a cheer than with their ability to serve interests.”\textsuperscript{50}

In short, hybrid regimes are more adaptive and flexible than closed autocracies, but at the same time are far more authoritarian than liberal democracies. The proliferation of a liberal democratic form of government must therefore not mislead us to believe that undemocratic higher control has been consigned to the dustbin of history.\textsuperscript{51} Authoritarianism has been the norm for most of human history, and is likelier than not to remain so.\textsuperscript{52}

The two liberal democratic institutional forms adopted most prominently, almost universally, by hybrid regimes are multiparty elections\textsuperscript{53} and independent judiciaries armed with constitutional review powers.\textsuperscript{54} The adoption of constitutional review and its exercise by independent courts are, of course, two separate developments. Founding documents do not distribute review competence once for all: their provisions, viewed as desirable by framers at the moment of constitutional making, do not necessarily explain the perdurable influence of such a court in day-to-day politics.\textsuperscript{55} The court may claim primacy over constitutional meaning, but whether its assertions will be tolerated by political actors is another question.\textsuperscript{56} At the end of the day, independent and consequential constitutional review cannot be presumed, simply

\textsuperscript{49} Clara Boulianne Lagacé & Jennifer Gandhi, Authoritarian Institutions, in Routledge Handbook of Comparative Political Institutions 278, 288 (Jennifer Gandhi & Rubén Ruiz-Rufino eds., 2015).

\textsuperscript{50} See Geoffrey Brennan & Alan Hamlin, Constitutions as Expressive Documents, in The Oxford Handbook of Political Economy 329, 342 (Barry R. Weingast & Donald A. Wittman eds., 2006).

\textsuperscript{51} Brooker, supra note 28, at 1.

\textsuperscript{52} Stephen Haber, Authoritarian Government, in The Oxford Handbook of Political Economy 693, 695 (Barry R. Weingast & Donald A. Wittman eds., 2006).

\textsuperscript{53} See Jason Brownlee, Authoritarianism in an Age of Democratization (2007).


\textsuperscript{55} Vanberg, supra note 13, at 169.

\textsuperscript{56} See Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History (2007).
because it is bound, eventually, to inconvenience those wielding political power.\textsuperscript{57}

Indeed, it is hard to imagine that a dictator, regardless of ideological orientation, would invite or allow even nominally independent judges potentially to obstruct the making of major public policies, or tolerate checks and balances that give priority to adherence to procedural rights over achievement of desired substantive outcomes.\textsuperscript{58} The presence of democratic forms thus appears to be a necessary, though certainly not a sufficient, condition for consequential constitutional review to be entrenched.\textsuperscript{59} A settled consensus in the comparative constitutional law literature holds that “[i]t seems very unlikely that one will encounter the judicialization of politics outside democratic polities.”\textsuperscript{60} Often it is casually assumed that judicial independence is impossible in non-democracies, including hybrid regimes, in which legal institutions are unable to restrain political power, and judges are faithful tools of the ruling regime.\textsuperscript{61} This assumption is understandable. After all, “abrasive” constitutional review could provoke dictators to abort entire constitutions by brute force.\textsuperscript{62} There is no shortage of examples of hybrid regimes prepared to inflict extralegal sanctions on courts and judges according to political needs.\textsuperscript{63} In September 1993, Russian President Boris Yeltsin preemptively suspended the entire Constitutional Court after the Court became embroiled in a power struggle between the presidency and the Duma.\textsuperscript{64} In April 2011, under the auspices of Prime Minister Viktor Orbán, an open advocate of “illiberal democracy,” the Hungarian parliament passed a new Constitution that curbed the jurisdiction of and access to the country’s previously powerful


\textsuperscript{58} David S. Law & Mila Versteeg, \textit{Constitutional Variation among Strains of Authoritarianism, in Constitutions in Authoritarian Regimes} 165, 166 (Tom Ginsburg & Albert Simpser, eds., 2014).


\textsuperscript{60} \textit{Id.} at 28.


\textsuperscript{62} Po Jen Yap, \textit{Courts and Democracies in Asia} 207 (2017).

\textsuperscript{63} Terence C. Halliday, \textit{Why the Legal Complex Is Integral to Theories of Consequential Courts, in Consequential Courts: Judicial Roles in Global Governance} 337, 349 (Diana Kapiszewski et al. eds., 2015).

Constitutional Court. In January 2013, Sri Lanka’s parliament, dominated by the ruling Freedom Party, defied a Supreme Court ruling in removing the Chief Justice from her office after the Court had imposed stringent procedural hurdles on a development budget proposed by the President’s brother. More recently, in February 2018, Maldivian President Abdulla Yameen declared a state of emergency in response to the Supreme Court’s decision to release political prisoners, including convicted but exiled former President Mohamed Nasheed, and to reinstate twelve ousted Opposition parliamentarians; consequently, two justices, including the Chief Justice, were arrested, and the controversial judgment was rescinded by the Court’s remaining members. Recent detailed case studies of constitutional review under authoritarian regimes – a nascent field of study – have also discovered that courts in at least some hybrid regimes have from time to time aggrandized power with impunity. The reconstituted Constitutional Court of the Russian Federation has, since 1995, “done far better than its counterpart constitutional courts in most post-Soviet countries,” and has endured “as an arbiter of

65 Miklos Bankuti et al., Hungary’s Illiberal Turn: Disabling the Constitution, in The Hungarian Patient: Social Opposition to an Illiberal Democracy 37, 38–39 (Peter Krasztev et al. eds., 2015).
68 See Moustafa, supra note 54, at 282.
political disputes and increasingly as a guarantor of stable constitutional rules” for more than two decades till the present day. In spite of formidable political limits, it has effectively abolished the death penalty in all of Russia, and from time to time upheld the civil rights of individuals in cases involving state officials. In 2014 alone, in the teeth of backlash from Prime Minister and later President Erdoğan, the Constitutional Court of Turkey struck down legal provisions that would have conferred on the Minister of Justice sweeping powers over judicial and prosecutorial appointments; invalidated government bans on social media as breaching the freedom of expression; nullified legal impediments on high-ranking civil servants returning to their positions within two years of being unjustly removed; and ruled unconstitutional a law that empowered the state to shut down websites within four hours without a court order.

Overall, the constitutional courts of nondemocratic regimes show ever greater tendencies to converge on common patterns of behavior and reasoning with their counterparts, and biases in favor of secularism and modernism. Constitutional courts have been found to produce stabilizing effects that hold even authoritarian elites themselves together, and also vital “focal points” that coordinate state-society conflict. It is therefore imprudent uncritically to presume that constitutional review matters only in democracies. The above developments have led some scholars to discern the emergence of alternative constitutionalisms, ranging from “sham constitutionalism” and “authoritarian constitutionalism” through “abusive constitutionalism,” to “mixed constitutionalism” and “hybrid constitutionalism,” within the universe of authoritarian regimes. “Constitutional-oligarchic regimes . . . [that]
combine high levels of constitutionalism with low levels of electoralism" can indeed be found in jurisdictions such as Singapore, Malaysia, and Hong Kong.\(^{83}\) In any event, with over half of all countries recognized as closed authoritarian or hybrid regimes, little can excuse our neglect of the constitutional and judicial dynamics in these political settings.\(^{84}\)

**CONSTITUTIONAL REVIEW IN THE CHINESE SPECIAL ADMINISTRATIVE REGIONS**

Under what conditions will the final appellate courts\(^{85}\) of two subnational hybrid regimes diverge fundamentally in their understandings of and approaches to constitutional review, despite endowment with identical jurisdiction by kindred constitutions, overseen by a common sovereign in roughly the same time frame? This book ventures to address this question with the Hong Kong and Macau Special Administrative Regions (SARs) of the People’s Republic of China as case studies. Both Regions are located on the northern edge of the South China Sea, bordering Guangdong Province, and only 60 kilometers apart from each other.\(^{86}\) The two Chinese SARs are in many ways “most similar” to each other, politically, economically, and socially (see Tables 1.1 and 1.2). They were the only European dependencies left on East Asian soil at the resumption of Chinese sovereignty in 1997 and 1999, respectively. Hong Kong was founded by the British in the midst of the First Anglo-Chinese War (1839–42) on one of the islands lying off the coast of the Cantonese County of Bao’an. In 1842, Qing China, by the Treaty of Nanking, ceded to the British Crown in perpetuity.\(^{87}\)

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\(^{85}\) Gretchen Helmke & Julio Ríos-Figueroa, *Introduction: Courts in Latin America, in Courts in Latin America* 1, 7 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011) (political economy analyses of judicial behavior are “interested first and foremost in how judges interact with other political actors and how these interactions shape policy outcomes. Whereas lower-level courts can sometimes play this role, courts imbued with constitutional review jurisdiction – whether they are supreme courts, constitutional chambers, or separate constitutional courts – hold the proverbial last word over whether to enforce the political rules of the game, at least within the judicial hierarchy.”).
