



Introduction

An Onerous Role for Courts as Democracy-Builders

This book seeks to question the development since 1945 of a global model of democracy-building for post-authoritarian states that places undue reliance on courts. In essence, instead of being viewed as epiphenomenal, constitutional courts and regional human rights courts¹ have come to be viewed as integral to the achievement of, or even constitutive of, a functioning democratic order. In other words, they are seen as central to successful democratisation.² It is an onerous role, which differs significantly from the judicial role in long-established democracies (hereinafter, ‘mature democracies’). In young democracies courts are required to somehow ‘judge’ democratisation. They are expected to both assess what is required to support the democratisation process at any given point, especially in light of key deficiencies of the newly democratic order, and to judge when the democratisation context requires a different approach than may be appropriate in a mature democracy, such as the United States, Costa Rica, or Ireland.

The burden placed on courts tends to lead, at the extreme, to an expansion of the judicial role beyond the usual limits seen in mature democracies, and a blurring of the boundaries between judging law and judging democratic propriety. It also freights courts with weighty expectations to ‘deliver’ on the promises of a new democratic order, while navigating their own place in that developing order – or, in the case of regional human rights courts, inserting themselves into the democratisation process from without. However, the aim here is not merely to examine adjudication for its own sake. Rather, the effectiveness and viability of the global court-centric model for democracy-building, as it currently exists, is the overarching concern that drives this enquiry. This book, then, focuses on the evolving, interacting, and overlapping

¹ The terms ‘constitutional court’ and ‘regional human rights court’ are defined at the end of this Introduction.

² The meaning of ‘democratisation’ is discussed at length in Chapter 1.

roles constitutional courts and regional human rights courts play in 'building' democracy, as distinct from the governance roles such courts play in a mature democracy. By examining what we *think* courts do as democracy-builders, what they *actually* do, and what they *should* do, it is argued that the decades-long trend toward ever greater reliance on courts is based on slim evidence and that a rebalancing of democracy-building models away from excessive reliance on courts is required.

1 Origin of the Book and Key Questions

The germ of this book lay in the rather simple observation that the Supreme Court of Brazil and the Inter-American Court of Human Rights had taken divergent stances in 2010 on the validity of Brazil's Amnesty Law of 1979 – a core component of that state's transition to democratic rule in 1985. For the Supreme Court, the law was constitutional, as a valid catalyst for the democratic transition, and its amendment or repeal was a political question for the representative branches of government. By contrast, the Inter-American Court deemed the law invalid as enshrining continued impunity for serious human rights violations, contrary to the pan-regional American Convention on Human Rights (ACHR). The result on the ground was something of a fudge: the law remains on the statute books, but the state complied with a central order of the Inter-American Court; namely, establishing a Truth Commission that facilitated an official and public discussion of human rights violations under the military dictatorship of 1964–1985.

Was the Supreme Court's approach correct, by batting the decision back to the elected branches of the state? Or was the Inter-American Court's approach preferable, not only in vindicating human rights in the instant case, but also in addressing the impunity 'bottleneck' in Brazil's democratisation process left by this legislative legacy of the democratic transition – one which the state, and Brazilian society more generally, had proven unwilling or unable to address?

This discussion could all too easily become fixated solely on the question of which court should have the 'final say' regarding key societal questions, or on general concerns as to the democratic legitimacy³ of courts of any stripe resolving questions that cut to the heart of the identity and foundations of a democratic political community. However,

³ It is recognised here that 'democratic legitimacy' is a somewhat vague term. It is employed in this thesis due to its prevalence in the existing normative debate, discussed in Chapter 7.

to focus exclusively on such questions would add little to an extremely well-trodden debate concerning the rise and legitimacy of judicial governance power in democratic states since the latter half of the twentieth century, which has become a ‘central obsession’⁴ of constitutional scholars. In this book, a rather different set of questions raised by the Brazilian scenario is addressed. First, how have domestic constitutional courts and regional human rights courts become such central actors in post-war democratisation processes? Second, what roles do these courts actually play in democratisation processes, and how does the democratisation context shape their roles? Third, what roles should courts play to ‘build’ democracy in a post-authoritarian polity, as compared to a mature democracy?

A *Global Resonance*

Today these questions are of global resonance. In the decades since the establishment of constitutional courts in the defeated Axis powers of post-war Europe (Austria, Germany, and Italy)⁵ and the inauguration of a regional Court of Human Rights for Western Europe in 1959, the court-centric legal paradigm for supporting democratisation has spread worldwide.

In the various ‘waves’⁶ of democratisation since 1945 a ‘new constitutionalism’,⁷ focused on transformative constitutional texts and expansive bills of rights, saw constitutional courts and strong judicial review become ‘standard equipment’⁸ for states transitioning from Communist, military, and autocratic rule, across Europe, South America, Africa, and East Asia, with the perceived democratisation successes of post-war European courts exerting a strong influence.⁹ Regional human rights

⁴ E.C. Dawson, ‘Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage’ (2013) 16 *University of Pennsylvania Journal of Constitutional Law* 97, 100.

⁵ Constitutional courts were established in Austria, Germany, and Italy in 1945, 1951, and 1956 respectively.

⁶ See Chapter 1, Section 2.

⁷ M. Shapiro & A. Stone, ‘The New Constitutional Politics of Europe’ (1994) 26 *Comparative Political Studies* 397.

⁸ D. Horowitz, ‘Constitutional Courts: A Primer for Decision Makers’ in L. Diamond & M. Plattner (eds.), *Democracy: A Reader* (Johns Hopkins University Press, 2009) 183.

⁹ Ginsburg observes: ‘Germany’s Constitutional Court is arguably the most influential court outside the US in terms of its institutional structure and jurisprudence.’ T. Ginsburg, ‘The Global Spread of Constitutional Review’ in A. Caldeira, R.D. Kelemen & K.E. Whittington (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 85–6.

courts, in turn, have been established in two other world regions: the Americas and Africa.¹⁰ The Inter-American Court of Human Rights is perceived as having played a key role in democratisation processes across Latin America since the late 1980s.¹¹ A democratisation role was conferred on the European Court of Human Rights with the enlargement of the Council of Europe in the 1990s to include Turkey and the new democracies of the post-Communist world in Central and Eastern Europe.¹² Since its first merits judgment in 2013, the African Court on Human and Peoples' Rights has taken a strident approach in cases concerning non-inclusive electoral arrangements, free speech, and fair trial (albeit not in a context of sweeping regional democratisation).¹³ An Arab Court of Human Rights is reportedly close to establishment,¹⁴ and there are growing calls for an Asian Court of Human Rights.¹⁵

The focus on courts as key actors in new democracies shows no sign of abating, in scholarship or practice. For instance, at a conference in 2014 on constitutional reforms in the Middle East and North Africa – bringing together judges, constitutional lawyers, and political activists from across the region, as well as international experts – discussion of legal mechanisms for enhancing rights protection and supporting nascent or potential democratisation processes in Arab states was dominated by courts.¹⁶ Delegates debated the promise and perils of domestic courts

¹⁰ See Chapter 3. ¹¹ See the quotations at the start of Chapter 3.

¹² In 1998 the Council of Europe's recently resigned Deputy Secretary General opined: 'The [Council's] new task is to play an active role in "democracy-building" in the post-communist countries'. P. Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' (1998) 8 *Transnational Law & Contemporary Problems* 313, 317.

¹³ Discussed in Chapters 3 and 6.

¹⁴ 'Plan to Establish Arab Court of Human Rights in Final Stage' *Arab News* 23 February 2016 www.arabnews.com/saudi-arabia/news/884921. Such a court had been mooted as long ago as 1986: see A.A. An-Na'im, 'Human Rights in the Arab World: A Regional Perspective' (2001) 23 *Human Rights Quarterly* 701, 714–15. See further discussion in Chapter 3.

¹⁵ See e.g. M. de Visser, 'Cultivating Judicial Conversations on Human Rights Protection under the Auspices of a Regional Rights Regime' *The Asian Yearbook of Human Rights and Humanitarian Law* (forthcoming, 2017); S. Chiam, 'Asia's Experience in the Quest for a Regional Human Rights Mechanism' (2009) 40 *Victoria University of Wellington Law Review* 127; and the Third Congress of the World Conference on Constitutional Justice, 'Seoul Communiqué' (30 September 2014) www.venice.coe.int/wccj/seoul/WCCJ_Seoul_Communique-E.pdf. See also H.D. Phan, 'A Blueprint for a Southeast Asian Court of Human Rights' (2009) 10 *Asian-Pacific Law & Policy Journal* 384.

¹⁶ Arab Association of Constitutional Law, Third Annual Conference, 'Enforcement Mechanisms and the Protection of Political, Economic and Social Rights', Beirut, Lebanon, 16–17 October 2014. The author attended as an invited speaker.

and the recently announced Arab Court of Human Rights as democratic or undemocratic institutions, as well as a formal Tunisian proposal to the UN General Assembly for the establishment of an International Constitutional Court, to issue decisions on mass rights violations, the holding of elections, and serious violations of international law principles related to democracy.¹⁷ Even sessions specifically devoted to non-judicial mechanisms persistently returned to talk of judicial review, as though on a loop.

In Tunisia, the one potentially viable democracy to emerge from the Arab Spring, a new Constitutional Court endowed with an array of powers, though yet to be established, is viewed as ‘the centerpiece of the Tunisian legal order.’¹⁸ Beyond the Arab region, courts are centre stage in contemporary democracy-building processes across the globe, such as those in Nepal, Sri Lanka, Kenya, and Zimbabwe.¹⁹ At the international level, a chorus of scholars and policy-makers supports the establishment of human rights courts in the remaining world regions (Asia and the Pacific²⁰), or even a World Court of Human Rights.²¹

Thus, the promise of domestic constitutional courts and regional human rights courts as democracy-builders now forms a *fil rouge* connecting post-authoritarian states across the globe. These courts represent a central ‘democratisation technology’ in the minds of many scholars and in the toolkit of domestic and international constitution-makers and law-makers.

B The Distinct Role of Courts in New Democracies

What is distinctive about the roles of these courts in new democracies, compared to their functions in mature democracies? A central claim of this book is that the democratisation context alters courts’ roles, and changes our perspective on familiar questions concerning the legitimate roles courts can play in democratic governance, for five principal reasons.

¹⁷ See D. Landau, ‘Abusive Constitutionalism’ (2013) 47 *UC Davis Law Review* 189, 257–8. See also International IDEA, ‘International Constitutional Court proposed to protect democracy’ 4 May 2013 www.oldsite.idea.int/wana/international-constitutional-court-proposed-to-protect-democracy.cfm.

¹⁸ See Mekki, ‘The Tunisian Constitutional Court’.

¹⁹ For instance, Kenya’s constitutional reform process, centred on the new Constitution of 2010, included the establishment of a new Supreme Court with broader jurisdiction and powers than its previous iteration. See also Jayawickrama, ‘Establishing a Constitutional Court’.

²⁰ See the sources cited at (n 15).

²¹ See e.g. M. Nowak, ‘On the Creation of a World Court of Human Rights’ (2012) 7 *National Taiwan University Law Review* 257.

First, in new democracies strong judicial review,²² which accords the final say on constitutional matters to the courts, often forms a fundamental component of the political bargain underpinning the very transition to democratic rule. It is thus viewed, not as an option, but as a prerequisite for the democratic project. Second, a new democracy is paradigmatically underpinned by a new or substantially revised constitution (or a new constitutional understanding²³) and a significant residue of authoritarian-era laws, which requires the courts to engage in whole-scale constitutional construction while remaking ordinary law in the democratic image of the constitution. This differs starkly from the general constitutional ‘fine-tuning’ role of a court in a mature democracy. Third, submission to the jurisdiction of a regional human rights court is often viewed as a symbolic act underscoring a commitment to democratic rule, as well as a useful adjunct to support nascent domestic institutions. Fourth, the relationship between the courts at each level is itself shaped by the trajectory and vicissitudes of the democratisation process, with regional adjudication, designed as a ‘back-up’ system, tending to assume more prominence either through adherence by domestic courts to regional case-law, or where domestic adjudication is deemed lacking – whether due to the unwillingness or incapacity of the domestic constitutional court to engage in robust decision-making. Finally, in new democracies the capacity of other actors in the democratic order to play their part in democracy-building is limited, in a context where multi-party politics is often nascent or stifled by dominance of a single party, civil society is weak, and citizens are unschooled in democratic deliberation and the wielding of political power.

These reasons all point to some justification for strong judicial review as a necessary component of successful democracy-building, although they do not address the extent to which courts should assume central roles in democratisation processes, nor the true nature of their adjudicatory function in such processes. In the sense of ‘judging’ democratisation, we are faced with the crucial question of when the specific demands of supporting or navigating the democratisation process justify a court’s taking a more assertive or more deferential approach than might be appropriate in the context of a mature democracy. Whether we can trust courts to carry out such a difficult task, what happens when the courts at each level disagree, and whether we can trust other state organs in new

²² The term ‘strong judicial review’ is defined at the end of this Introduction.

²³ This is discussed in more depth in Chapter 1, Section 5.B.

democracies, or even the people, to carry more of the ‘democratisation burden’ apportioned to courts under the post-war model are all vital questions. This book focuses on the first two questions, but with the other questions in mind.

2 Gaps in the Literature

The key questions set out above are not systematically addressed in existing scholarship on the role of constitutional courts and regional human rights courts in democratisation processes, which is scattered across a wide array of distinct but overlapping research fields. These generally consist of a shared terrain between two key disciplines, political science and law. On even a short roll-call are legal theory, political philosophy, constitutional theory, comparative constitutional law, law and politics, judicial politics, democratisation studies, transitional justice, and international human rights law.

The core scholarship here is a small number of region-specific analyses of the roles played by constitutional courts in new democracies, including Wojciech Sadurski, Jan Zielonka, and Kim Lane Scheppele on Central and Eastern Europe; Roberto Gargarella, Siri Gloppen, Gretchen Helmke, and Irwin Stotzky on Latin America (and, to a lesser extent, Africa); Theunis Roux and Magnus Killander on Africa; and Tom Ginsburg on East Asia.²⁴ Others, such as Samuel Issacharoff, Andrew Harding,

²⁴ See W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2008); W. Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Springer, 2002); J. Zielonka (ed.), *Democratic Consolidation in Eastern Europe, Vol. 1: Institutional Engineering* (Oxford University Press, 2001); K.L. Scheppele, ‘Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe’ (2006) 154 *University of Pennsylvania Law Review* 1757; K.L. Scheppele, ‘Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)’ in W. Sadurski, M. Krygier & A. Czarnota (eds.), *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses* (Central European University Press, 2005); K. Lane Scheppele, ‘The New Hungarian Constitutional Court’ (1999) 8 *Eastern European Constitutional Review* 81; G. Helmke & J. Ríos-Figueroa (eds.), *Courts in Latin America* (Cambridge University Press, 2011); S. Gloppen, B.M. Wilson, R. Gargarella, E. Skaar & M. Kinander (eds.), *Courts and Power in Latin America and Africa* (Palgrave MacMillan, 2010); S. Gloppen, R. Gargarella & E. Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Routledge, 2004); I. Stotzky (ed.), *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press, 1993); T. Roux, *The Politics of Principle: The First South*

Peter Leyland, Daniel Bonilla Maldonado, Diana Kapiszewski, Oscar Vilhena Vieira, and Upendra Baxi provide cross-regional comparisons of constitutional courts.²⁵ Important scholarship using specific country case-studies (e.g. Russia, Argentina, Indonesia) has also been developed by authors including Nancy Maveety, Rebecca Bill Chavez, and Marcus Mietzner.²⁶

Analysis of the specific roles played by regional human rights courts in new democracies remains rare. Europe is the principal focus, with three main works on the European Court of Human Rights: an edited collection by the transitional justice scholars Michael Hamilton and Antoine Buyse; a monograph by the transitional justice scholar James Sweeney; and a co-authored work by Christopher McCrudden and Brendan O’Leary focusing on the European Court’s widely criticised judgment in *Sejdić and Finci v. Bosnia and Herzegovina*,²⁷ which found aspects of

African Constitutional Court, 1995–2005 (Cambridge University Press, 2013); T. Roux, ‘The South African Constitutional Court’s Democratic Rights Jurisprudence: A Response to Samuel Issacharoff’ (2014) 5 *Constitutional Court Review* 33; T. Roux, ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 106; M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press, 2010); T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003); and A. Harding & P. Nicholson (eds.), *New Courts in Asia* (Routledge, 2010).

²⁵ See S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015); S. Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 *Georgetown Law Journal* 961; S. Issacharoff, ‘Constitutional Courts and Consolidated Power’, (2014) NYU Public Law and Legal Theory Working Papers, Paper 459; S. Issacharoff, ‘The Democratic Risk to Democratic Transitions’, (2013) NYU Public Law and Legal Theory Working Papers, Paper 418; A. Harding & P. Leyland (eds.), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill Publishing, 2009); D. Bonilla Maldonado (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, 2013); O. Vilhena Vieira, F. Viljoen & U. Baxi (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013). See also D. Kapiszewski, G. Silverstein & R.A. Kagan (eds.), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013) chs. 1–5.

²⁶ See N. Maveety & A. Grosskopf, ‘“Constrained” Constitutional Courts as Conduits for Democratic Consolidation’ (2004) 38 *Law & Society Review* 463; C.J. Walker, ‘Toward Democratic Consolidation: The Argentine Supreme Court, Judicial Independence, and the Rule of Law’ (2006) 18 *Florida Journal of International Law* 745; R.B. Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford University Press, 2004); and M. Mietzner, ‘Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court’ (2010) 10 *Journal of East Asian Studies* 397.

²⁷ ECtHR, App. Nos. 27996/06 and 34836/06 (22 December 2009).

the Bosnian consociational political system to be incompatible with the European Convention on Human Rights (ECHR).²⁸ Literature on the Inter-American Court of Human Rights is modest,²⁹ but recent groundbreaking comparative work by Alexandra Huneus has provided greater understanding of the democracy-building roles of both the European and Inter-American courts.³⁰ Analysis of the African Court on Human and Peoples' Rights remains scant, given that its first merits judgment was not issued until 2013.³¹

Despite providing significant insights into the roles of courts in the post-war model for judicialised democratisation, these roles as yet remain unclear and far from fully understood. The existing scholarship suffers from five central deficiencies.

First, existing scholarship does not engage sufficiently with the foundational concept of democratisation itself; in terms of what it really means, and when it starts and ends. This is essential to any discussion of how we view courts' roles in this process. Second, there is a tendency to focus on single-country case-studies, and an inordinate focus on a small number of empirical contexts (e.g. South Africa, Hungary, Colombia). Third, the literature fails to capture the very particular context of adjudication in a new democracy, and how this context shapes not only how the courts approach their adjudicative role, but also objective justifications for a role that differs from that of courts in mature democracies. Fourth, in the majority of the literature, produced largely by political scientists, and by lawyers using political science methodologies, the unique nature of courts as legal institutions is easily obscured. The

²⁸ See A. Buyse & M. Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press, 2011); J.A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge, 2013); and C. McCrudden & B. O'Leary, *Courts & Consociations: Human Rights versus Power-Sharing* (Oxford University Press, 2013).

²⁹ See A. Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) 50(1) *Texas International Law Journal* 45; D. Rodríguez-Pinzón, 'The Inter-American Human Rights System and Transitional Processes' in Buyse & Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press, 2011); and D. García-Sayan, 'The Inter-American Court and Constitutionalism in Latin America' (2011) 89 *Texas Law Review* 1835.

³⁰ A. Huneus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40(1) *Yale Journal of International Law* 1.

³¹ The leading work on the African regional human rights system was published before the African Court had issued its first full judgment in 2013: M. Kiwinda Mbondenyei, *International Human Rights and their Enforcement in Africa* (LawAfrica, 2011).

primary focus tends to be on judicial behaviour and strategy, using game theory, rational choice institutionalism, and other behavioural methodologies. This provides useful insights, but often fails to fully capture the nature of adjudication in a new democracy, and tends to privilege the outcome and impact of judgments over their content. We are left with an incomplete picture, which fails to appreciate the impact of doctrinal development and contestation *within* courts on the roles they assume as democracy-builders.

Fifth, and perhaps more importantly, there is a stark divide between a vast literature on domestic constitutional courts in new democracies and a much smaller literature on the impact of regional human rights courts on such states. Analysis of courts at the domestic level does not integrate the role of courts at the regional level, or *vice versa*, with the result that their interaction in the context of democratisation is never fully explored and remains underconceptualised. In addition, existing scholarship fails to capture, more generally, the multiple and overlapping systemic interaction between courts and non-judicial sites of constitutional authority across the domestic and regional levels, and how this raises a complex scenario of ‘variable geometry’ where assertive action at any one site has ramifications for the roles carried out by the other actors.

This glaring gap reflects the fact that the relevant literature as a whole is contained in discrete silos. There is little connection or communication between specific fields of scholarship that analyse different aspects of the roles of courts in new democracies. In particular, as we will see, normative arguments concerning the roles that courts should play in supporting democratisation processes often engage to a limited extent not only with the core debate on the judicial role in mature democracies,³² but also, more importantly, with other normative arguments focused on the role of courts as democracy-builders. To a certain extent, this fragmentation is due to the differing preoccupations of scholars, addressing different questions to those in this book.

3 Scope of the Book

A What the Book Aims to Achieve

Evidently, no monograph can attempt to fully address all of the deficiencies in the literature described above. This project does not aim to fully

³² Discussed at the end of the Introduction.