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The alchemists: Courts as democracy-builders in contemporary thought

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Abstract: Can courts really 'build' democracy in a state emerging from undemocratic rule? In contemporary thought, courts are perceived as central components in any political settlement aimed at achieving a functioning democratic order in a previously authoritarian state (this piece, unlike others in the special collection, does not specifically address post-conflict contexts). The past four decades have witnessed an increasing tendency in post-authoritarian states to place significant faith in courts as guardians of the new democratic dispensation – a trend replicated in contemporary democracy-building projects (e.g. Tunisia). Constitutional courts (including supreme courts) are expected not only to breathe life into the paper promises of the democratic constitutional text, but also, increasingly, to guard and build democracy itself by policing political adherence to emerging transnational norms of democratic governance. Outside the state, regional human rights courts have also been cast as democracy-builders, acting as a support, backup mechanism, and even surrogate for domestic courts. Yet, despite this 'court obsession', our understanding of courts as democracy-builders remains critically underdeveloped. This article argues that while it has been assumed that courts have a central role to play in democracy-building, this assumption is based on rather slim evidence and undermined by yawning gaps in existing research.

Keywords: courts; democracy-building; democratisation; judicial review; political settlements

I. Introduction: Tunisia's court-centric new democracy in perspective

> Since the Second World War, rights and review have been crucial to nearly all successful transitions from authoritarian regimes to constitutional democracy […]. Indeed, it appears that the more successful any transition has been, the more likely one is to find an effective constitutional or supreme court at the heart of it … .
>
> Alec Stone, 2012[1]

[1] A Stone, 'Constitutional Courts' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 827.

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Courts have become central to our thinking on democracy-building in post-authoritarian states in the past four decades, including contemporary movements toward democratic rule worldwide, from Nepal to Zimbabwe. Take Tunisia. Five years ago, street vendor Mohamed Bouazizi struck the match that ended his life and sparked the Arab Spring, ushering in a phase of revolutions, constitutional reforms and potential democratic transitions in a region that had long been viewed as culturally hostile to liberal democracy. Fast forward to 2016, and Tunisia remains a fragile seat of hope for the entrenchment of democratic rule in an increasingly volatile neighbourhood. The state has achieved the enactment of a democratic constitution drafted in an inclusive process, and the potential for a functioning democratic politics – albeit beset by significant threats from terrorism, remnants of the old regime and profound distrust between Islamist and secular political forces.

As Silvia Suteu highlights elsewhere in this collection, the Tunisian democracy-building project is doubtless occurring in a more difficult regional context than previous region-wide democratisation processes, in Southern Europe, South America, and Central and Eastern Europe from the 1970s to the 1990s, as well as single-state transitions in other regions (e.g. South Korea, South Africa). These generally occurred in an overall atmosphere of peace and relative stability. Yet, the Tunisian story to date has followed a pattern that has become increasingly familiar worldwide since the so-called global 'third wave of democratisation', which began with Portugal's Carnation Revolution of 1974.[2] This pattern is rather simple: movement toward electoral democracy is made in an authoritarian state, whether by revolution or more peaceful means, and the resulting free and fair elections are accompanied by a novel or wholly revised constitution giving voice to the new democratic political settlement. Each time, a court is placed at the centre of the new order, not simply to guard the new constitution, but, more widely, to serve as a central engine of the democracy-building project. In essence, courts with the power to have the 'final say' on constitutional and governance matters (i.e. 'strong-form' judicial review) have become 'standard equipment'[3] for states transitioning from authoritarian rule – mirroring the adoption of strong-form judicial review in post-conflict states analysed by Jenna Sapiano.

[2] The concept of 'waves' of democratisation has been subjected to robust criticism but remains useful as a shorthand for the various global phases of democratisation: see S Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, Norman, OK, 1991) chs 1–2.

[3] D Horowitz, 'Constitutional Courts: A Primer for Decision Makers' in L Diamond and M Plattner (eds), *Democracy: A Reader* (Johns Hopkins University Press, Baltimore, MD, 2009) 183.

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Faithful to this pattern, as discussed by Silvia Suteu, Tunisia has placed emphasis on a court as the central guardian of the new democracy. The drafters of the 2014 Constitution opted to replace an existing advisory constitutional council with a constitutional court enjoying an expansive array of powers, as 'the centerpiece of the Tunisian legal order'.[4] The new court, which has yet to be established,[5] is empowered not only to assess the validity of legislation, Bills and even international treaties against the Constitution, but also to assess proposed constitutional amendments, decide on impeachment of the President, and to act as an arbiter in potential constitutional crises (e.g. disputes between the president and prime minister, states of emergency, or temporary vacancy of the presidency).[6] This is far from an isolated case. Courts are centre stage in other democracy-building processes across the globe; such as those in Nepal, Libya and Kenya.[7]

The spread of democratic rule globally has also seen adjudication beyond the state increasingly linked to democracy-building: the Inter-American Court of Human Rights began to carve out its role in the late 1980s, as a democratic wave swept Latin America; the role of the European Court of Human Rights assumed a democracy-building role in the 1990s with the accession of new democracies from the former Communist sphere; and, most recently, the African Court of Human and Peoples' Rights began issuing strong merits judgments in 2013 on matters such as electoral rules, free speech and fair trial. Other developments have added to a heightened 'court obsession' linking international adjudication with democratic rule, including the Arab League's announcement in September 2014 that it will establish an Arab Court of Human Rights (now reportedly close to establishment,[8] albeit widely derided as a democratic 'fig leaf'[9]), calls for the establishment of human rights courts for the remaining world regions

[4] See N Mekki, 'The Tunisian Constitutional Court at the Center of the Political System - and Whirlwind' ConstitutionNet (9 February 2016) <http://www.constitutionnet.org/news/tunisian-constitutional-court-center-political-system-and-whirlwind?utm_source=newsletter&utm_medium=email>.

[5] In the meantime, an interim body has been set up to conduct *a priori* review of Bills.

[6] See arts 118–125 of the 2014 Constitution. Arts 80, 84, 88 and 144 set out additional functions.

[7] 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. Libya's draft constitution of April 2016 envisages the establishment of a powerful Constitutional Court (art 150).

[8] 'Plan to establish Arab Court of Human Rights in final stage', *Arab News*, 23 February 2016 <www.arabnews.com/saudi-arabia/news/884921>.

[9] See e.g. R Lowe, 'Bassiouni: New Arab Court for Human Rights is fake "Potemkin tribunal"' International Bar Association (1 October 2014) <www.ibanet.org/Article/Detail.aspx?ArticleUid=c64f9646-15a5-4624-8c07-bae9d9ac42df>.

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(Asia and the Pacific[10]), and even calls for a World Court of Human Rights.[11] Perhaps the most explicit linkage of courts and democracy-building is a (now defunct) formal Tunisian proposal for 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.[12] Other courts could also be included here – for example, the South African Development Community (SADC) Tribunal, the East African Court of Justice (EACJ), or the International Criminal Court (ICC). However, this article confines its focus to constitutional courts and regional human rights courts, which have generally been presented as the central judicial 'democracy builders' in both scholarship and policymaking.

Yet, this growing 'court obsession' and the decades-long trend toward freighting courts with an ever-increasing democracy-building role is significantly undermined by the highly fragmentary and underdeveloped nature of our understanding of the roles these courts play in 'building' democracy.[13] This article, by anatomising contemporary thinking on courts as democracy-builders and focusing on the most important gaps in our knowledge, argues that dominant conceptions of courts as central to democracy-building are based on disquietingly shaky foundations. The first section briefly maps existing scholarship, the second section addresses the meaning of 'democratisation' as a concept central to democracy-building, the following two sections address the source of our obsession with constitutional courts and the debate surrounding their roles as democracy-builders, and the final section addresses the state of thinking on regional human rights courts as democracy-builders. The article concludes by proposing a research agenda to address these knowledge gaps.

II. Mapping the landscape of contemporary thought

There is no defined research area devoted to courts as democracy-builders. Existing research is scattered across a wide array of distinct but overlapping

[10] See e.g. S Chiam, 'Asia's Experience in the Quest for a Regional Human Rights Mechanism' (2009) 40 *Victoria University of Wellington Law Review* 127, 128.

[11] See e.g. M Nowak, 'On the Creation of a World Court of Human Rights' (2012) 7 *National Taiwan University Law Review* 257.

[12] 'Africa: AU Summit Approves Local Proposal to Create International Constitutional Court' AllAfrica (28 January 2013) <http://allafrica.com/stories/201301291130.html>.

[13] This is vividly underscored by the forthcoming report, compiled by the present author, of an international workshop on 'The Judiciary and Constitutional Transitions' held in The Hague in November 2014, organised by International IDEA and the International Development Law Organization (IDLO): <www.constitutionnet.org/event/framing-workshop-role-judiciary-constitutional-transitions>.

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research fields, generally consisting of a shared terrain between two key disciplines – political science and law. On even a short roll call are legal theory, political philosophy, comparative constitutional law, judicial politics, transitional justice and international human rights law. Scholars in these areas, as may be expected, address the roles of courts from different angles: constitutional comparativists tend to focus on the extent to which constitutional courts in new democracies resemble those in long-established democracies, or one another, as well as institutional and jurisprudential innovations, and forms of 'international constitutionalism'; legal theorists and political philosophers are preoccupied with the democratic legitimacy and source of these courts' authority; while political scientists analyse courts at both the domestic and regional levels as 'political' actors, comparable to other sites of political power (e.g. executives, legislatures).

Throughout this scholarship, the analyses of leading thinkers often give the impression that both constitutional courts and regional human rights courts have played key roles to date as democracy-builders. Alec Stone, quoted at the outset, has stated: 'The [constitutional court] has proved its worth as an instrument for consolidating constitutional democracy.'[14] Samuel Issacharoff, in his recent work *Fragile Democracies*, pursues this argument at length:

> In country after country, the transition to democracy is eased by the creation of a court system specifically tasked with constitutional vigilance over the exercise of political power. All the new democracies have either created constitutional courts or endowed supreme courts with ample power of judicial review to enforce the democratic commands of the constitution. What is striking, and perhaps distinct, about the Third Wave of democratization is the central role assumed by these apex courts in sculpting democratic politics.[15]

As regards regional human rights courts, James Sweeney asserts that the European Court of Human Rights 'has been a vital part of European democratic consolidation and integration for over half a century'.[16] Nina Binder opines that the Inter-American Court's 'far-reaching exercise of authority in the field of amnesties and the broad interpretation of its own mandate seem to further democratization in various Latin American countries'.[17]

[14] Stone (n 1) 819.

[15] S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, Cambridge, 2015) 9.

[16] JA Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge, London, 2013) 1.

[17] N Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' in A von Bogdandy and I Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer, Heidelberg, 2012) 324.

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Of course, to some extent the role of courts in 'building democracy' is a perennial. John Hart Ely's theory of judicial review in his seminal work *Democracy and Distrust*, for instance, argued that the US Supreme Court's core role should be to reinforce democratic governance by ensuring broad participation in electoral and decision-making processes, and fair representation of all (including minorities) by those elected.[18] However, the focus here is not on courts reinforcing democratic governance in Western states which enjoyed a slow march toward democracy, such as the US or the UK, but on the trend since the 1970s in particular to expect courts to act as central engines of a more rapid democratisation process in the first decades of a post-authoritarian polity.

Systematic analysis of the roles of constitutional courts as democracy-builders in such states can be traced to a focus on the highest courts of Latin America in the early 1990s, as countries in that region grappled with the task of entrenching democratic rule.[19] In the intervening quarter-century, successive regional studies, and country-specific studies, have shone light on the roles played by constitutional courts (including supreme courts) in the post-authoritarian democracies of Central and Eastern Europe, Asia, Latin America (again) and Africa – although, with the exception of South Africa, the latter region remains relatively unexplored.[20] On one level, this scholarship simply suggests that courts in new democracies carry out concrete

[18] J Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press, Cambridge, MA, 1981).

[19] I Stotzky (ed), *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press, Boulder, CO, 1993).

[20] See, in particular, W Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International, The Hague, 2002); W Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, Dordrecht, 2008); T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003); S Gloppen, R Gargarella and E Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass, London, 2004); S Gloppen, BM Wilson, R Gargarella, E Skaar and M Kinander (eds), *Courts and Power in Latin America and Africa* (Palgrave MacMillan, New York, NY, 2010); and G Helmke and J Ríos-Figueroa (eds), *Courts in Latin America* (Cambridge University Press, Cambridge, 2011). See also N Maveety and A Grosskopf, '"Constrained" Constitutional Courts as Conduits for Democratic Consolidation' (2004) 38 *Law & Society Review* 463; M Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court' (2010) *10 Journal of East Asian Studies* 397; CJ Walker, 'Toward Democratic Consolidation: The Argentine Supreme Court, Judicial Independence, and the Rule of Law' (2008) 4 *High Court Quarterly Review* 54; and T Ginsburg, 'The Politics of Courts in Democratization: Four Junctures in Asia' in D Kapiszewski, G Silverstein and RA Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, Cambridge, 2013).

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tasks similar to courts in mature democracies: vindicating fundamental rights; adjudicating on inter-branch (and often centre–periphery) disputes; and providing authoritative interpretations of contested provisions in the constitution.

However, scholars have also consistently identified distinctive aspects of the roles constitutional courts carry out in new democracies, as compared to mature democracies: addressing transitional justice questions, such as the validity of amnesty laws and trials of former regime officials; invalidating unconstitutional and authoritarian-era laws; and, in some cases, addressing the very constitutionality of constitutional amendments in order to combat what David Landau terms 'abusive constitutionalism'[21] – where democratically elected actors seek to hollow out democracy and constitutional constraints through procedurally legitimate constitutional procedures.[22] For instance, Silvia Suteu discusses attempts to do away with executive term limits in Honduras and various African states in another contribution to this collection. Less tangible roles suggested by various scholars include fostering a new legal and political culture wedded to democratic constitutionalism;[23] providing a focal point for 'a new rhetoric of state legitimacy, one based on respect for democratic values and rights';[24] and educating the people on ideals of representative democratic government, thereby ensuring the informed citizenry on which the principle of popular sovereignty rests.[25] These roles all tend to place the court centre stage in navigating the shift from the old to the new regime, as a key actor in the afterlife of the initial political settlement underlying the democratic transition.

It is only since the late 2000s that there has been any sustained focus on the role of regional human rights courts as democracy-builders, and the lion's share of attention has gone to the European Court of Human Rights.[26] The dearth of research on the African Court of Human and Peoples' Rights is understandable, given that it did not issue its first merits decision until

[21] D Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189.

[22] See generally the works cited at (n 20).

[23] D Grimm, 'Constitutional Adjudication and Democracy' in D Fairgrieve (ed), *Judicial Review in International Perspective* vol. 2 (Kluwer Law International, The Hague, 2000) 142.

[24] Stone (n 1) 827.

[25] I Stotzky, 'The Tradition of Constitutional Adjudication' in Stotzky (n 19) 349.

[26] See A Buyse and M Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press, Cambridge, 2011), which includes analysis of the Inter-American Court; Sweeney (n 16); C McCrudden and B O'Leary, *Courts & Consociations: Human Rights versus Power-Sharing* (Oxford University Press, Oxford, 2013); and D García-Sayán, 'The Inter-American Court and Constitutionalism in Latin America' (2011) 89 *Texas Law Review* 1835.

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2013.[27] However, the relative lack of research on the Inter-American Court of Human Rights as a democracy-builder is rather surprising, given that it has been operating fully since 1988 in a region dominated by new democracies, although recent groundbreaking work by Alexandra Huneeus in particular has begun to fill this gap.[28] What scholarship exists suggests that these courts carry out a somewhat similar role to constitutional courts, such as vindicating core human rights, constraining arbitrary exercise of state power, and addressing the validity of transitional justice processes – albeit one that is shaped by the very different institutional position and powers of a regional court, which lies outside any particular democratisation process and which is charged with upholding a pan-regional bill of rights, rather than a constitution. Some even characterise the step of ratifying a regional human rights convention and submitting to a regional court as important in themselves, as 'symbolic and legal markers which reflect key steps in a transition process'.[29]

There is, then, a dominant narrative that courts are central to democracy-building, and that there is something special about the roles both domestic and constitutional courts play as democracy-builders. However, there remain crucial gaps in our understanding of the roles courts actually play, and how they interact. The following sections address four key deficiencies.

III. Democratisation: A conceptual tangle at the heart of current thinking

If we generally agree that there is something distinctive about the role courts play in 'building' new democracies, when does this distinctive role begin and end? In other words, when does the extraordinary context of a 'new' democracy cede to a 'normal' functioning democracy, and presumably, a more 'normal' role for courts? At present, no satisfactory theoretical account has been provided to address these questions, and contemporary thinking about courts as democracy-builders tends to be clouded by the way relevant concepts and terminology concerning democracy-building are employed. This section therefore briefly canvasses these deficiencies.

[27] As a first step, the author provides a systematic account of the African Court's first decade in a forthcoming working paper, 'The Authority of the African Court on Human Rights at Ten: A Comparison of Progress, Power and Prospects' (iCourts Working Paper Series, forthcoming, 2016).

[28] A Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40(1) *Yale Journal of International Law* 1. See also J Schönsteiner, A Beltrán y Puga and DA Lovera, 'Reflections on the Human Rights Challenges of Consolidating Democracies: Recent Developments in the Inter-American System of Human Rights' (2011) 11(2) *Human Rights Law Review* 362.

[29] Buyse and Hamilton (n 26) 287.

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To begin, what do we mean when we call courts 'democracy-builders'? Democracy-building, a term with increasing currency in international development,[30] might simply be defined as activity aimed at supporting a process of democratisation in a given state. Any discussion of 'democracy-building' therefore requires some understanding of the central concept of 'democratisation'. This is no easy task. Encompassing everything from the initial concrete movement to elections in a non-democratic regime, to the progressive realisation of a democratic order in the mould of a long-established liberal democracy of the Global North,[31] democratisation is a prismatic and expansive meta-concept, referring to a system of processes which is almost unknowably complex, along a continuum of indefinite length. Its ultimate horizon – the 'quintessentially contested'[32] concept of democracy – compounds and underpins its problematic nature. Two key research fields take divergent approaches: democratisation theory and transitional justice.

First, democratisation theory, which has developed since the 1970s, separates the overall process of 'democratisation' into two separate phases[33] that are the focus of separate but overlapping research areas: 'transition to democracy', defined as the movement toward full, free and fair elections in post-authoritarian states, whether through revolution, a political pact, or the gradual ceding of power by an authoritarian regime; and 'consolidation of democracy', which might be defined as the development of a minimal level of democratic governance in the period following the first democratic elections.[34]

While transition as a concept is relatively settled, consolidation has been highly contested. Theorists diverge starkly on when a democratic regime might be considered to be 'consolidated', which depends on the underlying definition of democracy itself: for those adhering to a more minimal procedural conception – centred on the electoral process – consolidation can be considered achieved when, for instance, a state has experienced two peaceful transitions of power through full, free and fair elections and there

[30] The term is used by a variety of organisations, including the European Union and International IDEA.

[31] However, recent scholarship challenges the place of mature Western democracies as the ultimate empirical referents for young democracies: see CK Lamont, J van der Harst and F Gaenssmantel (eds), *Non-Western Encounters with Democratization: Imagining Democracy after the Arab Spring* (Ashgate, Farnham, 2015).

[32] G O'Donnell, 'The Perpetual Crises of Democracy' (2007) 18 *Journal of Democracy* 5, 6.

[33] An alternative conceptual framework from the 1990s, aimed at examining 'quality of democracy', places much less emphasis on the temporal aspects of democratisation and has never quite supplanted the other two.

[34] See e.g. P Schmitter and J Santiso, 'Three Temporal Dimensions to the Consolidation of Democracy' (1998) 19(1) *International Political Science Review* 69, 72, 77.

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are no significant threats to democratic rule.[35] However, the weight of scholarship has shifted toward more demanding conceptions of democracy, such as Robert Dahl's concept of 'polyarchy', which encompass a functioning separation of powers, rights protection and core freedoms, such as a free media and freedom of assembly and association.[36] In an allied development, the notion of 'constitutional democracy', which conceptually fuses constitutional order and democratic governance, has supplanted 'democracy' as the gold standard.[37]

Real-world trends in the post-war era, especially since the 1970s, have confirmed the triumph of 'thicker' conceptions of democracy and the constitutionalisation of democracy, as bills of rights have grown progressively longer and constitutions have become more prescriptive regarding the functioning of democratic institutions.[38] Indeed, as Silvia Suteu addresses in her analysis of 'eternity clauses' elsewhere in this collection, constitutions increasingly seek to constrain the power of democratic majorities not only to legislate, but to amend the constitution itself. Complicating the picture further in recent years has been an intensifying focus on additional elements increasingly seen by some as central to any conception of 'true' democracy, particularly the protection of social and economic rights.[39] At the extreme, the vogue for 'transformative' constitutionalism, aimed at wholesale transformation of political, social and community structures and values, appears to hold to an unprecedentedly thick conception of democracy, which is expected to deliver all manner of social goods beyond mere political empowerment of the people.[40] There remains, in short, no consensus on how to delineate the core of a functioning democracy.

The second strand of literature is centred in the research field of 'transitional justice', which developed in parallel to democratisation theory. Transitional justice scholars employ 'transition' as an overarching concept that occupies an ever-expanding conceptual space. From its original core preoccupation with understanding the theoretical and practical implications of addressing past human rights violations in post-conflict and post-authoritarian polities (through truth commissions and trials, for instance),

[35] Huntington (n 2) 266.

[36] RA Dahl, *On Democracy* (Yale University Press, New Haven, CT, 2000) 90–9.

[37] See L Ferrajoli, 'The Normative Paradigm of Constitutional Democracy' (2011) 17 *Res Publica* 355.

[38] See e.g. S Issacharoff, 'Constitutional Courts and Democratic Hedging' (2011) 99 *Georgetown Law Journal* 961, 967.

[39] See R Gargarella, P Domingo and T Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, Farnham, 2006).

[40] See O Vilhena Vieira, F Viljoen and U Baxi (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press, Pretoria, 2013).

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transitional justice scholarship has expanded to a broader enquiry regarding the challenges faced by new democracies, including the protection of core democratic rights, such as expressive and associative rights.[41]

In many ways, then, the central preoccupations of transitional justice have started to overlap significantly with those of democratisation theory. This is, at least partly, a reaction to specific real-world developments: transitions to democracy in South Africa, Guatemala and El Salvador in the 1990s, in particular, featured a clear fusing of the post-authoritarian context and emergence from armed conflict, in a context where all actors agreed that the 'transition' involved movement to democratic rule. However, in recent years, transitional justice scholarship has further extended to address attempts to grapple with the past in long-established democracies, e.g. the use of extra-legal detention in Ireland until the 1990s.[42] Thus, we now see 'transitional justice' applied to justice processes which are conducted in stable democracies far removed from any societal transition, conflict or political regime change.[43]

Both democratisation theory and transitional justice scholarship have suffused thinking on courts as democracy-builders. However, while scholars analysing courts tend to make use of the terminology of 'democratisation', 'transition' and 'consolidation', they often use these terms interchangeably, and generally overlook the contested nature of 'consolidation' as a concept in particular, employing the term as though its meaning is settled.[44] Similarly, the use of 'transition' as a catch-all concept, applicable to an ever-expanding variety of contexts, can lead to considerable confusion. When we speak of the Constitution of South Sudan (discussed by Charmaine Rodrigues) as a 'transitional constitution', and the UK Constitution as being 'in transition'[45] we see that a term of art fashioned for examining post-conflict and post-authoritarian societies can all too easily collapse into the ordinary usage. If 'transition' can now mean any form of transformation, how does this concept help us to pin down what is distinctive about the roles courts play in democracy-building, or temporally delineate their distinctive role?

[41] See C Bell, C Campbell and F Ní Aoláin, 'Transitional Justice: (Re)Conceptualising the Field' (2007) 3(2) *International Journal of Law in Context* 81; and Sweeney (n 16).

[42] See e.g. K O'Donnell, 'Thoughts on a New Ireland: Oral History and the Magdalene Laundries' Human Rights in Ireland (22 August 2011) <http://humanrights.ie/law-culture-and-religion/thoughts-on-a-new-ireland-oral-history-and-the-magdalene-laundries/>.

[43] See e.g. S Winter, *Transitional Justice in Established Democracies* (Palgrave, Basingstoke, 2014).

[44] See e.g. Gloppen, Gargarella and Skaar (n 20).

[45] See e.g. D Oliver, 'The United Kingdom Constitution in Transition: From Where to Where?' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, Oxford, 2009).

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The importance of precise terminology becomes clearer when we consider the various ways in which constitutional courts are said to impact on democracy-building. Tom Ginsburg has proposed a typology suggesting that constitutional courts tend to play four possible roles: (i) triggering the transition to democracy (e.g. in Ukraine, where a Supreme Court judgment ordering Prime Minister Yanukovych to hold fresh elections triggered the Orange Revolution of 2004–5); (ii) protecting the old regime from democratic forces (e.g. in Turkey, after enactment of the post-coup 1982 Constitution, where the Supreme Court (and the Constitutional Court before reforms in 2012) acted to protect the secular regime from emerging Islamist democratic forces); (iii) inertia, where the court remains on the sidelines (e.g. in Chile, where the courts played a quiescent and muted role in governance for at least a decade after the return to democratic rule in 1990); and (iv) consolidation of the new democratic regime.[46] The first three roles listed are relatively rare. The fourth, consolidation, is generally viewed as the paradigmatic purpose of a constitutional court, and is generally the temporal phase scholars are investigating when analysing courts as democracy-builders. Yet, this is obscured by the variable use of terminology across relevant scholarship – what one author calls 'consolidation', another calls 'transition', even though both may refer to 'consolidation' as defined in democratisation theory.

For the purposes of this article, the schema developed in democratisation theory is used for the sake of clarity. 'Transition' refers to the movement toward democratic rule culminating in full, free and fair elections; and 'consolidation' refers to the temporal phase following the end of transition, in which the basics of a functioning democratic order are developed. A useful working definition of a consolidated regime has been offered by Carsten Schneider as one which

> … allows for the free formulation of political preferences, through the use of basic freedoms or associations, information and communication, for the purpose of free competition between leaders to validate at regular intervals by non-violent means their claims to rule … without excluding any effective political office from that competition or prohibiting members of the political community from expressing their preference.[47]

This definition is evidently not immune to contestation: it tends to prioritise core civil and political rights, for instance, which flies in the face of a clear trend toward viewing contemporary democratic transitions as

[46] T Ginsburg, 'The Politics of Courts' (n 20).

[47] C Schneider, *The Consolidation of Democracy: Comparing Europe and Latin America* (Routledge, Abingdon, 2008) 10.

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rooted in calls for social justice. However, it serves the central purpose of underlining that while democratisation itself refers to the entire process of developing democratic rule on a par with the mature, albeit wholly imperfect, democracies of the Global North (or a more abstract ideal of fully-fledged democracy), 'consolidation' sets a lower bar. The importance of how we define consolidation is discussed further in the penultimate section, but it suffices to note here that our definition of consolidation will tend to shape how we view the role of courts as democracy-builders: an expansive definition will place a more significant burden on the courts, across a longer period of time, than a more restrictive definition. It will also tend to shape what we view as priorities in the democracy-building role that any given court should play.

IV. The slim foundations of our 'court obsession'

If, as discussed above, constitutional courts play a variety of roles as democracy-builders, with the paradigmatic role to act as an engine of democratic consolidation (as defined above), how has this paradigm arisen? Surprisingly, at present no comprehensive account exists in the literature to explain the historical emergence of courts as key democracy-builders, and the ways in which they have operated to 'build democracy'. Rather, we encounter three strands of scholarship that have together fuelled a perception of courts as effective democracy-builders: accounts of the proliferation of strong-form judicial review in new democracies worldwide, which accords the 'final say' on constitutional matters to the judiciary; analyses of a select number of these constitutional courts; and dominant presentations of past successes in court-led consolidation.

First, the global diffusion of strong-form judicial review is relatively well documented, at least in broad brushstrokes – although the main focus is on 'European-style' constitutional courts with exclusive constitutional review powers, to the detriment of supreme courts.[48] This gives us a basic sense of how constitutional courts developed from a form of niche institutional experiment for the democracies of pre- and post-war Europe, to the now established reality that a strong constitutional court has become 'standard equipment' for a new democracy. Working backwards from Tunisia today, we pass clear landmarks in the proliferation of such courts in new democracies: their virtually universal adoption in post-Communist

[48] See Stone (n 1); and T Ginsburg, 'The Global Spread of Constitutional Review' in A Caldeira, RD Kelemen and KE Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, Oxford, 2008).

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Central and Eastern Europe in the 1990s; the establishment of a constitutional court as part of South Africa's era-defining democratic transition in the early- to mid-1990s, the emergence of constitutional courts in South Korea and Latin America in the 1980s and 1990s; and in both Spain and Portugal in the 1970s as they emerged from dictatorship. Establishment of the latter was heavily influenced by the Federal Constitutional Court of Germany, which had been created in 1951, and themselves influenced institutional choices in later transitions.

However, scholars have tended to focus strongly on a relatively small number of case studies from the immediate post-cold war era; particularly those of Hungary, South Africa and Colombia. This is largely due to the ways in which these courts expanded the frontiers of judicial review in response to their political contexts – and, in the South African and Colombian cases, on the basis of expansive 'transformative' constitutions that placed a significant governance burden on the constitutional court. The unprecedented assertiveness of the Hungarian Constitutional Court in the 1990s aimed at holding government to account in a state where parliament was unable to do so,[49] and where the Court bore the burden of symbolising the new democratic order in the absence of a wholly new constitution.[50] The South African Constitutional Court occupied an odd meta-constitutional position, not only in its formal power to assess the validity of the draft 1996 Constitution against the provisions of the 1994 Interim Constitution (and its decision to find certain provisions invalid), but in its overall function as a central guarantee in the political settlement underlying the democratic transition, to protect the rights of the white minority from the newly empowered majority as well as consolidating democracy for South African society as a whole.[51] The Colombian Constitutional Court's vigorous activity from 1992 onward derived from its place as sole state defender of the 1991 Constitution, which was disowned by other political actors not long after its adoption as part of a wide-ranging effort at a political settlement to achieve peace in that state. That court remains perhaps the high-water mark of judicial assertiveness, with not only a strident approach to the separation of powers, abuse of

[49] See in particular K Lane Scheppele, 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)' in W Sadurski, M Krygier and A Czarnota (eds), *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses* (Central European University Press, Budapest, 2005).

[50] See L Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary' in A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, Oxford, 2015) 8.

[51] See T Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, Cambridge, 2013).

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emergency powers, and civil and political rights, but also social and economic rights. The Court has, for instance, invalidated constitutional amendments aimed at changing presidential term limits, and has asserted the power to recognise an 'unconstitutional state of affairs', which allows the Court to address structural deficiencies in rights protection and order wide-ranging measures to the State for their amelioration.[52] As Jenna Sapiano discusses in her piece, the Court has also been central in setting outer limits on, and providing a constitutional imprimatur to, the peace process that recently led toward a comprehensive agreement.

However, overall, the inordinate focus on these 'star' courts, and their admission to the international pantheon of courts alongside the US Supreme Court and Federal Constitutional Court of Germany, has generally left a rather skewed picture of courts as democracy-builders. First, 'European-style' constitutional courts in other young democracies (e.g. South Korea, Poland, Senegal) have been underexplored. Perhaps even more importantly, the marked focus on 'European-style' constitutional courts has left states which eschewed this option often ignored, despite a large number of new democracies in the post-war era choosing alternative means of empowering the judiciary (e.g. by amplifying the powers of the existing supreme court, reforming the court, or adding a 'constitutional chamber' to the court). The experiences of diverse states, from the majority of South American states (e.g. Brazil, Uruguay), to African and Asian states such as Tanzania and Taiwan, remain at the periphery.[53] Greater focus on these courts, which have generally not evinced the same assertiveness as the Hungarian, South African and Colombian courts, would help to provide a more balanced picture.

The principal exception to this is another 'star' court: the Indian Supreme Court, which has garnered significant international attention for its groundbreaking jurisprudence since the 1970s. This includes its 'basic structure' doctrine, through which it arrogated the power to assess the validity of constitutional amendments during the authoritarian rule of Prime Minister Indira Ghandi, and which has influenced courts from Colombia to Tanzania,[54] as well as its 'public interest jurisprudence' vindicating social and economic rights.[55]

[52] See MJ Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529.

[53] This is not to overlook treatments of 'peripheral' courts, such as those of Tanzania, Bolivia and Taiwan, in, for instance, Gloppen *et al*., *Courts and Power in Latin America and Africa* (n 20); Gargarella *et al*., *Courts and Social Transformation* (n 39); and Ginsburg, *Judicial Review in New Democracies* (n 20).

[54] See, in particular, *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

[55] See Vilhena Vieira, Viljoen and Baxi (n 40).

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Third, beyond the 'greatest hits' of the third-wave era, are general claims for the effectiveness of courts as consolidators of democracy. The bold assertions from Alec Stone and Samuel Issacharoff in section II, above, place emphasis on the global diffusion of constitutional courts as a recognition of past success. However, the popularity of an institution is hardly conclusive evidence of its effectiveness. Other scholars point to a variety of reasons for the diffusion of strong constitutional courts: not least their use as a form of 'political insurance' to ensure adherence by all parties to the bargains in the political settlement;[56] a developing perception that they form part of a 'normal' democracy;[57] and, perhaps, as a way of reaching political settlement by allowing greater flexibility in the constitutional scheme, through deferral, ambiguity and 'silence', as discussed by Silvia Suteu – preferred to other options such as interim constitutions discussed by Charmaine Rodrigues elsewhere in this collection. Issacharoff's characterisation of these courts as 'integral structural parts of the moment of original constitutional creation',[58] for instance, casts courts as secondary constitutive forces beyond the constitutional text. This produces what Vicki Jackson calls an 'incremental constitutionalism' which requires the court to address the gaps and fudges left in the constitution.[59]

Yet, concrete evidence for the grander claims regarding the democracy-building capacities of constitutional courts remains somewhat slim. Going back to the grandfather of contemporary democracy-building courts, for instance, there is no clear evidence that the Federal Constitutional Court was central to successful democratisation in West Germany. The increasing centrality and power of the Court from 1951 onward may have simply been facilitated by, rather than the driver of, the advance of democratisation in that state, which was substantially aided by various factors, including: direct oversight by Allied powers in the early years; a clear commitment to democratic governance by the main political forces; a functioning competitive electoral system; a 'rapid and robust economic revival';[60] and a strong desire to rehabilitate the state in the international arena. Indeed, when Stone Sweet, as quoted at the outset, opines that 'the more successful any transition has been, the more likely one is to find an effective constitutional or supreme court at the heart of it', there is a clear risk of mistaking *correlation* for *causality* (although, of course, this may

[56] See e.g. Ginsburg (n 20) 22ff.

[57] See e.g. L Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary' (2003) 18 *International Sociology* 133, 134.

[58] Issacharoff, 'Constitutional Courts and Democratic Hedging' (n 38) 986.

[59] VC Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2006) 49 *William & Mary Law Review* 1249, 1265–8.

[60] DP Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (1st edn, Duke University Press, Durham, NC, 1989) 292.

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not be his intended meaning). Most successful post-war democratisation processes have occurred in post-war Europe, where similarly propitious conditions existed for both successful democratisation and the accretion of judicial governance power – precisely the conditions that have so often been lacking in democratisation processes in other world regions.

Of course, various scholars present a more balanced picture. Tom Ginsburg cautions that courts may 'play an essential role in structuring an environment of open political competition, free exchange of ideas, and limited government', but do not lead the democratisation process itself.[61] Lach and Sadurski's observation that constitutional adjudication in Central and Eastern Europe has been 'a mixed bag of undoubtedly courageous and democracy-strengthening decisions as well as of decisions which seem like a set-back to these values'[62] can be applied to other regions. For instance, in Latin America, although there is a sense that 'there have been remarkable advances in the consolidation of the rule of law and constitutionalism'[63] there remains a palpable air of disappointment that judges are not 'blazing the way to robust constitutional democracy in the way many hoped they might'.[64] Most starkly, the stalled, problematic or even backsliding democratisation processes in Hungary, South Africa and Colombia underline that there are clear limits to court-centric democracy-building. This alone should provide pause for thought in contemporary democracy-building processes.

In short, it appears that constitutional courts are neither a guarantor of, nor a shortcut to, a functioning democratic system. Moreover, underlying any analysis of the roles played by courts as democracy-builders is the core methodological challenge of discerning how and whether a court has an impact on *any* process, especially a process as multifaceted and multi-causal as democratisation. Yet, looking at the faith placed in courts in contemporary democracy-building projects, one gets a strong sense that the dominant presentations of the virtues and effectiveness of such courts have overshadowed more nuanced presentations.

V. The contested role of courts as 'consolidators'

Evidently, to say that claims for the capacities of courts as democracy-builders appear to rest on shaky foundations is not to say that they have

[61] Ginsburg, 'The Politics of Courts' (n 20) 50.

[62] K Lach and W Sadurski, 'Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill Publishing, London, 2009) 79.

[63] J Couso, 'Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970–2010' (2011) 89 *Texas Law Review* 1517, 1520.

[64] Kapiszewski, Silverstein and Kagan, *Consequential Courts* (n 20) 1.

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no role to play as democracy-builders. Yet, questions concerning dominant presentations of the capacities of courts to act as consolidators of democracy are further compounded by the absence of any clear consensus on the core of the 'consolidation' role constitutional courts carry out in new democracies.

At the level of constitutional design, post-war courts worldwide have been endowed with a wide variety of powers. Some courts have relatively few powers, limited to assessing the validity of legislation against the constitution. Others are empowered to address everything from failure to legislate, or 'legislative omission' (e.g. Hungary), to the capacity of elected leaders to hold office (e.g. Mozambique), to political corruption (e.g. Brazil) and the constitutionality of international treaties (e.g. Tunisia). At the level of empirical experience worldwide to date, despite the impression provided by the 'star' courts discussed above, the reality is that highly assertive courts are in the minority, different courts have taken divergent approaches in facing a difficult political environment (from quiescence to incrementalism to defiance, or a mixture), and even assertive courts face significant challenges in exerting their power.

Perhaps even more problematic is the diversity of normative arguments concerning the role courts *should* play in supporting democratisation. Five basic positions can be identified, which lie outside the 'core' debate on the legitimacy of judicial review between scholars such as Jeremy Waldron and Ronald Dworkin, who expressly focus their attention on well-functioning (i.e. mature) democracies.[65]

First, scholars such as Wojciech Sadurski generally appear to expect constitutional courts in young democracies to operate in a similar manner to their counterparts in mature democracies, remaining within the format established by courts such as the US Supreme Court by focusing primarily on rights protection.[66] Second, scholars such as Roberto Gargarella and Samuel Issacharoff emphasise a court's central role in constraining the power of the state. Gargarella's concept of 'democratic justice' suggests two key roles of guarding against, first, the gradual establishment of restrictions on basic civil and political rights, such as the rights to freedom of expression and fair trial, and second, the executive's tendency to amplify its powers and distort or overcome democratic controls.[67] Issacharoff suggests, similarly, that the core role of a constitutional court should be

[65] See e.g. J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1402.

[66] See Sadurski's works at (n 20).

[67] R Gargarella, 'In Search of a Democratic Justice – What Courts Should Not Do: Argentina, 1983–2002' in Gloppen, Gargarella and Skaar (n 20).

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aimed at shoring up the worst inadequacies of a new democratic political system and thus facilitating the persistence and development of democratic rule rather than its decay after the initial transition to electoral democracy through capture by dominant political forces. A court can do this, he argues, by filling gaps in the governance structure and ensuring the openness of electoral competition.[68]

The third and fourth positions argue for a much broader role for courts in new democracies. Daniel Bonilla Maldonado and Upendra Baxi, on an analysis of highly assertive courts in Colombia, Hungary, India and South Africa, see courts as capable of an even broader governance role that addresses economic governance, socio-economic inequality and even constraining state violence.[69] Fourth, a more audacious argument by Kim Lane Scheppele, based on the Hungarian experience in the 1990s, holds that, where the elected organs are unable to fulfil their functions in the same manner as their counterparts in mature democracies, a constitutional court can act as a substitute for deliberation and reflection of the popular will, with judicial review thus recast as a democratic process.[70]

Fifth, and finally, is an argument from Stephen Gardbaum that, rather than the prevailing model of strong judicial review, 'weak' review should be embraced as a means of establishing and maintaining the independence of the judiciary in a new democracy and reducing political attacks on courts. Concerned by the growing backlash against constitutional courts in 'third wave' democracies worldwide, he argues that weak review, by leaving the final say to the other branches of government, would allow courts to nevertheless play a significant role by providing a more '"dialogical" mode of judicial intervention'.[71]

Despite this variety of positions, this normative debate has yet to catch fire: there is a lack of intense engagement by scholars with the positions of others, and the above is even the first mapping of the debate as it stands. Five particular points, which go to the heart of how we view courts as democracy-builders, have yet to be fully thrashed out.

First is what we view as central to the consolidation of 'true' democracy. Carsten Schneider's working definition, discussed in section III above, would suggest that courts should focus on deciding on key electoral issues

[68] Issacharoff, 'Constitutional Courts and Democratic Hedging' (n 38).

[69] See D Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, Cambridge, 2013); and Vilhena Vieira, Viljoen and Baxi (n 40).

[70] Scheppele (n 49).

[71] S Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285.

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and protecting core civil and political rights central to the functioning of the electoral system, such as free speech, assembly, association and media freedom. Yet, this would appear unduly restrictive to scholars who appear to embrace a much 'thicker' conception of democracy, which would suggest a more intensive role for courts as democracy-builders.

Second is whether the 'consolidation' role, in particular, is primarily positive or negative: Issacharoff and Gargarella suggest the former; others suggest a more mixed picture, but do not suggest what they consider to be priorities. Both the first and second questions relate to questions of capacity: can constitutional courts meet our expectations if their consolidation role is expanded to encompass a much thicker conception of even consolidated democracy? Can courts perform a strident negative and positive consolidation role in tandem, or are there trade-offs to be made between these roles?

Third is how we conceive of the very nature of courts themselves as democracy-builders: are they guardians of the constitution, or of democracy itself? This question comes to the fore not only in Issacharoff and Jackson's characterisation of courts as secondary constitutive forces, but also, more specifically, in Issacharoff's argument that courts in new democracies should espouse a version of the Indian Supreme Court's 'basic structure' doctrine in order to assess the validity of constitutional amendments,[72] as a way of combating 'abusive constitutionalism'. That this approach transforms a court from a mere 'constituted' power under the constitution and bound by its limits, to a meta-constitutional entity standing somewhat apart from the constitution, is not systematically addressed in Issacharoff's work, despite the existence of a significant body of literature on the subject since the 1970s at least.[73] As his approach is, he admits, 'unreservedly instrumental',[74] he does not address crucial theoretical questions: are courts in this role acting as the high priests of Carl Schmitt's notion of 'political theology', by stepping into the exceptional liminal space where law ends and politics begins?[75] How does this role fit with our understandings of the two possible bearers of constituent power? – the prince or the people, as Loughlin puts it.[76] In whose name do courts assume this role?: as the 'true' representatives of 'the people', as some claim;[77] or of a transnational epistemic community

[72] Issacharoff, 'Constitutional Courts and Democratic Hedging' (n 38).

[73] See, regarding India and Germany: C Dietrich, 'Limitation of Amendment Procedures and the Constituent Power' (1970) *Indian Yearbook of International Affairs* 375.

[74] Issacharoff, *Fragile Democracies* (n 15) 241.

[75] See P Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia University Press, New York, NY, 2011) 2.

[76] See M Loughlin, 'The concept of constituent power' (2014) 13 *European Journal of Political Theory* 218, 225.

[77] Ibid 233.

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of courts and other organs (e.g. the Council of Europe's Venice Commission) which itself increasingly identifies transcendent norms of 'true' constitutional democratic governance? These questions raise the perennial question concerning the democratic legitimacy of judicial review in perhaps its most acute form, and the existing literature on this role needs to be integrated into discussion of the roles played by courts in new democracies.

Fourth, the debate concerning the role a constitutional court should play as a democracy-builder has paid relatively little attention to the role of comparative law in the stances courts take in new democracies. Johanna Kalb has recently argued that constitutional courts in new democracies engage in 'strategic' citation of the case law of foreign constitutional courts and international courts (especially regional human rights courts) to bolster their adjudicative role and to fill in gaps in the new legal order.[78] However, her valuable work has only begun this investigation: she does not, for instance, make reference to one of the most striking examples; that some version of the Indian 'basic structure' doctrine has been adopted by many courts (e.g. in Belize, Colombia and Tanzania) to combat concrete domestic variants of abusive constitutionalism.[79] Partly, this omission reflects the general approach in scholarship, which eschews close textual analysis of judgments by approaching courts mainly as political rather than judicial actors.

The final question concerns whether we can make universal prescriptions for the democracy-building role of courts that will apply across a variety of empirical contexts. The existing normative arguments are strongly tied to a relatively small number of country case-studies, and what different scholars present as possibilities for courts depends largely on the case studies they use. Arguments for an expansive role appear to be supported by the Colombian experience, for instance, but undermined by the Hungarian experience where, after a relatively brief period of unusually assertive activity in the 1990s, the Constitutional Court had its wings definitively clipped by government and is now a shadow of its former self. Indeed, it is all too easy to overlook the often significant additional constraints faced by constitutional courts in young democracies compared to long-established democracies. For instance, Issacharoff's views, based on the central case-studies of the South African and Colombian constitutional courts, have been criticised

[78] J Kalb, 'The Judicial Role in New Democracies: A Strategic Account of Comparative Citation' (2013) 38 *Yale Journal of International Law* 423.

[79] See e.g. JI Colón-Ríos, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143, 145–6; and the Tanzanian High Court's judgment in *Mtikila v Attorney General*, Civil Case No. 5 of 1993 (24 October 1994).

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by Theunis Roux as mistakenly assuming these courts (and other courts in new democracies) to be in a position analogous to courts in mature democracies.[80] In sum, we have yet to get a full sense of the divergences and commonalities between courts as democracy-builders across new democracies.

VI. The underexplored regional context

As Silvia Suteu discusses, transnational and international law now looms large in any analysis of how law supports transformation in post-authoritarian (as well as post-conflict) states. The last two sections focused on constitutional courts at the national level, but served also to set up our discussion of regional human rights courts as democracy-builders. Indeed, if our understanding of domestic constitutional courts as democracy-builders is hampered by critical research gaps, this is all the truer of our understanding of the roles of regional human rights courts. Similar problems with terminological and conceptual clarity, grand claims, a limited number of case studies, and a lack of any full conceptualisation of these courts' roles as democracy-builders are replicated, if not heightened, in this scholarship. This section focuses on the most pressing deficiencies.

As discussed above, the European Court of Human Rights has been the predominant focus of a very modest literature on regional courts as democracy-builders (and even here the emphasis is on the court's role as a transitional justice actor). This not only leaves two key world regions with human rights courts underexplored – Africa and Latin America – but raises the risk of approaching these regions through 'European' lenses. The most significant difference is that no equivalent to the European Union (EU) exists in the non-European regions. The pronounced diminution of the state in Europe is thus exceptional when set in the global context. In the other regions, while similar 'supranational' language is often used to describe regional integration projects such as MERCOSUR, the Andean Community and the African Union, these still operate largely on intergovernmental lines.[81] As a result, whereas the European Court of Human Rights forms just part of a plural and overlapping legal order that underpins democratic rule in Europe, in Africa and Latin America the human rights systems centred on the American Convention on Human Rights and the African

[80] T Roux, 'The South African Constitutional Court's Democratic Rights Jurisprudence: A Response to Samuel Issacharoff' (2014) 5 *Constitutional Court Review* 33, 45.

[81] See further, TG Daly, 'Baby Steps Away from the State: Regional Judicial Interaction as a Gauge of Postnational Order in South America and Europe' (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1011.

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Charter on Human and Peoples' Rights are the closest these regions come to a 'supranational' order that extends beyond mere intergovernmentalism.[82] This appears to simultaneously weaken the capacity of these courts to act as democracy-builders, while placing a heavier democracy-building burden on their shoulders as the central components of anything like a regional constitutional order.

The second significant difference between Europe and the two other regions is the proportion of mature democracies and the vintage of the regional human rights courts. Compared to the high proportion of mature democracies in the European system, they are virtually absent in the latter (with the exception of Costa Rica in Latin America). In addition, whereas the European Court of Human Rights enjoyed a stately rise to prominence from its establishment in 1959 until the accession of post-Communist new democracies in the 1990s, faced largely with stable democracies and less severe rights violations, the Inter-American Court of Human Rights was established just as democratic transitions began to sweep Latin America, which encouraged it to take a generally more strident approach than its counterpart in Strasbourg. It eschewed any margin of appreciation, for example, through which the European Court accords a measure of discretion to the states under its purview.[83] Facing a majority of non-democratic regimes, the African Court has, like the Inter-American Court, foregone any margin of appreciation and has from its first merits judgment in 2013 taken a strong stance on violations of the African Charter regarding exclusionary constitutional rules on electoral candidacy, free speech and fair trial.[84]

These key differences mean that the insights provided by scholarship centred on Europe will have limited relevance to regions outside Europe. Indeed, even within Europe, Nico Krisch's picture of domestic courts and the Strasbourg Court as co-equal entities in a heterarchical plural legal space is based on analysis of Western European courts, leaving the position of courts in post-Communist young democracies unexplored.[85] Overall, his analysis (though highly illuminating in general) lacks a normative inflection

[82] This is even true of the sub-regional East African Community (EAC), whose express *finalité politique* is a full political federation: see <www.eac.int/integration-pillars/political-federation>.

[83] See e.g. D García-Sayán (n 26).

[84] *Tanganyika Law Society v Tanzania* App 009/2011 and 011/2011 (14 June 2013); *Zongo v Burkina Faso* App 013/2011 (28 March 2014); *Konaté v Burkina Faso* App 004/2013 (5 December 2014); *Thomas v Tanzania* App 005/2013 (20 November 2015); *Onyango v Tanzania* App 006/2013 (18 March 2016); and *Abubakari v Tanzania* App 007/2013 (3 June 2016).

[85] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010).

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capable of guiding us toward addressing the particular asymmetries between regional and domestic courts in the democratisation setting outside Western Europe, where the relationship may take on a more hierarchical aspect. As Silvia Suteu notes, international human rights law has tended to be accorded formal constitutional status in new democracies. Courts have also elevated human rights law in the domestic order; seen, for instance, in Latin American courts fusing international human rights law and constitutional law in a so-called 'block of constitutionality'[86] and a 'creeping monism' in African courts.[87] Significant reliance by domestic courts in new democracies on international and regional case-law appears, in part, to be related to the challenges of grappling with a new constitution and powers, which may well render them unwilling or unable to offer alternative interpretations even where they disagree with certain lines of regional jurisprudence.[88] There is a clear need for greater exploration and conceptualisation of how domestic and regional courts interact as democracy-builders, and how the democratisation context shapes this interaction.

There is also a need for further analysis of the ways in which the different powers and institutional setting of a regional human rights court, as compared to a constitutional court, affect its capacity to act as an effective democracy-builder. Despite a common and increasing tendency to present regional human rights courts as constitutional courts writ large,[89] there are key differences between the two types of court that are highly relevant here. Certain features may be viewed as an advantage: that such courts are external to any one democratisation process; that the validity of their fundamental normative text transcends the transition to democracy at the state level and is not tied to the old or new constitution; and that, because of this external normative base, they may be able to better address forms of 'abusive constitutionalism' that seek to hollow out the new democracy through procedurally perfect means. However, other factors

[86] ME Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (Inter-American Institute of Human Rights, San José, Costa Rica, 2011) 169–98.

[87] MA Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628.

[88] Indeed, Ariel Dulitzky is highly critical of the Inter-American Court's 'control of conventionality' doctrine, which accords little room to domestic courts as potential co-interpreters of the American Convention on Human Rights: 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.

[89] A Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (2009) *Yale Law School Faculty Scholarship Series*. Paper 71, 5.

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suggest significant limits to a key role for such courts: the often long time lag before cases reach the court (due, in part, to the need to exhaust domestic remedies – although this requirement can be waived); the limits imposed by *ratione temporis* requirements (meaning such courts are often prevented from addressing rights violations prior to the state's acceptance of the court's jurisdiction); and the fact that such courts, guarding a rights convention rather than a full constitution, are less well placed than a constitutional court to address structural issues central to building a functioning democracy, such as separation of powers matters.

In addition, echoing the discussion of constitutional courts above, claims for the democracy-building successes of regional courts rest on relatively slight evidence. In Europe, for instance, Sweeney's own verdict on the European Court's contribution to the consolidation of post-Communist democracies is mixed. The Court has softened the excesses of new democratic governments in property restitution and lustration programmes, by emphasising rights protection and the need for adequate standards of procedural justice.[90] However, its vindication of free speech and electoral rights has been uneven, partly due to a rather opaque methodology and reasoning.[91] In the context of its impossible case-load, the overall quality of the Court's judgments is viewed by some as decreasing,[92] and ensuring compliance with its decisions, especially 'pilot judgments' aimed at structural deficiencies in new democracies, has become increasingly challenging in a climate where partial compliance is now common.[93] This has all affected its capacity to 'build' democracies in post-Communist Europe. Similarly, the Inter-American Court's case law has led to the repeal or restricted application of amnesty laws and strict defamation laws across the region,[94] and to the right to freedom of information being written into law across Latin America.[95] However, compliance is an even greater problem in comparison to the European Court: full compliance has been achieved for a mere 18 out of over 200 judgments issued by the

[90] Sweeney (n 16) chs 4–5.

[91] Ibid ch 6, ch 8.

[92] See N Huls, M Adams and J Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond* (TMC Asser Press, The Hague, 2009).

[93] See B Rainey, E Wicks and C Ovey (eds), *Jacobs, White and Ovey: The European Convention on Human Rights* (Oxford University Press, Oxford, 2014) 64; and M Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79(1) *Law and Contemporary Problems* 141, 172–3.

[94] V Krsticevic, 'How Inter-American Human Rights Litigation Brings Free Speech to the Americas' (1997) 4 *Southwest Journal of Law & Trade in the Americas* 209.

[95] See e.g. García-Sayán (n 26) 105ff.

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Inter-American Court to date, and remains particularly lacking regarding orders for reparations beyond compensation, especially where a state is ordered to investigate or prosecute a rights violation.[96] Both courts have encountered starkly low compliance levels with so-called 'structural reform' judgments aimed at addressing systemic deficiencies in the young democracies under their purview.[97] Implementation has also proved a central difficulty for the African Court.[98]

While we often see a cascade of jurisprudence at the regional source, then, in terms of impact it can often be reduced to a trickle at its intended destination. This is not to deny, of course, other roles that such courts may play in building democracy, which are less amenable to verification: providing a focal point for the development of transnational pro-democracy and human rights civil society networks, for instance;[99] addressing contested historical narratives;[100] or encouraging domestic courts to engage in robust adjudication.[101] Yet, there remains the sense that – especially outside Europe – regional human rights courts struggle to gain visibility. As three Stanford scholars observe in a forthcoming publication: 'It seems likely that the average Brazilian or Peruvian hardly realises that the Inter-American System exists.'[102] Similarly, the President of the African Court on Human and Peoples' Rights has observed: 'Even here in Arusha [the seat of the Court in Tanzania], there are people who are wondering if there is such a court in the city.'[103]

[96] See DA González-Salzburg, 'Complying (Partially) with the Compulsory Judgments of the Inter-American Court of Human Rights' in P Fortes, L Boratti, A Palacios and TG Daly (eds), *Law and Policy in Latin America: Transforming Courts, Institutions, and Rights* (Palgrave MacMillan, forthcoming).

[97] See Huneeus (n 28); and TG Daly, 'The End of Law's Ambition: Human Rights Courts, Democratisation and Social Justice' (2016) iCourts Working Paper Series No. 67.

[98] See O Windridge, 'Guest Post: 2014 at The African Court on Human and Peoples Rights–a Year in Review' *Opinio Juris* (10 January 2015) <http://opiniojuris.org/2015/01/10/guest-post-2014-african-court-human-peoples-rights-year-review/>. See also Daly, 'The Authority of the African Court' (n 27).

[99] See e.g. MN Bernardes, 'Inter-American Human Rights System as a Transnational Public Sphere: Legal and Political Aspects of the Implementation of International Decisions' (2011) 15 *SUR – International Journal on Human Rights* 131.

[100] See e.g. F Ní Aoláin, 'Transitional Emergency Jurisprudence: Derogation and Transition' in Buyse and Hamilton (n 26).

[101] See e.g. García-Sayán (n 26) 1836–7, 1839.

[102] D Gil, R Garcia and LM Friedman, 'Media Representations of the Inter-American System of Human Rights' in Fortes, Boratti, Palacios and Daly (n 96).

[103] 'African rights court unknown to many', *The Citizen*, (23 August 2016) <http://www.thecitizen.co.tz/News/African-rights-court-unknown-to-many/1840340-3354600-5yrbx/index.html>.

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Finally, unlike the (admittedly somewhat diffuse) normative debate concerning the role a constitutional court should play in building democracy, there is as yet little sustained normative debate concerning the role regional human rights courts should play in new democracies. Some, such as Antoine Buyse and Michael Hamilton, appear to assume that such courts can play a legitimate role as 'transitional justice' actors, but do not explore the temporal boundaries of this role.[104] Leading arguments from scholars such as Richard Bellamy against the role of the European Court of Human Rights focus, like the 'core' domestic debate between political and legal constitutionalists, on its operation regarding 'well-functioning democratic regimes'. They therefore present a critique of the Court's lack of democratic credentials that applies equally to mature and new democracies: chiefly, that it is less familiar with the mores and particularities of domestic societies and legal systems, freer from even indirect forms of (democratic) political accountability in the form of an electorate or co-equal constitutional partners, and threatens the coherence of law by competing with domestic law.[105] Bellamy does acknowledge the possible enhanced legitimacy of such courts as 'transitionary arrangements' for the 'stabilising of democracy'[106] in young democracies, but this remains an afterthought that is not pursued further – for example, how does he view the Court's role in this respect, and how would we assess when such a 'transitional' phase was complete? Criticism of the Inter-American Court follows similar lines, but can be more blunt: for instance, Ezequiel Malarino's strident criticism of the Court, bemoaning its 'illiberal and antidemocratic tendencies',[107] rests primarily on arguments as to the basic legality of the Court's case law, concerning the Court's perceived illegitimate departure from the text of the American Convention on Human Rights and recognition of norms not expressly laid out therein, thus violating the sovereignty of states, which (he argues) have not agreed to be bound by such norms.[108]

[104] Buyse and Hamilton (n 26).

[105] R Bellamy, 'The Democratic Legitimacy of Regional Human Rights Conventions: Political Constitutionalism and the *Hirst* case' in A Føllesdal, B Peters, J Karlsson Schaffer and G Ulfstein (eds), *The Legitimacy of Regional Human Rights Regimes* (Cambridge University Press, Cambridge, 2013).

[106] Ibid 248.

[107] E Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 *International Criminal Law Review* 665.

[108] Ibid 686.

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Beyond these standard critiques, which would apply equally to a mature democracy or a young democracy, an emerging debate concerns the extent to which the democratic quality of a state should be a parameter for calibrating the intensity of review by a regional human rights court. Various scholars point to the differential treatment accorded by the European Court to mature and young democracies;[109] while in Latin America some scholars have begun arguing for the adoption of a European-style margin of appreciation doctrine by the Inter-American Court in recognition of the democratic development of some states in the region.[110] Normative discussion of the justification for specific innovations in doctrine aimed at addressing structural deficiencies affecting rights protection in new democracies, such as 'pilot judgments' in Strasbourg and the doctrine of 'conventionality control' in San José, is needed; particularly how these fundamentally transform the roles played by these courts and more dramatically recast the 'constitutional' nature of their respective regional orders in a quasi-federal vein that cuts more deeply across national sovereignty.[111] Whether the particular pathologies of a new democracy generally justify more intense scrutiny or greater deference from a regional human rights court, or whether this is entirely case- and context-specific, and how this affects the coherence of regional jurisprudence, is also a debate that could be usefully developed much further.

VII. Conclusion: Charting a way forward

Can courts really 'build' democracy in a state emerging from authoritarian rule? Despite the global emergence of a court-centric

[109] See e.g. Sweeney (n 16); and B Çalı, 'Domestic Courts and the European Court of Human Rights: Towards Developing Standards of Weak International Judicial Review?' *Opinio Juris* (11 January 2013) <http://opiniojuris.org/2013/01/11/domestic-courts-and-the-european-court-of-human-rights-towards-developing-standards-of-weak-international-judicial-review/>.

[110] Two papers presented at a conference in 2014 devoted themselves to this argument: X Soley Echeverría, 'The Legitimatory Discourse of Inter-American Constitutional Adjudication'; and S Hentrei, 'The Conventionality Control of the Inter-American Court of Human Rights as a Manifestation of Complementarity', 'Latin American Constitutionalism: Between Law and Politics', University of Glasgow, 2 July 2014. See also J Contesse, 'Inter-American constitutionalism: the interaction between human rights and progressive constitutional law in Latin America' in C Rodríguez-Garavito (ed), *Law and Society in Latin America: A New Map* (Routledge, Abingdon, 2014).

[111] See Dulitzky (n 88); and Huneeus (n 28). The fundamental transformation of an international treaty regime by its court has been explored in a more general manner in J Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organisations' (2013) 38 *Yale Journal of International Law* 289.

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model for democracy-building, featuring both domestic and regional courts, we still have no definitive answer to this question. We have yet to achieve a fine-grained understanding of the roles courts play as democracy-builders and to fully conceptualise the roles they play in guarding not only the constitution, but the democratic order inaugurated by the political settlement itself. Yet, policymaking and constitution-making continues to proceed as though the effectiveness of courts as democracy-builders has been proven. Constitutional courts and regional courts are trusted to achieve a feat of alchemy, by transmuting the base materials of a new democracy – an incomplete political settlement, a nascent commitment to democratic rule and imperfect constitutional and international texts – into the gold of a functioning democracy.

The central point of this brief sketch of the contours of contemporary thought – to highlight the highly deficient nature of our present understanding of courts as democracy-builders – is no dry academic problem. Existing court-centric prescriptions for constitutional settlements in new democracies may hinder rather than help their democratic trajectory. Most importantly, they may blind us to the possibility of alternative or novel constitutional design options that may prove more effective than courts, or at least to the potential of less court-centric models. The urgency of achieving a better understanding of courts as democracy-builders should therefore not be in doubt.

What, then, are our immediate research priorities to achieve this better understanding? We need a more systematic account of the development of courts as democracy-builders in the post-war world since 1945. We need a more sophisticated theoretical framework for understanding democracy-building, which integrates the insights from democratisation theory, transitional justice and constitutional theory (including theories on constitutionalism beyond the state). We need a conceptual framework which provides a better tool for analysing courts as 'democracy builders' and how this role and its context differs from adjudication in mature democracies. We need a better understanding of how the roles and institutional capacities of constitutional courts and regional human rights courts differ, how they operate as a system, and how their roles as democracy-builders may clash. We need further empirical work to add to the existing case studies. We need a systematic analysis of existing normative arguments made for what courts should do to build democracy. This is only the starting point. Ultimately, the stakes are high if the faith of policymakers in courts is misplaced, and we need to begin addressing these knowledge gaps now if we are to achieve more effective legal frameworks and institutions for supporting democracy-building projects into the future.

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