

The Democratic Recession and the ‘New’ Public Law: Toward Systematic Analysis

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Abstract: This paper will discuss the development of a ‘new’ public law in response to the worldwide democratic recession of the past 15-20 years (and ongoing in e.g. Hungary, Poland, India, South Africa, Brazil). It briefly examines three questions: (i) What is the democratic recession and what is new about contemporary democratic breakdowns and constitutional crises? (ii) How have public law mechanisms evolved to address the democratic recession in regional and transregional international organisations? (e.g. Commonwealth, Organization of American States, Council of Europe, European Union, and African Union); and (iii) What are our existing conceptual and theoretical frameworks for understanding this new reality, and are they adequate? Overall, the paper will argue that systematic analysis is sorely needed if we are to make sense of this democratic recession, its impact on the evolution of public law, and the adequacy of the public law response to democratic backsliding.

Keywords: democratic recession; public law; international organisations; constitutional law

Introduction

2016 thus far has been marked by democratic backsliding and constitutional crises worldwide: European Commission ‘rule of law’ investigations into Polish laws on the Constitutional Tribunal and media;¹ Turkish President Erdogan’s insistence that he will not comply with decisions of the Constitutional Court or the European Court of Human Rights,² combined with accelerated plans for a problematic new constitution;³ talk of an ‘implosion’ of South Africa’s democratic institutions;⁴ a disturbing crackdown on dissent in India;⁵ pro-democracy rallies in Brazil against a

¹ ‘Rule of law in Poland: Commission starts dialogue’, 13 January 2016. <http://ec.europa.eu/news/2016/01/20160113_en.htm>.

² ‘Erdogan says he ‘does not respect, will not obey’ top court ruling on arrested journalists’, *Hurriyet Daily News*, 28 February 2016. <<http://www.hurriyetdailynews.com/erdogan-says-he-does-not-respect-will-not-obey-top-court-ruling-on-arrested-journalists.aspx?PageID=238&NID=95784&NewsCatID=339>>. M Akyol, ‘The rage against the Constitutional Court’, *Hurriyet Daily News*, 12 March 2016. <<http://www.hurriyetdailynews.com/the-rage-against-the-constitutional-court.aspx?pageID=449&nID=96345&NewsCatID=411>>.

³ ‘Turkish gov’t to speed up process for new constitution’, *Hurriyet Daily News*, 27 March 2016. <<http://www.hurriyetdailynews.com/govt-to-speed-up-process-for-new-constitution-with-presidential-system-pm.aspx?pageID=238&nid=96950&NewsCatID=338>>. See also S Demirtaş, ‘New Turkish constitution to redefine powers of constitutional court and judiciary’, *ConstitutionNet*, 29 March 2016. <<http://www.constitutionnet.org/news/new-turkish-constitution-redefine-powers-constitutional-court-and-judiciary>>.

⁴ B Cibane, ‘SONA2015 and our Constitutional crisis: What happens when the fox guards the henhouse?’, *Daily Maverick*, 17 February 2015. <<http://www.dailymaverick.co.za/opinionista/2015-02-17-sona2015-and-our-constitutional-crisis-what-happens-when-the-fox-guards-the-henhouse/#.VwI5evI97IU>>.

⁵ Editorial, ‘India’s Crackdown on Dissent’, *New York Times*, 22 February 2016. <<http://www.nytimes.com/2016/02/23/opinion/indias-crackdown-on-dissent.html>>.

perceived political *coup d'état* through impeachment of President Rousseff;⁶ and warnings that democracy in the Maldives is on a 'negative trajectory'.⁷

These are just some of the crises we see unfolding around us, and they form part of a wider pattern of global democratic decay and breakdown that has appeared to gather pace in the past decade, from Hungary and Romania, to Venezuela and Botswana. Larry Diamond speaks of a 'democratic recession',⁸ while Freedom House laments the 'discarding' of democracy and a 'return to the iron fist'.⁹ This democratic recession has raised three central issues for public lawyers worldwide, which have yet to receive systematic analysis: First, what is new about the nature of contemporary democratic decay and constitutional crises? Second, how have public law mechanisms evolved worldwide in response to the democratic recession? Third, what conceptual and theoretical frameworks have we developed to understand and assess this new reality, and are they adequate? This paper seeks to present a brief initial mapping of the current state of thinking and institutional development in this area, and to make the case that systematic analysis is sorely needed if we are to make sense of this democratic recession, its impact on the evolution of public law, and the adequacy of the public law response to democratic backsliding.

1 What is new about contemporary democratic breakdowns and constitutional crises?

Democratic breakdown and constitutional crisis are hardly new phenomena. The conventional—albeit contested—narrative speaks of 'waves of democratisation' in which multiple states take steps toward democratic rule at roughly the same time,¹⁰ followed by 'reverse waves' as the democratic gains made in each movement sour or stall in certain states.¹¹ The current democratic recession concerns the reversal of democratic gains made during the third, most extensive, wave of democratisation, which saw transitions to democratic rule across Southern Europe, Latin America, Central and Eastern Europe, and various states in East Asia and Africa in the 1980s and 1990s, including South Korea, Taiwan, Tanzania and South Africa. Authoritarian reversals in previous eras have affected states worldwide, including the rise of fascist and totalitarian regimes in inter-war Europe, the striking emergence of one-party, 'strong man' and military rule in post-independence African states and Latin America in the 1960s and 1970s, Greece's military *coup d'état* in 1967, and India's authoritarian turn under Indira Gandhi in the 1970s.

Nor is there anything new in the attempt to dress up undemocratic governance as constitutional democracy. Across the twentieth century states commonly used constitutional law to assert their democratic credentials; seen, for instance, in the 'sham constitutionalism' of Communist states and the instrumental fidelity to a distorted form of constitutional law in apartheid South Africa and military-era Brazil, seen in 'the singular degree to which the rulers' most repressive policies were publicly promulgated as positive law.'¹² Yet, despite the eagerness to

⁶ J Watts and B Douglas, "We won't accept a coup": groups unite to save beleaguered Dilma Rousseff", *The Guardian*, 3 April 2016. <<http://www.theguardian.com/world/2016/apr/03/brazil-beleaguered-rousseff-anthems-protests-fill-streets-impeachment>>.

⁷ A Naish, 'Maldives democracy on 'negative trajectory,' warns top US diplomat, *Maldives Independent*, March 31 2016. <<http://maldivesindependent.com/politics/maldives-democracy-on-negative-trajectory-warns-us-assistant-secretary-of-state-123158>>.

⁸ L Diamond, 'Facing Up to the Democratic Recession' (2015) 26(1) *Journal of Democracy* 141.

⁹ Freedom House, *Discarding Democracy: Return to the Iron Fist. Freedom in the World 2015* <https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf>.

¹⁰ See S Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oxford University Press, 1991) chs 1-2.

¹¹ Huntington, *ibid*, 15-17, 290 et seq. A key work is J Linz and A Stepan (eds), *The Breakdown of Democratic Regimes* (John Hopkins University Press, 1978).

¹² See MJ Osiel, 'Dialogue with Dictators: Judicial Resistance in Argentina and Brazil' 20 *Law and Social Inquiry* 481 (1995) at 528.

maintain a façade of democratic governance, such regimes were generally unable to conceal tell-tale signs of democratic and constitutional degradation, including a mixture of suspension of parts of the constitution (especially rights provisions), a functional concentration of power at one site, exclusionary electoral systems, abuse of emergency powers, the use of dubious constitutional amendments to incrementally revolutionise the constitution, and the overt or covert cowing of judicial constraints.

What is new about many more recent instances of democratic decay and breakdown, as David Landau has observed, is the level of sophistication in the use of constitutional law and language to degrade democratic governance.¹³ A number of regimes in the world's younger democracies have succeeded in achieving a carefully calibrated and incremental hollowing out of constitutional structures designed to constrain power, hold it to account, and prevent its misuse, while maintaining a functioning constitutional order that is less obviously stultified than in the undemocratic regimes of yesteryear.

The subjugation of the Hungarian media and Constitutional Court through adoption of a new constitution and enactment of constitutional laws from 2010-2012 has become the paradigmatic example.¹⁴ The conservative Fidesz party, having won a two-thirds majority in the 2010 elections—and thereby empowered to amend the Constitution without opposition agreement—overturned the constitutional settlement developed since the transition to democratic rule in 1989. Organic laws curtailing media freedom preceded a new constitution (the Basic Law of 2012), which curtailed the jurisdiction of the Court, followed by a constitutional amendment of March 2013 which annulled all its decisions prior to that date.¹⁵ While it was clear to observers that something was afoot, there was no one moment that signalled the full breakdown of democratic rule (unlike, say, military coups in Thailand, Nigeria and Pakistan, or President Fujimori's self-coup in Peru in 1992). It is difficult today to pinpoint precisely whether Hungary is now authoritarian or democratic. This 'slow death' of democracy might be compared to Romania, where the degradation of democratic rule was both swifter and more obvious: the government in July 2012 adopted a series of legislative measures (including by emergency ordinances) that led to removal from office of the Presidents of both Houses of Parliament and the Ombudsman, curtailment of the competences of the Constitutional Court, changes to the rules governing a referendum on the suspension of the President of the Republic and the suspension of the President itself, the combination of which provoked a constitutional crisis.¹⁶

We can now point to Hungarian-style developments taking place elsewhere. In Poland the current Law and Justice Party (PiS) government voted into power in October 2015—the first to win an outright majority since the fall of Communism in 1989—has embarked on a path of legislative and constitutional reform that strongly echoes that taken in Hungary since 2010, enacting legislative and constitutional reforms permitting stronger government control of the media, curtailing the jurisdiction of the Constitutional Tribunal, and permitting more extensive police surveillance. In Turkey, the incremental and ongoing subversion of democratic rule under President Erdogan, especially in the past three years, has similarly rendered it difficult to pinpoint

¹³ D Landau, 'Abusive Constitutionalism' 47 *UC Davis Law Review* 189 (2013).

¹⁴ See chs 1-4, 11 and 14 in A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Bloomsbury Publishing, 2015).

¹⁵ See K Lane Scheppele. 'Understanding Hungary's Constitutional Revolution' in von Bogdandy and P Sonnevend (eds) *ibid*.

¹⁶ See Venice Commission, 'Opinion on the Compatibility with Constitutional Principles and the Rule of Law of Actions Taken by the Government and the Parliament of Romania in Respect of Other State Institutions and On the Government Emergency Ordinance on Amendment to the Law No. 47/1992 Regarding the Organisation and Functioning of the Constitutional Court and On the Government Emergency Ordinance on Amending and Completing the Law No. 3/2000 Regarding the Organisation of a Referendum of Romania' 17 December 2012 CDL-AD(2012)026.

at what moment the regime may be said to have lost its democratic character.¹⁷ Diamond captures this well, and it is worthwhile providing an extended quotation:

For a number of years now, Turkey's ruling Justice and Development Party (AKP) has been gradually eroding democratic pluralism and freedom in the country. The overall political trends have been hard to characterize, because some of the AKP's changes have made Turkey more democratic by removing the military as an autonomous veto player in politics, extending civilian control over the military, and making it harder to ban political parties that offend the "deep state" structures associated with the intensely secularist legacy of Kemal Atatürk. But the AKP has gradually entrenched its own political hegemony, extending partisan control over the judiciary and the bureaucracy, arresting journalists and intimidating dissenters in the press and academia, threatening businesses with retaliation if they fund opposition parties, and using arrests and prosecutions in cases connected to alleged coup plots to jail and remove from political life an implausibly large number of accused plotters.

This has coincided with a stunning and increasingly audacious concentration of personal power by Turkey's longtime prime minister Recep Tayyip Erdogan, who was elected president in August 2014. The abuse and personalization of power and the constriction of competitive space and freedom in Turkey have been subtle and incremental, moving with nothing like the speed of Putin in the early 2000s. But by now, these trends appear to have crossed a threshold, pushing the country below the minimum standards of democracy. If this has happened, when did it happen? Was it in 2014, when the AKP further consolidated its hegemonic grip on power in the March local-government elections and the August presidential election? Or was it, as some liberal Turks insist, several years before, as media freedoms were visibly diminishing and an ever-wider circle of alleged coup plotters was being targeted in the highly politicized Ergenekon trials [of 275 military officers, journalists and opposition politicians accused of a plot to mount a coup against the president]?¹⁸

Since Diamond's article, published in January last year, this downward slide has continued. President Erdogan's has continued to consolidate his power: May 2016 alone saw the passage of a law to temporarily strip MPs of their constitutional immunity from prosecution (thereby facilitating prosecution of pro-Kurdish political leaders and the possible jailing of swathes of the opposition);¹⁹ and the president's appointment of a longstanding ally, Binali Yıldırım, as the new Prime Minister.²⁰ The sole remaining State institution capable of presenting strong resistance to the authoritarianism of AKP rule has been the Constitutional Court, which, since the introduction of a petition procedure for individuals in 2012, has unexpectedly emerged as a staunch defender of democratic rights and the democratic order. This is discussed below.

'Creeping authoritarianism' in itself is not new. Contemporary developments in Botswana and South Africa, for instance, in many ways mirror the emergence of strong-man and one-party rule after independence in the 1960s.²¹ However, a signal difference in Turkey, compared to these other states, is the wholesale recourse to constitutional law to present a veneer of legitimacy to the political takeover of the democratic system. In another echo of the Hungarian story, President Erdogan plans to adopt an entirely new constitution, with two central features: a movement from a parliamentary to a presidential system; and curtailment of the power of the Constitutional Court, particularly by removing its power to receive petitions from individuals.²² Although the ostensible

¹⁷ A recent article asserts that the results of the June 2015 elections, returning an AKP government, marked Turkey's confirmation as a 'competitive authoritarian' regime. B Esena and S Gumuscub, 'Rising competitive authoritarianism in Turkey' *Third World Quarterly* 1 (2016).

¹⁸ Diamond (n 8) 145-146.

¹⁹ Al-Jazeera, 'Turkey passes bill to strip politicians of immunity', 20 May 2016 <<http://www.aljazeera.com/news/2016/05/turkey-passes-bill-strip-lawmakers-immunity-160520103841992.html>>.

²⁰ P Kingsley, 'Turkish president consolidates power as he confirms new PM', *The Guardian*, 22 May 2016 <<https://www.theguardian.com/world/2016/may/22/turkish-president-consolidates-power-as-new-pm-calls-for-presidential-system>>.

²¹ *ibid* 146. Regarding South Africa, see S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015) 242, 268.

²² See (n 3).

aim of this new text, touted as the ‘new civilian constitution’, is to finally do away with the constitutional settlement imposed through the 1982 Constitution after the military coup of September 1980, it threatens not to entrench democratic rule, but to dismantle it entirely under a new civilian dictatorship.

Even more problematic is the development in Latin America of a ‘new constitutionalism’²³ since the 1990s in Andean states (particularly Bolivia, Ecuador and Venezuela), which purports to ground a form of ‘post-liberal’ democracy that proclaims a new social compact and a form of constitutionalism tailored to local needs. New constitutions adopted in the region initially presented an interesting puzzle to observers, including measures widely viewed as positive, such as the recognition of indigenous communities and the multi-ethnic nature of the state, measures to strengthen the judiciary, and openness to international law, while also experimenting with new forms of the separation of powers, and laying claim to stronger democratic credentials by providing greater focus on mechanisms of direct democracy such as referendums.²⁴

However, in hindsight, these models have tended to allow the concentration of power in the executive. Amplified presidential authority, coupled with tensions between the new model’s focus on participatory majoritarian democracy and core tenets of liberal democracy, such as judicial independence, has proved problematic.²⁵ The turn to authoritarianism in Venezuela under Hugo Chavez has been well documented²⁶ and the political trajectory at present is unclear as President Maduro attempts to delay a recall referendum that would likely end his administration.²⁷ The result in other states, such as Bolivia, has been less obviously negative: the rule of President Evo Morales has been less heavy-handed than that in Venezuela, and he has recently bowed to the result of a popular referendum that scuppered his plan to extend presidential term-limits and allow him a fourth term in power, stating: ‘We respect the results, it is part of democracy’.²⁸

Overall, in practice, it can often be hard to discern what distinguishes some of these forms of ‘democratic’ constitutionalism from the contemporary ‘authoritarian constitutionalism’ of states such as Singapore, which, as Mark Tushnet has discussed, cannot simply be reduced to ‘rule by law’ rather than ‘rule of law’ and where authoritarian rule is nevertheless shaped and constrained by constitutional law.²⁹ These new models are generally presented as simply an alternative, and entirely valid, form of constitutional democracy to the liberal model that became the gold standard in the late twentieth century, especially after the fall of Communism in 1989. There are certain similarities from region to region. Despite their purported openness to international law and judicial control, Andean experimental models purport to ground a form of ‘post-liberal’ democracy that rejects the Washington consensus and evinces strong scepticism toward both assertive domestic courts and external oversight of rights and governance by international actors and courts—seen in attacks by Andean regimes on the Inter-American system for the protection of human rights through dubious reform of the Inter-American Commission on Human Rights and Venezuela’s decision to leave the jurisdiction of the Inter-American Court in 2012.³⁰ Governments

²³ See generally A Schilling-Vacaflor and D Nolte (eds), *New Constitutionalism in Latin America: Promises and Practices* (Ashgate, 2012).

²⁴ R Uprimny, ‘The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges’ 89 *Texas Law Review* 1587 (2010-2011).

²⁵ *ibid* 1606.

²⁶ See AR Brewer-Carías, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment* (Cambridge University Press, 2010).

²⁷ See ‘Maduro vows no Venezuela recall referendum before next year’, *The Telegraph*, 12 June 2016 <<http://www.telegraph.co.uk/news/2016/06/12/maduro-vows-no-venezuela-recall-referendum-before-next-year/>>.

²⁸ A Schipani, ‘Evo Morales concedes defeat in Bolivia referendum’, *Financial Times*, 24 February 2016 <<http://www.ft.com/cms/s/0/a91b3734-daa9-11e5-a72f-1e7744c66818.html#axzz4BaGWlriD>>.

²⁹ M Tushnet, ‘Authoritarian Constitutionalism: Some Conceptual Issues’, in T Ginsburg & A Simpsen (eds), *Constitutions in Authoritarian Regimes* (CUP, 2014).

³⁰ See International Justice Resource Center, ‘OAS Concludes Formal Inter-American Human Rights ‘Strengthening’ Process, but Dialogue Continues on Contentious Reforms’, 24 March 2013

in Hungary, Poland and Romania do not claim to reject constitutional democracy, but rather, the model of liberal, judicialised, technocratic, cosmopolitan, multi-level, internationalised democracy so characteristic of the European pan-regional constitutional project developed in the post-war era.³¹ However, unlike the radical leftist regimes of the Andes, Hungarian, Turkish and Polish governments tend to speak of ‘conservative democracy’, which, although not meaning precisely the same thing in each state, tends to be defined somewhat in opposition to liberal democracy.³²

This is all taking place in an environment where Western-style liberal democracy and constitutionalism have become tarnished currencies in recent years: arguments are increasingly made for younger democracies outside the West to construct their own models, with talk of (re)‘imagining democracy’³³ and a ‘constitutionalism of the Global South’.³⁴ This further complicates efforts to separate good faith experimentation and divergence from Western models of constitutional democracy from bad faith plans to gut democratic rule.

2 How have public law mechanisms evolved to address the democratic recession?

The defining feature of the public law response to the ongoing democratic recession has been the emergence of ‘democracy defence’ systems in regional and transregional organisations, including the Commonwealth, the Organization of American States (OAS), the European Union (EU) and Council of Europe, and the African Union (AU). Increasing scholarly attention is being paid to developments in Europe, where the elaboration of a meaningful institutional framework for addressing democratic decay and democratic breakdown has gathered pace in the past five or six years due to democratic decay in a variety of European states.³⁵

However, it may be emphasised that development and use of the European systems (especially the EU) has lagged behind that of other organisations—the Commonwealth system is in fact the pioneer, having been put in place as early as 1995. It is also important to stress that these systems represent merely the most recent mutation of public law in response to democratic breakdown, which has been a central spur to evolution of this branch of law since 1945. In other words, the developments in Europe represent just one chapter of a public law story that has deep historical roots and a much wider geographical context, which has yet to be fully recounted. This section briefly sketches this post-war story of iterative mutations, before turning to comparative analysis of four existing international ‘democracy defence’ systems: in the Commonwealth; the OAS; the EU and the Council of Europe.

Mutations in public law since 1945

The experience of inter-war democratic breakdown, and the fear of future democratic breakdown, has been central to the evolution of public law since 1945. At the national level, central to the

<http://www.ijrcenter.org/2013/03/24/oas-concludes-formal-inter-american-human-rights-strengthening-process-but-dialogue-continues-on-contentious-reforms/>.

³¹ See P Blokker, *New Democracies in Crisis?: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, 2013).

³² See eg Adam Szymanski, ‘Religion Oriented Conservative Parties and Democracy. The Case of Turkish Justice and Development Party and Polish Law and Justice’ Paper for 7th ECPR General Conference 4-7 September 2013, Bordeaux; and ‘Justice Minister Defends Hungary’s “Conservative Democracy”’, *Euractiv*, 21 April 2014 <<http://hungarytoday.hu/news/euractiv-justice-minister-defends-hungarys-conservative-democracy-78848>>.

³³ See CK Lamont, J van der Harst and F Gaenssmantel (eds), *Non-Western Encounters with Democratization: Imagining Democracy after the Arab Spring* (Ashgate, 2015).

³⁴ D Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP, 2013).

³⁵ See, in particular, von Bogdandy and P Sonnevend (eds), *Constitutional Crisis* (n 14).

‘never again’ constitutionalism³⁶ of the post-war era was a proliferation of countermajoritarian elements in constitutions, including more expansive rights provisions, eternity clauses forbidding amendment of selected constitutional provisions (usually concerning a mixture of rights, the separation of powers and the democratic nature of the state), and constitutional courts with the power not only to invalidate unconstitutional laws, but also (as in the totemic example of the Federal Constitutional Court of Germany) other powers aimed at shoring up shaky democratic rule, such as banning political parties that threaten democratic rule.

These constitutional innovations speak to the same fear (and lived experience) of what Issacharoff calls the democratic threat to democratic rule: that untrammelled majoritarian decision-making can lead to an excessive concentration of power and subversion of wider democratic and constitutional controls on power. Konrad Adenauer’s concern in the West German constitutional convention of 1948-49 regarding tyranny by parliamentary majorities³⁷ has found new meaning in the current democratic recession, as large parliamentary majorities and one-party dominance of the electoral arena have facilitated democratic backsliding in states such as Hungary, Poland, South Africa and Turkey.

At the international level, this fear spurred the establishment of the Council of Europe and the European Economic Community, including their respective courts—the European Court of Human Rights in particular was envisaged as a ‘canary in the mineshaft’ regarding reversions to authoritarianism.³⁸ Urging the establishment of the Court at the Council of Europe in 1949, Henri-Pierre Teitgen had argued:

Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one, freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the “Führer” is installed and the evolution continues even to the oven of the crematorium.

It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or Dachau.

An international Court, within the Council of Europe, and a system of supervision and guarantees could be the conscience of which we all have need, and of which other countries have perhaps a special need.³⁹

These national and regional models of public law then spread to other world regions, particularly during the so-called ‘third wave of democratisation’ from the 1970s onwards: constitutional courts (including revamped supreme courts) became ‘standard equipment’⁴⁰ for newly democratic states. Regional human rights courts were established for the Americas and Africa—the Inter-American Court of Human Rights (1979) and the African Court of Human and Peoples’ Rights (2006), respectively.

³⁶ C Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001) 221-237; cited in T Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press, 2013) 204.

³⁷ G Vanberg, ‘Constitutional Courts in Comparative Perspective: A Theoretical Assessment’ 18 *Annual Review of Political Science* 167 (2015) at 170.

³⁸ E Bates, *The Evolution of the European Convention on Human Rights. From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 8.

³⁹ Quoted in AH Robertson, ‘The European Court of Human Rights’ (1960) 9 *American Journal of Comparative Law* 1, 10.

⁴⁰ D Horowitz, ‘Constitutional Courts: A Primer for Decision Makers’ in L Diamond and M Plattner (eds), *Democracy: A Reader* (John Hopkins University Press, 2009) 183.

Courts as primary bulwarks against democratic decay

Courts have long been perceived as the primary bulwarks public law offers against democratic decay and democratic breakdown—a perception that is often traced to the central role accorded to the German Constitutional Court as guardian of the new democratic polity of West Germany in 1951.

The Court developed its key doctrine of ‘militant democracy’ in the early 1950s, holding that the substantive understanding of democracy in the 1949 Basic Law required that enemies of the constitutional order should be repressed before they could gain entry to public office—seen to most striking effect in the Court’s banning of the quasi-Nazi Socialist Reich Party in 1952 and the Communist Party in 1956.⁴¹ The Court also strongly resisted attempts by the federal government to exert federal control of television services—delivering an ‘an extended lecture on political morality to the Adenauer regime’⁴² in 1961 emphasising the need to respect the competences of the *Länder* as well as free speech. Various factors aided the Court in its task, including oversight by the Allied Powers during the early years of the new West German polity, and the desire among West Germany’s leaders to confirm commitment to democracy.⁴³ Although the government fulminated against assertive judgments, each time it submitted to the Court’s authority.⁴⁴ Additional mutations in public law spurred by the threat of democratic breakdown include the Indian Supreme Court’s landmark arrogation of the power to assess the validity of constitutional amendments through elaboration of a ‘basic structure’ doctrine in the 1970s, in order to counter Indira Ghandi’s authoritarian rule.⁴⁵

As Issacharoff recounts, in recent decades courts worldwide have, in many states, appeared as the sole domestic institutions capable of challenging an excessive concentration of political power that threatens to subvert democratic rule.⁴⁶ Examples include successful blocking of government attempts to restrict freedom of association in Benin;⁴⁷ the Slovenian Constitutional Court’s invalidation of a law permitting blanket secret surveillance of individuals by the State;⁴⁸ and the Colombian Constitutional Court’s blocking of President Uribe’s constitutional amendment seeking to extend presidential term-limits in 2010.⁴⁹

A contemporary example is found in Turkey. The Constitutional Court, following the introduction of a mechanism for individual petitions in 2012 as part of a package of constitutional reforms (explicitly aimed at reducing the number of Turkish applications to the European Court of Human Rights) adopted a much more assertive position against the creeping authoritarianism of President Erdogan. Adhering much more closely to case-law of the European Court, the Constitutional Court has forced the government to lift bans on Youtube and Facebook in 2014, invalidated parts of a law seeking to place the judiciary under stronger governmental control, and, in February 2016, ordered the release of imprisoned journalists accused of breaching State security. As such, it has hampered Erdogan’s efforts to consolidate power and remove all democratic controls on his rule.

⁴¹ See J-W Müller, ‘Militant Democracy’ in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1254-1259.

⁴² E McWhinney, ‘Judicial Restraint and the West German Constitutional Court’ (1961-1962) 75 *Harvard Law Review* 5, 33.

⁴³ DP Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* 1st ed. (1st edn, Duke University Press, 1989) 227-228.

⁴⁴ McWhinney (n 42) 35.

⁴⁵ Set out in *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

⁴⁶ Issacharoff (n 21) 272.

⁴⁷ Linnan (ed), *Legitimacy, Legal Development and Change* ((Routledge, 2016) 65 note 13.

⁴⁸ W Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2008) 201.

⁴⁹ Issacharoff (n 21)

International courts have also attempted to arrest democratic backsliding; seen in everything from the development of a regional variant of Germany's 'militant democracy' doctrine by the European Court of Human Rights in the 1980s (controversially invoked to uphold Turkey's ban on the Refah Partisi (Welfare Party) in 2004 on the basis that its opposition to secularism constituted a threat to the democratic order),⁵⁰ to its recent judgment finding Hungary's new law permitting blanket State surveillance as a violation of the European Convention,⁵¹ to the Inter-American Court's judgment addressing illegitimate interference with the judiciary in Venezuela.⁵²

Both domestic and international courts can therefore play a key part in arresting democratic decay, and it is little wonder that, alongside the media, they tend to be central targets of any regime seeking to subvert democratic rule. However, there are clear limits to their capacities. As Issacharoff offers:

Once power is truly consolidated, courts are capable of being bypassed as irrelevant institutions, as in Russia today, or subject to replacement of their leading jurists, as in Hungary – or perhaps simply disregarded.⁵³

Turkey again provides a useful illustration: unlike the German and Indian scenarios of the past, or the contemporary contexts of Hungary or Poland, where leaders have been careful in mounting attacks on judicial actors, President Erdogan and his government have begun to overtly state that the government will no longer comply with judgments of the Constitutional Court and the European Court of Human Rights.⁵⁴ When domestic actors and international human rights courts are no longer heeded, the sole remaining hope for protection against a full slide into authoritarianism is some form of alternative international action.

Non-judicial public law mutations: The rise of international 'democracy defence' systems

Compared to a sustained focus on courts as bulwarks against democratic decay and breakdown, surprisingly little attention has been given to date to the emergence of wider international systems for defending democracy, despite their appearance in a host of leading regional and international organisations. There is as yet no comparison of the emergence, nature and operation of these different systems, despite their increasing use and centrality in addressing democratic breakdown.⁵⁵ This section presents the first, albeit brief, comparative analysis of these systems, concentrating on the Commonwealth and OAS, before moving to consider the European systems developed by the EU and Council of Europe. As will become clear, each system has tended to develop in response to a key crisis, although their institutional form, operation and effectiveness appear to differ widely.

The Commonwealth

To begin with the Commonwealth, an association of 53 member states worldwide,⁵⁶ its elaboration of a system for defending democracy at the national level is intimately tied to its search for a *raison*

⁵⁰ JA Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge, 2013) 192 et seq.

⁵¹ *Szabó and Vissy v Hungary* App. No. 37138/14 (12 January 2016).

⁵² In *Apitz v Venezuela* (ser. C) No. 182 (5 August 2008) the Court ordered the reinstatement of three judges who had been fired.

⁵³ Issacharoff (n 21) 273.

⁵⁴ See (n 3).

⁵⁵ Existing comparative work is now over a decade old and does not cover all regional organisations. See eg D Hawkins, 'Protecting Democracy in Europe and the Americas' (2008) 62(3) *International Organization* 373.

⁵⁶ Africa (Botswana, Cameroon, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Seychelles, Sierra Leone, South Africa, Swaziland, Uganda, United Republic of Tanzania, Zambia); Asia (Bangladesh, Brunei Darussalam, India, Malaysia, Maldives, Pakistan, Singapore, Sri Lanka); Caribbean and Americas (Antigua and Barbuda, The Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, St Kitts and Nevis, St Vincent and The Grenadines, Trinidad and Tobago); Europe (Cyprus,

d'être in the post-colonial era.⁵⁷ Faced with obsolescence as a relic of Empire, the organisation made democratic rule its chief defining purpose in the 1970s. The end of the Cold War opened a space for it to engage more resolutely with this purpose: the Harare Declaration of 1991 enunciated the core principles of the Commonwealth, including a clear commitment to democratic rule and human rights:

[W]e pledge the Commonwealth and our countries to work with renewed vigour, concentrating especially in the following areas:

...

- democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;
- fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;

In 1995 the Millbrook Action Programme unveiled at the organisation's Auckland summit institutionalised oversight of the Harare principles through the creation of a new organ, the Commonwealth Ministerial Action Group (CMAG). Comprising a representative group of eight foreign ministers from Commonwealth states, the CMAG was empowered to address 'serious or persistent' violations of the Harare principles, 'to assess the nature of the infringement and recommend measures for collective Commonwealth action aimed at the speedy restoration of democracy and constitutional rule'.⁵⁸ The CMAG can, of its own volition, visit states in order to assess the situation on the ground and, where it deems Commonwealth principles to have been breached, take punitive sanctions, including suspension and even expulsion of a state from the Commonwealth. Although a 'startling' and 'unparalleled international innovation' in a conservative and consensus-oriented organisation, as Colville notes, the Group was 'created in anger' as a reaction to the extra-judicial execution of key political activists by Nigeria's military junta, and 'its role would diminish as tempers cooled'.⁵⁹

Views diverge on the effectiveness of the CMAG mechanism. Senior Commonwealth officials such as Amitav Banerji have emphasised that CMAG has not been reticent in using its powers—it has twice suspended Fiji and Pakistan from the councils of the Commonwealth (it re-suspended Pakistan in 2007), for instance, and suspended Sierra Leone in 1997— that every state that has been suspended has worked to address the issues and remove the suspension (e.g. Nigeria, Sierra Leone, Pakistan), bar Zimbabwe, which left the Commonwealth in 2003 in reaction its suspension following presidential elections marred by violence and intimidation. He also insists that, because of its unique nature, the Commonwealth has an unusual degree of access to member states and acceptance of intervention.⁶⁰

By contrast, detractors make a host of criticisms: that the body is too timid and cautious in the use of its powers, especially regarding preventive action before democratic breakdown is fully manifest; focuses too much on electoral issues; focuses too much on military rule rather than wider human rights issues; disengages too quickly once immediate problems are resolved, has been 'riddled with fudging and indecision', and has failed to effectively address democratic breakdown in states that simply have little regard for the Commonwealth.⁶¹ Colville reports the complaint of CMAG's Vice-chairman in 1996 that the Nigerian junta 'has no interest in the Commonwealth, or

Malta, United Kingdom); and the Pacific (Australia, Fiji, Kiribati, Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu).

⁵⁷ See generally A Banerji, 'The Commonwealth of Nations: A Force for Democracy in the 21 st Century?' (2008) 97 *The Round Table* 813.

⁵⁸ Millbrook Declaration 1995 <<http://thecommonwealth.org/sites/default/files/history-items/documents/millbrook%20declaration.pdf>>.

⁵⁹ See eg R Colville, 'A Place to Stand: The Problems and Potential of the Commonwealth Ministerial Action Group' (2004) 93(375) *The Round Table* 343, 343-344..

⁶⁰ Banerji (n 57) 818.

⁶¹ See Colville (n 59) 343.

membership of the Commonwealth, or the ability to have dialogue with the Commonwealth'.⁶² The contemporary Maldivian context tends to support this position. 'Touted by the Secretary-General of the Commonwealth as the 'definitive success story' in terms of intervention in 2012,⁶³ this year we see heavy intervention has been required due to the degeneration of democratic governance under current President Abdulla Yameen, with CMAG issuing a list of demands, including the release of jailed opposition leaders and return of exiles.⁶⁴ Recent reports that India has shielded the Maldives from CMAG sanctions⁶⁵ demonstrate its limits to act against the wishes of Commonwealth 'heavy hitters' (which also include Pakistan and Nigeria). As Colville asserts:

Although effective in dealing with crises in small states, the Group has been systematically denied the tools it needs to do an effective job in larger states, or where there has not been a military coup.⁶⁶

However, even critics such as Colville suggest that CMAG can play some role in delegitimising authoritarian regimes by influencing international opinion, and that its attempts to counter democratic decay beyond military coups have been vigorously resisted by Commonwealth states as a whole.⁶⁷ Other Commonwealth organs also play a role in addressing democratic decay and democratic breakdown. The leaders of Commonwealth states, acting in concert, can take action outside the CMAG process, although this is rare and requires consensus and very obvious breakdown of democracy. Suspensions were issued against Nigeria in 1995 and Zimbabwe in 2002. Importantly, concerning preventive action against democratic breakdown, is the development of a practice of preventive or pre-emptive diplomacy whereby the Secretary-General discreetly intervenes in a State that is suffering problems with democratic governance but not yet seriously enough for CMAG intervention (e.g. Swaziland, Zanzibar).⁶⁸ However, once again we encounter a rather rosy picture from Commonwealth officialdom, which may not reflect the true reality.

It is important to stress that the Commonwealth 'democracy defence' system is resolutely political and diplomatic in nature. This is reflected in the decision to restrict CMAG's membership to foreign ministers, rather than, say, attorneys general or justice ministers.⁶⁹ It also means that its decision-making process makes no pretensions to equating to a judicial process, with the reasoning and transparency that this would entail:

It takes account of the fact that a decision to suspend a country from the councils of the Commonwealth cannot be a cut-and-dried matter of law, but a political decision that takes all factors into account.⁷⁰

Kamalesh Sharma, another Commonwealth official, views this positively, on the basis that States always find out if they are to be 'CMAG'd' (as he puts it), and this does have some disciplining effect.⁷¹ However, the reliance on political and diplomatic measures in the Commonwealth system makes its operation somewhat opaque: its proceedings are not public and there is relatively little information in the public domain. This renders the system a difficult study, which impedes analysis of how its approach could be of use to other international organisations—key research, such as Colville's for instance, is heavily reliant on interviews with key actors.

⁶² *ibid* 348.

⁶³ K Sharma, 'Democracy and the Commonwealth' (2011) 100(412) *The Round Table* 39, 45.

⁶⁴ See (n 7).

⁶⁵ 'Maldives thanks India for support', *The Hindu*, 12 April 2016 <<http://www.thehindu.com/news/national/maldives-thanks-india-for-support/article8462754.ece>>.

⁶⁶ Colville (n 59) 344.

⁶⁷ *ibid* 349, 345.

⁶⁸ Sharma (n 63) 44 et seq.

⁶⁹ Banerji (n 57) 816.

⁷⁰ *ibid*.

⁷¹ Sharma (n 63).

The Organization of American States (OAS)

The OAS has expressed a commitment to democratic rule since its establishment in 1948. The OAS Charter from the outset stated that American solidarity is based on ‘the effective exercise of representative democracy’⁷² and made a rather fleeting textual reference to human rights. However, until the end of the Cold War democracy was largely defined in opposition to Communism, with the result that even military coups were not addressed with any vigour by the organisation.⁷³ It was only with region-wide transitions to democracy from 1978 onward that a meaningful system of democracy defence began to develop.

In 1985 a protocol to the OAS Charter (the Protocol Cartagena de Indias) made representative democracy one of the *raisons d’être* of the OAS. In 1991 Resolution 1080 introduced a procedure not unlike the CMAG procedure (albeit without creating a dedicated organ) whereby the OAS General Assembly requests the Secretary General to seek immediate convocation of the Permanent Council ‘in the event of any occurrences giving rise to sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government’ of any OAS member state, to permit an assessment of the situation under the OAS Charter, and to decide on calling a meeting, within 10 days, of foreign ministers or a special session of the Assembly.⁷⁴ The following year, the Washington Protocol provided for collective action at OAS level, allowing for suspension of a state ‘whose democratically constituted government has been overthrown by force’, by a two-thirds vote at a special session of the General Assembly, but only where diplomatic efforts have failed.

The OAS met a significant test in the 1990s with the reversion to authoritarianism under Alberto Fujimori in the 1990s. Democratically elected in 1990, Fujimori performed an *auto-golpe*, or self-coup, in 1992 with the help of the military, to seize power outside democratic controls by ‘dissolving’ the legislature and judiciary, which was apparently supported by a very significant majority of Peruvians. Spatial constraints preclude a full description of the episode, but it suffices to say that the national and OAS response was uncoordinated and incoherent: individual states took differing positions, with some breaking off diplomatic ties, others like Argentina and Chile requesting Peru’s suspension from the OAS, while the US government recognised the continued legitimacy of Fujimori’s rule. For its part, the OAS denounced the *coup* and demanded a return to ‘representative democracy’, but it had seemingly little disciplining effect. In the end, it was a collapse in Fujimori’s public support that prompted his removal from office and a return to democratic rule.

The Peruvian travails spurred the OAS (at the initiative of the post-Fujimori democratic government of Peru⁷⁵) to attempt establishment of a more coherent system for addressing democratic backsliding, leading to the adoption of an Inter-American Democratic Charter in 2001, which has become the basis for OAS intervention in democratic breakdowns over the past 15 years.⁷⁶ The Charter systematically compiles previously expressed concepts in various other instruments, including an explicit link between democracy and respect and promotion of human rights, among others. It lists the elements that make a government democratic (including not only regular elections and rights protection, but an express reference to social justice) and contains significant innovations, going as far as recognising a ‘right to democracy’ (Art.1) and a State obligation to ‘promote and defend’ it. Interestingly, it departs from the wording of the Washington Protocol, by referring to an ‘unconstitutional alteration of the constitutional regime that seriously

⁷² Article 3, OAS Charter.

⁷³ H de Zela Martínez, ‘The Organization of American States and its Quest for Democracy in the Americas’ (2013) 8 *Yale Journal of International Affairs* 23, 25.

⁷⁴ The Resolution text is available at <<http://www.oas.org/juridico/english/agres1080.htm>>.

⁷⁵ D Soria Luján, ‘Las democracias con libertades disminuidas en Latinoamérica en el siglo XXI y la Carta Democrática Interamericana: ¿Dos modelos de democracia en la región?’ (2015) 75 *Derecho PUCP* 57, 64.

⁷⁶ The Charter is available at <http://www.oas.org/en/democratic-charter/pdf/demcharter_en.pdf>.

impairs the democratic order in a member state', which is far more expensive than the overthrow of a democratic government by force.

Although the Charter has been criticised as setting out a rather 'desultory'⁷⁷ procedural framework for arriving at collective decisions than a fully-realised normative framework for addressing crises of democracy in the region, its core value has been said to lie in its expression of shared–pragmatic, not ideological–political will to deepen democratic principles and to act in accordance with them. By 2013, the Charter had been invoked nine times: against *coups* in Venezuela (2002-2004) and Honduras (2009-2010); and preventively against Nicaragua and Ecuador (2005), Bolivia (2008), Guatemala (2009), Paraguay (2009), Ecuador (2010) and Haiti (2010-2011) 'to avoid escalation of political and institutional crises that could have jeopardized continuity of the democratic process'.⁷⁸ Yet, relatively little analysis currently exists of this preventive use.

Most recently the OAS has resisted calls to invoke the Charter to address the ongoing crisis in Venezuela.⁷⁹ This has required other regional organisations to step into the fray: under the umbrella of the Union of South American States (UNASUR), for instance, the former leaders of Spain and the Dominican Republic initiated a confidential dialogue between representatives of the Venezuelan government and opposition in May 2016 in an attempt to find a mediated solution to the political stand-off.⁸⁰ Despite the apparent robustness of the Charter procedure, its effectiveness is viewed as hindered in practice by a wish to achieve decisions by consensus, despite the formal requirement of a two-thirds majority, which can lead to 'organizational paralysis'.⁸¹ A central difficulty is a lack of agreement not only in defining terms like 'unconstitutional alteration of the constitutional order' and 'serious impairment of the democratic order', but a more fundamental cleavage between traditional liberal understandings of representative democracy in the majority of states, as against the more novel understanding of participatory democracy in Andean states.⁸²

At times, this can require a shift of focus to surrogates for democratic rule; principally human rights. For instance, the Inter-American Commission on Human Rights, which, by interpreting its mandate broadly to encompass country visits and country reports, has played a significant role in the region since the 1970s, naming and shaming states such as Argentina and Nicaragua with reports detailing severe and widespread rights abuses,⁸³ assumed a key role in maintaining pressure on the Fujimori regime during the 1990s when other mechanisms, and political resolve, were somewhat lacking. The Inter-American Court and special rapporteurs with thematic mandates (e.g. freedom of expression) round out a system for addressing democratic backsliding that features significantly more actors than the Commonwealth model.

The EU and Council of Europe

At the EU level, like the other regimes described above, the development of a form of international 'democracy defence' system was initially spurred by crisis, when Jörg Haider's Freedom Party entered the Austrian government in 1999, following tortuous coalition negotiations.⁸⁴ The EU

⁷⁷ BS Levitt, 'A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter' (2006) 48(3) *Latin American Politics & Society* 93.

⁷⁸ de Zela Martínez (n 73) 31.

⁷⁹ See 'OAS won't discuss applying democratic charter to Venezuela: secretary general', *Xinhuanet*, 14 May 2016 <http://news.xinhuanet.com/english/2016-06/14/c_135435948.htm>.

⁸⁰ 'Ex-world leaders meet with Venezuelan officials and opposition to end standoff', *The Guardian*, 28 May 2016 <https://www.theguardian.com/world/2016/may/28/venezuela-government-standoff-nicolas-maduro-hugo-chavez?CMP=Share_iOSApp_Other>.

⁸¹ de Zela Martínez (n 73) 33.

⁸² *ibid.*

⁸³ T Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) 19 *Human Rights Quarterly* 510, 512.

⁸⁴ The following information is summarised from REFERENCE.

soon realised that it had strict controls for pre-accession states under the so-called ‘Copenhagen criteria’,⁸⁵ but lax oversight mechanisms for addressing problematic developments in post-accession states. In the end, all other 14 EU Member States at the time decided to act outside the EU treaties, and addressed the situation by declaring a freeze on diplomatic relations with Austria. This resulted in a form of diplomatic stalemate with Austria, only finally resolved by seeking assistance from the Council of Europe: the President of the European Court of Human Rights was requested to nominate three ‘wise persons’ to report on Austria’s respect for human rights.

Although diplomatic sanctions failed to force the Freedom Party from power, a key recommendation of the ‘three wise persons’ report was the establishment of an ‘early warning mechanism’: following the Amsterdam Treaty of 1997 Article 7 of the Treaty on European Union (TEU) already provided for the ‘nuclear option’ of suspending an EU Member State if it engages in a ‘serious and persistent’ breach of fundamental rights, but this was amended by the Nice Treaty of 2001 to empower the European Council to also recommend action if it believes that there is ‘a clear risk of a serious breach’ of common EU values (Art 2 TEU), which are: ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’

The two-tier Article 7 procedure was retained under the Lisbon Treaty. The European Council, acting by unanimity on a proposal of one-third of Member States or by the European Commission, and having obtained the assent of the European Parliament, can determine the existence of a ‘serious and persistent breach’ by a Member State of one of the core principles of the EU. In addition, a determination as to the existence of a ‘clear risk’ can be made by the European Council on a reasoned proposal by the European Commission, one-third of the Member States or the European Parliament, but (in an echo of the OAS arrangements) only after hearing from the Member State concerned.

At the wider Council of Europe level, which also requires member states to have democratic political systems,⁸⁶ developments since the 1990s have also led to the emergence of a distinct ‘democracy defence’ system through the addition of a variety of diplomatic, political and quasi-judicial mechanism, to add to judicial action by the European Court of Human Rights in Strasbourg. The Council of Europe’s ‘think tank’, the Commission for Democracy through Law (Venice Commission), was established in 1995 with a mandate that includes the provision of assistance to states regarding constitutional law, as well as ‘emergency constitutional aid’.⁸⁷ The Commission has played an increasingly central role in assessing the propriety of constitutional and legislative reforms, especially since 2010; issuing opinions on, for instance, the 2012 Hungarian Constitution, and this year, critical reviews of Polish laws on the Constitutional Tribunal and police surveillance, and most recently, an opinion on Turkey’s legislative framework for curfews in the context of the government’s renewal of conflict with Kurdish powers in the south-east.⁸⁸ We also see the increasing activity of the Commissioner for Human Rights, established in 1999, whose general mandate is ‘to promote awareness of and respect for human rights’ across the Council’s 47 member states, including identifying ‘possible shortcomings in the law and practice concerning human rights’.⁸⁹ The current Commissioner, Nils Muižnieks, has just released a country report on

⁸⁵ These criteria require that aspirant EU states, *inter alia*, prove the ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’.

⁸⁶ The Council’s Statute refers to ‘individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy’ (preamble) and insists: ‘Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms’ (Article 3).

⁸⁷ See <http://www.venice.coe.int/WebForms/pages/?p=01_Presentation>.

⁸⁸ See the list of publications at

⁸⁹ See Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, adopted on 7 May 1999.

15 June 2016 warning that human rights and democratic rule are under threat in Poland.⁹⁰ Interventions can also be made by the Council's Parliamentary Assembly (PACE). Both organs can engage in country visits, fact-finding missions and meetings in carrying out their mandates.

A recent edited collection, published in 2015, details the employment of some of these mechanisms to address systemic deficiencies in Hungary and Romania (principally, EU action and the Venice Commission), revealing strong linkages between the EU and Council of Europe systems.⁹¹ However, initial assessments concerning effectiveness have not been promising. In the Council of Europe, the 'nuclear option' of suspending a member state from the Council of Europe is viewed as an empty threat, given little political willingness to pursue this course against any state.⁹² In the EU, unlike the concerted action against Austria in 1999, it has not been possible to rally support to employ the 'nuclear option' of Article 7 against Hungary or Romania, and the European Commission has tended to fall back on the much more piecemeal approach of taking infringement proceedings to address specific pieces of legislation.⁹³ This has led to the introduction of a 'third way' in the form of a framework for 'pre-Article 7' rule of law monitoring established by the European Commission in 2014, to provide a fuller framework for preventive action,⁹⁴ which is currently being applied for the first time to Poland.

Key observations concerning these international democracy defence systems

Five key observations might be made about these institutional developments. First, the hallmark of the 'new reality' of public law worldwide appears to be a transition from the reliance on both constitutional and regional human rights courts as the primary bulwarks against democratic decay to a new reality where diplomatic, political and quasi-judicial mechanisms are at the fore, with courts pushed into a secondary (though still important) role.

Second, is the question of whether the new institutional configurations represent an extension of public law (as seen in new treaty mechanisms) or the sidelining of public law (in the secondary role accorded to national and regional courts, the activity of non-treaty bodies such as the Venice Commission, the 'soft law' frameworks of the EU, and the expressly political CMAG). Perhaps it is simply a necessary rebalancing from the late-twentieth-century obsession with judicial control—in a context where courts, lacking sufficient speed or flexibility, have been shown to be entirely unsuited to the task of providing a full first line of defence against democratic backsliding.

Third, these new institutional configurations have developed, and are operating, in an isolated, ad hoc, piecemeal, uncoordinated fashion, in various world regions, with few attempts to map the similarities, linkages and differences in approach across different regions and systems. We need a better understanding, for instance, of the precise nature of interaction between the individual actors in each system, for instance, and in Europe, the intense engagement between the two separate systems of the EU and the Council of Europe. Comparative work has the potential to offer greater insights. For example, our understanding of the Venice Commission's comprehensive 'Rule of Law Checklist', adopted in March 2016, might be assisted by likening it to a form of soft-law global 'democratic charter'.⁹⁵

⁹⁰ 'Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Poland, from 9 to 12 February' CommDH(2016)23 15 June 2016 <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH\(2016\)23&Language=lanEnglish&Ver=original&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2016)23&Language=lanEnglish&Ver=original&direct=true)>.

⁹¹ von Bogdandy and Sonnevend (eds), *Constitutional Crisis* (n 14).

⁹² See C Hillbrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press, 2014) 36 (discussing suspension for non-compliance with Strasbourg Court rulings).

⁹³ See von Bogdandy and Sonnevend (eds), *Constitutional Crisis* (n 14).

⁹⁴ European Commission press release, 'European Commission presents a framework to safeguard the rule of law in the European Union', Strasbourg, 11 March 2014 <http://europa.eu/rapid/press-release_IP-14-237_en.htm>.

⁹⁵ Study No. 711/2013, 'Rule of Law Checklist' CDL-AD(2016)007, 18 March 2016 <http://www.biicl.org/documents/897_vc_rol_checklist_-_cdl-ad2016007-e.pdf?showdocument=1>.

Fourth, are the significant questions concerning the effectiveness of these measures: intensive attention to Hungary has done little to stem its continued slide toward authoritarianism, for instance, while, as discussed above, the efficacy of Commonwealth action can be overstated. However, these systems—especially the European system—are evolving and expanding so rapidly that analysis is struggling to keep pace with developments, including the first use of ‘pre-Article 7’ monitoring against Poland, announced in January 2016, and the impact of Venice Commission intervention, whose tone has sharpened considerably since its more conciliatory approach to the Hungarian reforms of 2010-2012. Concerning the amendments to the Law on the Polish Constitutional Tribunal, for instance, the Commission’s opinion issued in March 2016 stated:

135. Constitutional democracies require checks and balances. In this respect, where a constitutional court has been established, one of the central elements for ensuring checks and balances is the independent constitutional court, whose role is especially important in times of strong political majorities. (...) [A]s long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights.

...

136. A solution to the current conflict over the composition of the Constitutional Tribunal, which originated from the actions of the previous Sejm [Parliament], must be found.

...

138. Crippling the Tribunal’s effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective. Making a constitutional court ineffective is inadmissible...⁹⁶

It remains to be seen whether enhanced intervention will prove more effective, or whether these mechanisms present simply a ‘talking shop’ that is closer to institutional appeasement of problematic regimes, under the guise of ‘dialogue’.

Fifth, and finally, is the observation that all of these regional democracy defence systems encounter clear difficulties in defining the core values essential to carrying out their role, not least democracy, the rule of law and human rights. Beyond clear cases of democratic breakdown, such as the military *coups* that have become a Commonwealth speciality and which have brought swiftest and most coherent OAS action, agreement breaks down amidst increasingly divergent views on the nature and core of democratic governance. This raises very significant obstacles for the European and OAS systems in particular, given the increasing rejection of standard models of liberal constitutional democracy in various states, which not only complicates attempts to identify and address bad faith developments from good faith experimentation or evolution, but fundamentally muddies the water as to what counts as truly democratic governance.

3 What are our existing conceptual and theoretical frameworks for understanding this new reality, and are they adequate?

The public law response to the democratic recession has been not only institutional, but conceptual, and also challenges theoretical frameworks for understanding the relationship between public law and democratic governance, especially the relationship between domestic, regional and transnational norms, actors and political processes.

A conceptual challenge

⁹⁶ ‘Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland’, 11-12 March 2016 CDL-AD(2016)001 24 (footnote numbers omitted).

Until recent years two central conceptual frameworks existed for understanding democratic backsliding'. A significant democratisation theory literature on 'democratic breakdown'⁹⁷ provides a fundamental typology between the 'quick death' of a *coup d'état*, invasion or other crisis (what we might view as 'pure' democratic breakdown), and the 'slow death' of successive authoritarian advances and a weakening of the existing democratic structures ('democratic decay' or 'deconsolidation').⁹⁸ With democratisation theorists tending to treat law as epiphenomenal, 'constitutional crisis' provides another leading conceptual framework—used as the core concept in by von Bogdandy and Sonnevend's recent collection, for example—despite its rather fuzzy edges and its application far beyond instances of democratic decay and breakdown.⁹⁹

Public lawyers have added to these frameworks through a flurry of conceptual development in recent years. David Landau has coined the term 'abusive constitutionalism' to refer to the hollowing out of democracy through successive amendments to the constitution.¹⁰⁰ This is echoed in recent scholarship: Julian Zaiden Benvindo speaks of 'abusive impeachment' of the President Rousseff in Brazil for instance,¹⁰¹ while Ali Acar discusses 'bad faith constitutionalism' in Turkey.¹⁰² An ever expanding literature deals with 'unconstitutional constitutional amendments', which are in conflict with eternity clauses and judicial basic structure doctrines.¹⁰³ Catherine Dupré's recent embrace of the notion of an 'unconstitutional constitution' (in reference to the Hungarian context) seems the logical terminus of this line of conceptual evolution.¹⁰⁴

Outside academia, the Venice Commission has developed a concept of 'constitutional justice',¹⁰⁵ which is clearly wider than 'constitutional law' in that it permits a more searching investigation of constitutional reforms that are technically valid but which do not fit on the spectrum of 'normal' constitutional democratic practice (as discerned by the Commission). Indeed, at times, the Venice Commission's reference to 'constitutional justice' and 'rule of law' can appear somewhat interchangeable, as seen in the Commission's 'Rule of Law Checklist', which could quite easily have been named a 'constitutional justice' checklist.

Ultimately, all of these concepts are aiming for the same thing: to provide some way of putting a finger on constitutional and legislative developments that are enacted through proper procedures, but which appear 'not quite right'; in other words, as Christopher May puts it, 'to define what is legitimate and what is illegitimate'.¹⁰⁶ However, unlike political and diplomatic measures, which can express this rather openly, approaches couched in the technical language of law and constitutionalism face greater challenges of justification, legitimacy and coherence. This,

⁹⁷ A recent analysis is found in S Mainwaring and A Pérez-Liñán, 'Democratic Breakdown and Survival' (2013) 24(2) *Journal of Democracy* 123.

⁹⁸ See eg See G O'Donnell, 'Transitions, Continuities, and Paradoxes' in S Mainwaring, G O'Donnell & J Valenzuela (eds), *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective* (UNDP, 1992) 19, 33.

⁹⁹ See e.g. J Colón-Ríos, 'New Zealand's Constitutional Crisis' (2011) 24(3) *New Zealand Universities Law Review* 448. Some refer to 'constitutional breakdown': See e.g. F Lehoucq, 'Bolivia's Constitutional Breakdown' (2008) 19(4) *Journal of Democracy* 110.

¹⁰⁰ Landau (n 13)

¹⁰¹ J Zaiden Benvindo, 'Abusive Impeachment? Brazilian Political Turmoil and the Judicialization of Mega-Politics', i-CONnect blog, 23 April 2016 <<http://www.iconnectblog.com/2016/04/abusive-impeachment-brazilian-political-turmoil-and-the-judicialization-of-mega-politics/>>.

¹⁰² A Acar, 'De-constitutionalism" in Turkey?', i-CONnect blog, 19 May 2016 <<http://www.iconnectblog.com/2016/05/deconstitutionalism-in-turkey/#comment-377978>>.

¹⁰³ See eg PJ Yap, 'The conundrum of unconstitutional constitutional amendments' (2015) 4(1) *Global Constitutionalism* 114.

¹⁰⁴ C Dupré, 'The Unconstitutional Constitution: A Timely Concept' in Bogdandy and Sonnevend (eds), *Constitutional Crisis* (n 14).

¹⁰⁵ See <<http://www.venice.coe.int/webforms/documents/?topic=12&year=all>>. This approach has much in common with other conceptions of 'constitutional justice': see e.g. TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003).

¹⁰⁶ C May, 'What we mean when we talk about the rule of law: The rule of law, regional organisations and constitutional politics', conference paper [draft], ICON-S Conference, Humboldt University, 17-19 June 2016, 1.

as we have seen, is a daunting task. Not only is the meaning of concepts as prismatic as the ‘rule of law’, ‘democracy’ and ‘human rights’ essentially contested, the inability to agree on their core meaning at the international level is further complicated by the fluid meaning of such terms in states suffering democratic and constitutional crisis. In the Romanian context, for instance, Bogdan Iancu has noted:

separation of powers, rule of law and constitutionality have acquired surprisingly pliable and unstable meanings in the current Romanian climate.¹⁰⁷

These new concepts are also confronted by a deeper conceptual difficulty. By attempting to assess democratic decay through exclusively constitutional criteria, they reflect the general post-war tendency to ‘define up’ democracy by fusing democracy and constitutionalism as ‘constitutional democracy’, thereby eliding the irresolvable tensions between these two concepts.¹⁰⁸ We need to seriously reflect on whether democratic decay and breakdown are coterminous with constitutional crisis and breakdown, or whether we need a more sophisticated framework. After all, simultaneous democratic and constitutional breakdown is easy to spot when we’re looking at a military *coup*, but much harder when we’re looking at states such as Hungary and Ecuador today, where elections continue, the constitution is not suspended, and courts continue to operate with some independence. We need to consider how concepts such as ‘authoritarian constitutionalism’ and ‘competitive authoritarianism’ fit into this picture.

We also need a workable typology of democratic decay and democratic breakdown that accommodates recent developments: there is a world of difference, for example, between the overt authoritarian turn in the Maldives and Botswana, the systematic, planned constitutional law assault on democratic structures in Hungary and Turkey, the slow suffocation of democratic governance in South Africa, and the crisis generated by dysfunctional democratic constitutional politics in Brazil. More fundamentally, we need to reflect on what model of ‘constitutional democracy’ we use to assess democratic decay and breakdown: Do we include reductions in protection afforded to social rights as well as civil and political rights? How much importance do we attach to the state’s willingness to comply with international and regional law, including the ‘soft law’ produced by bodies like the Venice Commission? Do we try to stick to a universal model of ‘normal’ constitutional democracy, or do we accept a diversity of models, including experimental models?

Theoretical frameworks

Finally, we need to reflect on how the ‘new’ public law fits within, and challenges, our existing theoretical frameworks for assessing public law. These systems represent the most extensive exceptions to the traditional agnosticism of international law concerning the political system of any given state, by requiring democratic governance and rejecting any undemocratic mode of government. In a sense, this brings these organisations closer to federal systems where the form of political governance in constituent states is conditioned by federal law—Article 4 of the US Constitution being a key example.¹⁰⁹ However, the actors involved in conditioning Member States of international organisations do not map cleanly onto any model of governance found at the domestic level.

Possible theoretical frameworks to draw on in understanding this new reality include Anne-Marie Slaughter’s theory of ‘government networks’ to capture the nature of contemporary global governance¹¹⁰ and evolving theoretical debates regarding the democratic legitimacy of judicial

¹⁰⁷ B Iancu, ‘Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts’ in Bogdandy and Sonnevend (eds), *Constitutional Crisis* (n 14).

¹⁰⁸ N Walker, ‘Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship’ (2010) 39 *Rechtsphilosophie & Rechtstheorie* 206, 206, 211.

¹⁰⁹ See eg SG Calabresi, ‘Federalism and the Rehnquist Court: A Normative Defense’ (2001) 574 *The Annals of the American Academy of Political and Social Science* 24.

¹¹⁰ A-M Slaughter, *A New World Order* (Princeton University Press, 2004).

review and international law interventions in young democracies.¹¹¹ A central normative question is whether democratic breakdown, or the threat of such breakdown, justifies more intense public law interventions to stem its advance, and if so, whether we accept new soft law, hybrid and quasi-judicial mechanisms as legitimate actors despite their having very limited democratic pedigree.

We also need to revisit scholarship at the heart of contemporary public law, including Carl Schmitt's theories of the relationship between democracy, political economy and 'constitutional failure',¹¹² as well as the scholarly turn toward monism by thinkers such as Hans Kelsen and Georges Scelle in the early twentieth century, which was motivated at least in part by the attempt to shore up shaky European democracies by enhancing the power of international law to achieve the ends of domestic constitutionalism.¹¹³

4 Conclusion: An ambitious research agenda

This is, of course, a highly ambitious research agenda seeking to address a range of interrelated empirical, conceptual and theoretical questions against a broad historical and geographical canvas. However, systematic analysis is necessary if we are to begin to get to grips with the nature of the 'new reality' of public law and its capacity to address democratic decay worldwide. We are, in effect, in the middle of a significant shift in global public law that needs to be charted, named, diagnosed and dissected. The scale of change, in short, necessitates a corresponding scale of analytical ambition.

¹¹¹ Regarding courts alone, see S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015); R Gargarella, 'In Search of a Democratic Justice – What Courts Should Not Do: Argentina, 1983-2002' in S Gloppen, R Gargarella and E Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Routledge, 2004); Bonilla Maldonado (ed), *Constitutionalism of the Global South* (n 34); K Lane Scheppelle, '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, 2005); and S Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285.

¹¹² See E Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Duke University Press, 2004).

¹¹³ See e.g. J Nijman & A Nollkaemper, 'Introduction' in Nijman & Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP, 2007) 9.