



Rule of Law and Constitution Building

The Role of Regional Organizations



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Foreword




The past few years have seen remarkable social movements for democratic change emerge around the world. They have demanded greater justice and dignity, more transparent political processes, a fair share of political power and an end to corruption. In other words, they have demanded democratic societies built on the rule of law.

The rule of law and democracy are interlinked and mutually reinforcing, and they belong to the universal and indivisible core values and principles of the United Nations. This was reaffirmed by the General Assembly in its High-Level Meeting on the Rule of Law in September 2012. On the same occasion the General Assembly recognized the important role of regional organizations and called on them to support their Member States in strengthening the rule of law.

The rule of law is based on key democratic principles, such as equality before the law, accountability to the law, separation of powers and participation in decision making. Like democracy, the rule of law is a principle of governance anchored in participatory and consultative processes. To be legitimate, laws should be widely consulted and reflective of society's needs and values. A democratically elected parliament and a vibrant and strong civil society provide ideal mechanisms for achieving this.

The importance of inclusive consultations is evident in constitution-making processes. The constitution of a nation represents the social compact between governors and governed. It is the basic law of the land. It affords a unique opportunity to ground a political settlement and build a peaceful future, particularly after years of rupture and chaos, as is often the case in post-conflict situations. In order for such hopes to materialize, a constitution needs to be developed and adopted in an open, consultative and democratic way.



The rule of law and constitutionalism are among the key principles and core mandates of many regional organizations. The Charter of the African Union reaffirms that freedom, equality, justice and dignity are essential objectives for the achievement of the aspirations of the African peoples. The European Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. Unconstitutional changes of government are firmly rejected, for example, by the South Asian Association for Regional Cooperation Charter of Democracy and the Inter-American Democratic Charter.

In practice regional organizations play a critical role in the formulation of normative frameworks, in supporting their Member States to strengthen democratic and accountable institutions, and in facilitating rules-based cooperation and peaceful settlement of disputes between Member States. In short, they strengthen the rule of law at national and international levels. In so doing, they contribute to the implementation of Chapter VIII of the Charter of the United Nations: maintenance of peace and security in their regions. In turn, this provides the conditions conducive to sustainable development and the promotion and protection of human rights for all.

The Inter-Regional Dialogue on Democracy, in particular through its meeting on the rule of law and constitutional governance and this resulting publication, has played a valuable role in advancing these intertwined, universal and global themes from the critically important regional perspective. I hope this publication will serve as an important contribution to further dialogue and the strengthening of the role played by the regional organizations in promoting the rule of law and constitutionalism across the globe.



*Jan Eliasson
Deputy Secretary-General and
Chair of the Rule of Law Coordination
and Resource Group of the United Nations*

Preface




The rule of law and constitution building are two concepts at the heart of sustainable democracy. Broadly speaking, the rule of law requires that everyone, including governmental bodies and officials, as well as citizens, is bound by and treated equally under the law. Constitutions, meanwhile, form the central repository and ultimate safeguard of the rule of law at a national level, providing a blueprint for a functioning system of rule of law and protecting and empowering the institutions that implement and enforce this system.

Given the centrality of constitutions to the democratic process, the International Institute for Democracy and Electoral Assistance (International IDEA) has developed one of the leading programmes on constitution building as part of our work to fulfil our mission to support sustainable democratic change through providing comparative knowledge, assisting in democratic reform, and influencing policies and politics. The Constitution Building Programme supports stakeholders engaging in processes of constitutional change to strengthen democracy and reinforce the rule of law. To do so, the programme produces capacity-building resources, encourages sharing of lessons learned, and provides technical assistance to actors at the local, national, regional, and global levels.

This publication focuses on how regional organizations play a key role in the development of democracy in their regions through support for the rule of law and constitution building. This support takes many forms depending on the mandates of the organizations and on regional needs. The diversity of experiences allows regional organizations the opportunity to compare, collaborate, and ultimately sharpen their own practices, enabling them to better fulfil their mandates and better serve their member states.

Some key findings in this book could inform the work of regional organizations in supporting the rule of law. Shifting legal and political landscapes can give



rapid rise to changes in adherence to and enforcement of the rule of law at the national level. Regional organizations are uniquely positioned to provide an additional level of protection when these shifts occur. At a fundamental level, the promotion of the rule of law therefore requires vigilance, flexibility, and responsiveness on the part of regional organizations.

Regional organizations also operate best when they fully engage their member states and utilize their diverse experiences, expertise, and lessons learned. Programmes for legal cooperation and assistance, for example, provide the opportunity for member states to pool their resources and experiences, enabling regional organizations to better support the rule of law across the region. By developing rule of law standards, regional organizations facilitate the implementation of the rule of law. These standards can serve as aspirational principles or as a tool for monitoring. When standards are accompanied by enforcement mechanisms, regional organizations are equipped to respond to coups or other unconstitutional changes of government, as well as other critical breaches of the rule of law, such as the weakening of democratic institutions or the limiting of rights and freedoms.

International IDEA is proud to facilitate the Inter-Regional Dialogue on Democracy, a programme that provides a venue for sharing and collaboration among regional organizations through workshops and high-level meetings. The programme also produces comparative knowledge resources, including this publication, the third in a series dedicated to exploring and sharing the democracy-related work and experiences of regional organizations.



*Yves Leterme
Secretary-General
International IDEA*

Acronyms and abbreviations



ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Commission on Human and Peoples' Rights
ACINET	Arab Anti-Corruption and Integrity Network
ACMW	ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AGA	African Governance Architecture
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
APSA	African Peace and Security Architecture
ASEAN	Association of Southeast Asian Nations
AU	African Union
CAR	Central African Republic
CoE	Council of Europe
CSO	civil society organization
EC	European Commission
ECJ	European Court of Justice
ECM	Enhanced Consultative Mechanism (Pacific Islands Forum)
ECOWAS	Economic Community of West African States
EP	European Parliament
EPG	Eminent Persons' Group (Pacific Islands Forum)
EU	European Union
FICs	Forum Island Countries
FRSC	Forum Regional Security Committee (Pacific Islands Forum)
IADC	Inter-American Democratic Charter
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
LAS	League of Arab States
MCG	Ministerial Contact Group (PIF)



MEF	Malaitan Eagle Force
MESICIC	Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption
NCA	National Constituent Assembly (Tunisia)
NGO	non-governmental organization
NHRI	national human rights institution
OAS	Organization of American States
OAU	Organization of African Unity
OIS	Organization of Islamic States
OSCE	Organization for Security and Co-operation in Europe
PIF	Pacific Islands Forum
PSC	Peace and Security Council (African Union)
RAMSI	Regional Assistance Mission to Solomon Islands
REC	regional economic community
REMJA	Meetings of Ministers of Justice or Other Ministers or Attorneys General of the Americas
SAARC	South Asian Association for Regional Cooperation
SAARCLAW	South Asian Association for Regional Co-operation in Law
SACEPS	South Asia Centre for Policy Studies
SDOMD	SAARC Drug Offences Monitoring Desk
SOSMA	Security Offences (Special Measures) Act (Malaysia)
STOMD	SAARC Terrorist Offences Monitoring Desk
TEU	Treaty on European Union
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNSMIL	United Nations Support Mission in Libya

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Introduction



Introduction

Raul Cordenillo and Kristen Sample



A broad definition of the rule of law

The rule of law is fundamental for any functioning democracy. Adherence to it implies that governments are accountable by law and that citizens are equal under the law. A broad conception of the rule of law incorporates such elements as a strong constitution with constitutional limits on power, human rights, an effective electoral system, a commitment to gender equality, laws to protect minorities and other vulnerable groups, and a strong civil society.

The report of the Global Commission on Elections, Democracy and Security reiterates the importance of the rule of law, particularly as it applies to promoting and protecting the integrity of elections. All citizens, including political competitors and the opposition, should have legal redress to exercise their election-related rights.

In support of the rule of law, the International Institute for Democracy and Electoral Assistance (International IDEA) focuses on constitution building. Inclusive and participatory constitutional processes reflect citizens' interests and are sustainable and enduring. The constitution then sets the framework for democratic institutions and enforcement mechanisms.

At the national level, governments ensure the practice of the rule of law. This is primarily defended by an independent judiciary that safeguards human rights and the dignity of all citizens. The judiciary also protects the various institutions of accountability from potential obstruction and intimidation by other branches of government and state actors. In this context, government responsiveness to the interests and needs of the greatest number of citizens can be associated with the capacity of democratic institutions and processes to bolster the rule of law.

At the international level, the responsibility of governments to be responsive to their citizens is underpinned by the rule of law. The UN secretary-general

has stated that the rule of law accords UN member states with ‘predictability and legitimacy, as well as strengthens their sovereign equality’.¹

At the World Summit in 2005, UN member states recommitted themselves to protecting and promoting human rights, the rule of law and democracy, recognizing that they are interlinked and mutually reinforcing, and that they belong to the universal and indivisible core values and principles of the UN. In 2012, UN member states reaffirmed their solemn commitment to ‘the purposes and principles of the Charter of the UN, international law and justice and an international order based on the rule of law, which are indispensable for a more peaceful, prosperous and just world’.²

The rule of law and regional organizations

At the regional level, regional organizations take the lead in upholding and strengthening the rule of law, subject to their respective mandates. In order to do this, they develop regional norms and implement initiatives that are meant to complement their commitment to democracy and affirm their respect for human rights. For example, the European Union (EU), as a union of values and a community of law, identifies the rule of law as one of its universal values. The Organization of American States (OAS) developed the Inter-American Democratic Charter, which states that the effective exercise of representative democracy is the basis for the rule of law for the constitutional regimes of the member states.

Regional organizations have set up various mechanisms and bodies to facilitate legal cooperation, as well as cooperation among the accountability institutions of their respective member states. For example, the South Asian Association for Regional Cooperation (SAARC), through the South Asian Association for Regional Co-operation in Law (SAARCLAW), promotes regional cooperation of the legal communities of its member states. Likewise, the Pacific Islands Forum (PIF) works to promote cooperation in the region’s legal sector, with a current emphasis on supporting legislative drafting services in the Forum island countries. Regional initiatives in the Pacific also seek to strengthen accountability institutions such as ombudsmen and auditors general.

Regional organizations have also adopted human rights charters and judicial or quasi-judicial institutions to implement their human rights commitments. As early as 1952, the EU set up the European Court of Justice to ensure that ‘the law is observed’ in the interpretation and application of EU treaties. The OAS created the Inter-American Court of Human Rights in



1979, an autonomous judicial institution with the objective of applying and interpreting the American Convention on Human Rights and other relevant treaties. In November 2012 the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration, which details the commitment of its member states to human rights. The League of Arab States (LAS) is setting up an Arab Court on Human Rights, and the PIF has established a senior officials' working group to explore the viability of establishing regional human rights mechanisms for the Pacific region.

Regional organizations are also increasingly seeking to strengthen constitutional governance in their member states by developing regulatory frameworks that reject and sanction attempts to remain in power unconstitutionally, particularly unconstitutional transfers of power. The African Union (AU), for instance, has developed normative standards ranging from the Algiers Declaration on Unconstitutional Changes of Government of 1999 to the African Charter on Democracy, Elections and Governance. As mentioned above, the OAS is guided by the Inter-American Democratic Charter of 2007. Normative frameworks adopted by leaders of the PIF—such as the Biketawa Declaration and the Forum Principles of Good Leadership—also recognize the rule of law as a fundamental principle underpinning the forum.

Some regional organizations also support the design phase of national constitutions. The AU's peace and security mandate, especially in transition contexts, appears to have gradually expanded over time to include brokering talks between stakeholders in constitution-building processes, as seen in Kenya (2007–10) and Somalia (2010–12). In the Americas, the OAS supported the Bolivian constitutional process of 2005 and mediated disputes around constitutional reforms in Nicaragua in 2005. The EU has become increasingly vocal in constitutional reform processes in member states, as seen in its legal challenges to revisions to Hungary's constitution in 2012.

In recognition of the significant work that regional organizations are undertaking in the area of rule of law, the Inter-Regional Dialogue on Democracy³ made it the focus of its activities in 2013. The theme of its Third High Level Meeting, which was hosted by European Commission President José Manuel Barroso in Brussels, Belgium, in June 2013, was 'Upholding and strengthening the rule of law in our regions'. UN Deputy Secretary General Jan Eliasson, who leads the overall coordination of rule of law work in the UN, delivered the keynote message at this meeting.

This publication is a collection of background papers prepared for the Inter-Regional Workshop on Regional Organizations, the Rule of Law and Constitutional Governance, which took place in The Hague, the Netherlands, in October 2013 as a follow-up to the Third High Level Meeting. These chapters were selected because they represent the wide spectrum of work that regional organizations undertake in promoting the rule of law.

Some of the chapters are written from an insider perspective by regional organization officials. These chapters cover the rule of law mandates, norms and initiatives of the organizations, and highlight their achievements, challenges, limitations and prospects. The other chapters are written by outside observers on the rule of law work undertaken by regional organizations and how this work relates to the organizations' member states. They highlight the successes of regional organizations and propose recommendations for policy-makers.

An overview of the chapters

Chapter 1, 'The Role of the African Union in Strengthening the Rule of Law and Constitutional Order in Africa', discusses the contribution of the AU (and its predecessor, the Organization for African Unity) in strengthening good governance and consolidating democracy by upholding the rule of law and constitutional order among its member states. In particular, it focuses on the standards and norms that provide AU member states with the framework to uphold constitutionalism and the rule of law. While recognizing the AU's achievements in this area, the chapter also highlights ways in which it could do more to support its members.

The LAS has broadly addressed issues relating to the rule of law in the Arab region. Given recent developments and calls for reform, the LAS needs to undertake this in a more comprehensive and coherent manner. Chapter 2, 'The Arab League and the Rule of Law', looks closely at the institutions, legal instruments and initiatives of the LAS in constitution building, developing judiciaries, protecting human rights and fighting corruption. It analyses the progress that has been achieved so far and proposes recommendations to help promote the rule of law in the Arab world.

Chapter 3, 'The Organization of American States: The Rule of Law and Legal Cooperation', discusses how the OAS became an authority in the defence of representative democracy in the Americas. It also highlights the rule of law mechanisms it has set up to promote legal and judicial cooperation and fight corruption.



One poignant development in the progress of the PIF is its articulation of a set of shared principles and values, which include commitments to the rule of law, democratic governance and respect for human rights. Chapter 4, ‘Promoting the Rule of Law, Democratic Governance and Human Rights in the Pacific: The Role of the Pacific Islands Forum’, introduces its oversight functions and examines its work in the development of legal frameworks, the facilitation of law enforcement, ratification of international human rights treaties, and advancing integration among legal and accountability institutions.

Chapter 5, ‘Not Nudging, Embracing: The ASEAN Human Rights Declaration as a Catalyst for Reinforcing a Rights-based Approach to Constitutionalism’, assesses the ASEAN Human Rights Declaration and its potential for instituting the Universality of Human Rights in South-east Asia. It concludes with recommendations as to how this potential could be tapped and highlights lessons that may be relevant to other regional organizations.

Chapter 6, ‘Developing Mechanisms for Regional Influence in National Processes of Constitutional Change: the European Union and Hungary’, looks closely at recent changes in Hungary’s constitution, which were criticized and deemed to impact on the practice of the rule of law in the country. It then discusses the role of the EU in this process and analyses potential mechanisms to promote a culture of constitutionalism and protect the values enshrined in the EU treaties.

Chapter 7, ‘SAARC and the Regional Promotion of the Rule of Law and Constitutionalism in South Asia’, broadly examines SAARC’s work on the rule of law and looks closely at its efforts in anti-drug trafficking and counter-terrorism, legal cooperation through SAARCLAW and the Charter of Democracy. It concludes with recommendations on how to improve the work of SAARC.

Chapter 8, ‘Regional Organizations and Threats to Constitutional Democracy from Within: Self-coups and Authoritarian Backsliding’, examines regional organizations’ mandates to safeguard constitutional democracy. In particular, it focuses on self-coups and authoritarian backsliding, which are beyond the conventional unconstitutional transfers of power that regional organizations and their charters usually guard against. Regional organizations’ mandates are often expanded to meet these new challenges.

These chapters are part of a larger group of background papers on the work of regional organizations in the rule of law and constitutional governance. The papers, including those that highlight cooperation between regional

organizations and various UN institutions, can be downloaded from the website of the Inter-Regional Democracy Resource, the secretariat of the Inter-Regional Dialogue on Democracy.⁴

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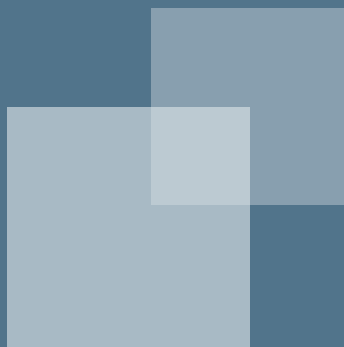
Notes

- ¹ UN 2013.
- ² UN 2012.
- ³ The Inter-Regional Dialogue on Democracy is a platform for engagement among regional organizations on democracy and related issues. The participating organizations include the African Union, the Association of Southeast Asian Nations, the Council of Europe, the European Union, the League of Arab States, the Organization of American States, the Pacific Islands Forum and the South Asian Association for Regional Cooperation with International IDEA as the facilitator. For more information about the dialogue, visit <<http://www.idea.int/democracydialog/>>.
- ⁴ See <<http://www.idea.int/democracydialog/workshop-on-regional-organizations.cfm>>.



Chapter 1

The Role of the African Union in Strengthening the Rule of Law and Constitutional Order in Africa



Chapter 1

George Mukundi Wachira



The Role of the African Union in Strengthening the Rule of Law and Constitutional Order in Africa

Introduction

The Organization of African Unity (OAU), the continental body of African member states, was formed over 50 years ago. Its principal purpose was originally the emancipation of the African peoples from colonialism and apartheid. By the late 1990s most African states were politically independent and apartheid had ended, which created an imperative to shift the focus to the continent's economic development, peace, good governance, democracy, rule of law and integration. The OAU was thus transformed into the African Union (AU) in 2002 to achieve an integrated, peaceful and democratically governed Africa that is responsive to its citizens.

In 2013–14, the AU celebrated its Golden Jubilee anniversary, which has been an opportune time to reflect on past accomplishments and challenges, take stock of emerging trends and prospects, and forecast a better future for African peoples. Indeed, the AU is in the process of developing a long-term development agenda for the next 50 years, the 'Africa Agenda 2063', which is anchored on the quest for Pan-Africanism and an African Renaissance. The agenda forecasts a continent in which the rule of law, constitutionalism, accountability, respect for human rights, democracy and good governance are key pillars of continental integration and sustainable development.

This chapter explores the contribution of the OAU/AU to the greater integration, unity and prosperity of African peoples through strengthening good governance and consolidating democracy by upholding the rule of law and constitutional order among AU member states.

While there has undoubtedly been marked progress in Africa towards democratization, there are remnants and emerging pockets of concern within several member states. Some of the emerging trends that call for deeper reflection include contested electoral processes and outcomes, popular uprisings, allegations of human rights abuses, unconstitutional changes of government through military coups and/or illegitimate and irregular changes of constitutions, and threats to the independence of democratic institutions, especially judiciaries. Thus the importance of upholding constitutional order and the rule of law in Africa cannot be overemphasized for ensuring continental unity and integration; promoting popular participation and accountable governance and respect for, and the realization of, human and peoples' rights; and achieving prosperity and transformative development.

The AU's objectives include enhancing democracy, popular participation, good governance, and protecting and promoting human and peoples' rights in Africa.¹ To ensure the effective realization of its objectives, the union is guided by, among other things, the principle of 'respect for democratic principles, human rights, the rule of law and good governance'.² It also rejects and condemns unconstitutional changes in government—a phenomenon that continues to bedevil the continent.

Under the auspices of the AU, member states have during the last decade undertaken progressive approaches to address various challenges related to good governance and democracy consolidation. The AU has, for instance, adopted numerous standards and norms such as the African Charter on Democracy, Elections and Governance (ACDEG), which is the most recent normative framework. Its principal objectives are to promote and enhance adherence to the principle of the rule of law premised on respect for (and the supremacy of) the constitution and constitutional order in the political and institutional arrangements of state parties.³

Of commendable note are the AU's pronounced and proactive approaches and interventions among member states aimed to address various challenges to the constitutional order, the rule of law, peaceful political transitions and lasting resolution of conflicts.⁴ The paradigm shift in the way in which the AU engages with member states—from one of strict non-interference in domestic affairs to a principle of non-indifference—is aptly demonstrated in recent and ongoing efforts in Kenya, South Sudan, Somalia, Côte d'Ivoire, the Central African Republic (CAR), Mali, Guinea-Bissau and Egypt.⁵



However, notwithstanding the elegant norms and standards, the level of compliance with and enforcement of the recommendations and decisions of the regional treaty-monitoring bodies remains unsatisfactory. While, technical, financial and human capacity constraints are often cited as obstructing the implementation of continental standards at the national level, states' political commitments remain the critical issue of concern. Indeed, while the technical challenges are not insurmountable, real adaptive challenges remain:

- impunity and vested political self-interest among those in positions of authority in some AU member states who hide behind the veil of state sovereignty;
- neo-colonial vestiges of elite self-preservation, leading to inconsistency in policy formulation and implementation, and failure to meet the demands and needs of citizens;
- the geopolitical and economic interests of external actors—such as continued over-reliance on external actors to finance rule of law, democracy and governance initiatives, and the resulting effects on ownership and sustainability; and
- bridging the gap between rhetoric and implementation.

This chapter uses practical examples and comparable experiences to share the AU's recent experiences in promoting the rule of law and constitutional order among member states through (1) setting norms and standards and (2) selected interventions in member states. The central thesis of the chapter is that the AU has been (and remains) at the forefront of fostering constitutional order and the rule of law in Africa, albeit with mixed success. The chapter surveys the relevant AU normative framework and examines the specific approaches the AU has used to engage member states in fostering constitutional order and the rule of law.

AU promotion of constitutional order and the rule of law

Under the auspices of the OAU/AU, numerous norms, standards and instruments have been adopted that seek to promote the rule of law and constitutional order in Africa.⁶ While the adoption of regional instruments on various issues has not necessarily translated into the realization of constitutional order and the rule of law (largely due to inadequate implementation), they provide useful normative guidelines for domestic legislation and application of the standards. In fact, regional norms have inspired the development of benchmarks for assessing the level of compliance by member states, and in turn have been useful in evaluating capacity constraints and providing a basis for technical support.

The AU's fundamental law, the Constitutive Act of 2000, remains the most important and promising instrument in terms of scope and reach in promoting constitutional order and the rule of law. All 54 AU member states are legally obliged to implement its norms. It is instructive to note that some of the regional economic communities (RECs)—the building blocks for continental integration—have (or are in the process of adopting) specific instruments to complement those enacted by the AU, which are pertinent to the promotion of constitutional order and the rule of law in those regions. The Economic Community of West African States (ECOWAS), for instance, adopted an Additional Protocol on Democracy and Good Governance in 2001. The East African Community is also in the process of finalizing a draft Protocol on Democracy.⁷

Respect for democratic principles and institutions, popular participation, human rights, the rule of law and good governance is at the core of the AU's mandate.⁸ The ACDEG emphasizes the importance of constitutionalism and the rule of law in a democracy.⁹ It elaborates the AU's guiding principles in promoting democracy and good governance:

- respect for human rights and democratic principles;
- access to (and the exercise of) state power in accordance with the constitution of the state party and the principle of the rule of law;
- promotion of a representative system of government;
- the holding of regular, transparent, free and fair elections;
- the separation of powers;
- the promotion of gender equality in public and private institutions;
- effective citizen participation in democratic and development processes and in the governance of public affairs;
- transparency and fairness in the management of public affairs;
- condemnation and rejection of acts of corruption, related offences and impunity;
- condemnation and the total rejection of unconstitutional changes in government; and
- strengthening political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.¹⁰

While the charter has thus far only been ratified by 21 of the 54 AU member states,¹¹ it is worth noting that the union has not hesitated to invoke the

charter even if a member has not yet ratified the instrument, as was the case in South Sudan¹² and the CAR.¹³ The AU's Peace and Security Council (PSC) called for dialogue in South Sudan among the protagonists and condemned the coup in the CAR. The PSC called for the restoration of constitutional order, reiterating that the conflict in South Sudan was a threat and that the coup d'état in the CAR was a violation of the principles of the Constitutive Act, the Democracy Charter and the Lomé Declaration. It is important to note that, while the Lomé Declaration is not legally binding, it is part of AU soft law, and most of its provisions have since been codified in the Democracy Charter. It is therefore applicable to all African states that have not yet ratified the charter.

While the overarching AU normative framework to promote constitutionalism and the rule of law is its Constitutive Act and the ACDEG, the African Governance Architecture (AGA) is the overall institutional framework for the promotion and sustenance of democracy, governance and human rights in Africa. The AGA is a comprehensive, overarching and consolidated mechanism for addressing issues of governance and governance-related problems on the continent, and serves as a prism for addressing African concerns on these issues in the global strategic arena. The principal objectives of the AGA—whose Secretariat is the Department of Political Affairs, African Union Commission—are to connect, empower and build the capacities of AU organs in order to enhance good governance and democracy in Africa under the following specific objectives:

- harness synergy, coordination and cooperation among AU organs, institutions and RECs to ensure the effective implementation of the decisions and norms of the AU and member states in promoting democracy, elections, human rights and good governance in Africa;
- strengthen the capacity of AU organs and institutions to help member states strengthen governance and consolidate democracy in Africa;
- establish a framework for the domestication and implementation of the normative framework of the ACDEG through the review of state reports;
- facilitate joint engagement in preventive diplomacy, conflict prevention, and post-conflict reconstruction and development associated with governance challenges in Africa;
- facilitate democracy and governance assessments, and monitoring and evaluation of governance and democracy trends, challenges and opportunities in Africa; and

- knowledge and data generation, and the dissemination of comparable best practices and resources to improve governance and democracy in Africa.

The AGA complements the African Peace and Security Architecture (APSA). While the AGA addresses the governance and democracy mandate of the AU, the APSA addresses the peace and security agenda. Together, they acknowledge that democratic governance, peace and security are related and mutually reinforcing imperatives. 'Accordingly to achieve unity, integration and development both democracy and peace are critical enablers. Without democracy, there may not be sustainable peace. Without peace, democracy is rooted on a weak foundation.'¹⁴ The next section examines how the AU has used its normative and institutional framework to foster constitutionalism and the rule of law in Africa.

Promoting respect for human and peoples' rights

The protection and promotion of human and peoples' rights is central to advancing respect for constitutionalism and the rule of law.¹⁵ Constitutionalism denotes not only the rule of (and by) the law but also, importantly, respect for the fundamental freedoms of individuals and groups, which today are codified in all AU member states' bills of rights.¹⁶ While all AU member states have written constitutions, critics argue that not all of them practise constitutional democracy based on respect for the rule of law and the protection of human and peoples' rights.¹⁷ Several AU resolutions have called on member states to uphold their own constitutions and protect the human and peoples' rights of their people as provided for in the African Charter on Human and Peoples' Rights, which has been ratified by 53 of the 54 AU member states.¹⁸

The African Commission on Human and Peoples' Rights (ACHPR), the Committee on the Rights and Welfare of the Child and the African Court on Human and Peoples' Rights are the main AU institutions charged with protecting human and peoples' rights in Africa. These three institutions address allegations of human rights violations submitted by victims and promote respect for human rights through state reporting, promotional missions, special procedures such as special rapporteurs and expert working groups, and thematic studies. Their specific mandates are contained in their founding instruments and additional protocols,¹⁹ but largely seek to complement the domestic mandates of member states in promoting and protecting human rights. Respect for human and peoples' rights is regarded as one of the pillars of the AU's efforts to promote democratic principles and



consolidate the culture of democracy, constitutional order and the rule of law.²⁰

However, while the AU has done commendably well in adopting norms that promote and protect human and peoples' rights, and has established the three treaty-monitoring institutions, there is a significant gap between its lofty standards and their implementation at the national level. The main challenges to the implementation of AU standards and norms include inadequate political will leading to an impunity gap; the absence of a follow-up mechanism; and capacity constraints.²¹

In member states emerging from conflict, one of the most significant challenges remains the threats to fundamental human and peoples' rights. In 2013, the AU made a landmark resolution that is bound to change the contour of its engagement with member states emerging from conflict in support of constitutionalism and the rule of law.²² In the first case of its kind, the AU decided to deploy civilian human rights observers in Mali, a development that has been welcomed globally as demonstrating the centrality of human rights protection in the restoration of the rule of law and order in Africa.²³ The observers were deployed as part of the 'implementation of the decisions of the African Union (AU) Peace and Security Council and the Authority of ECOWAS, endorsed by UN Security Council Resolution 2085 (December 2012), to deploy Human Rights Observers in Mali within the framework of the African-led International Support Mission in Mali (AFISMA)',²⁴

That deployment marked a significant shift in relations between the AU and its member states, given the sensitivity that human rights monitoring and observation evoke. State sovereignty is often invoked to curtail the extent to which the regional body can intervene in cases where human rights are abridged. The move is expected to contribute significantly to the ways in which the AU helps member states ensure accountability for human rights violations, and restore constitutional order and the rule of law in countries emerging from conflict.

Soon after the radical Mali initiative, on the basis of allegations of massive human rights violations, the AU established a Commission of Inquiry into Human Rights Violations in South Sudan in January 2014.²⁵

Upholding the constitutional order and the rule of law

The rule of law doctrine envisages that the power of the state and government can only be exercised in consonance with applicable laws and set

procedures.²⁶ Respect for the rule of law demands the separation of powers of the three branches of government, the legislature, judiciary and executive. The doctrine also envisages that citizens are able to hold their government to account through courts of law, free expression in the media, freedom of association and the exercise of their fundamental human rights as guaranteed in the constitution and regional legal instruments. However, respect for the principle of the rule of law and constitutionalism denotes far more than laws and constitutions, or regional instruments seeking to espouse the virtues of constitutional order.²⁷

Constitutionalism and the rule of law, importantly, envisage that institutions that seek to support democracy are independent of and separate from the executive and other branches of government. Judicial independence in particular is a crucial guarantor of the rule of law. While the AU has not been robustly engaged thus far in supporting domestic institutions that seek to support democracy, including courts of law, the recent AU request that the African Union Commission on International Law examine the proposed establishment of an International Constitutional Court and make recommendations to the 22nd Session of the Assembly of Heads of State and Government of the African Union (January 2014) on the proposal is a welcome development.²⁸ It is important to note that the AU is already engaging with the Association of Constitutional Courts in Africa, the Network of National Human Rights Institutions in Africa and the African Ombudsman Association through the Department of Political Affairs, whose comparable experiences in sharing information and best practices can inform the AU on the imperatives of judicial independence and the role of courts and regional cooperation in constitution-making, adjudication and reforms.

In fact, beyond elaborate norms and standards on promoting constitutional order and the rule of law,²⁹ the AU has in recent years provided technical support to some member states, albeit in an ad hoc fashion, to restore constitutional order and the rule of law. This is particularly evident in member states that are emerging from conflict or in the process of transition, or that have undergone unconstitutional changes in government. Some of that support has consisted more in the coordination and mobilization of international support than in the provision of technical support to reform constitutions, adopt transitional justice measures, or restore law and order.

AU interventions have also included political negotiations, the outcomes of which have resulted in constitutional reforms and the re-establishment of the rule of law and constitutional order. The intervention by the AU and the East African Community in resolving the Kenyan political crisis of



2007–08 is a case in point.³⁰ The AU efforts, which involved former UN Secretary-General Kofi Annan as the AU mediator, are widely acknowledged as having contributed significantly to resolving the political stalemate and the eventual adoption of a new constitution and transitional justice mechanisms, including the ongoing efforts to ensure accountability at the International Criminal Court (ICC).³¹

In its intervention in Kenya and in Zimbabwe's political crisis of 2008–09, the AU supported and helped craft national accords through its mediators, which culminated in governments of national unity and power-sharing agreements, thus ending the post-election crisis after contested elections and attendant violence.³² Although the national unity governments in both countries (amid significant challenges) helped usher in necessary constitutional, legal and institutional reforms, including transitional justice processes, the inconsistency of the AU approach in addressing constitutional order and the breakdown of the rule of law has been interpreted as reflective of the power of geopolitics over principles.³³ Although this issue is beyond the scope of this chapter, the idea of power-sharing and a unity government as an interim measure in order to restore the peace, unity and stability of a nation—and, if it is employed, to build durable solutions to a constitutional crisis—is considered compatible with constitutionalism.³⁴ Indeed, the idea of consociational³⁵ democracy is gaining greater traction and popular support among leading African political actors as a viable solution to the challenges of ensuring that all citizens in a country (irrespective of their numerical strength) are included in governance even in winner-takes-all electoral processes.³⁶

Power-sharing in Africa has the potential to ensure the peace and stability of governments in periods of fragility, as well as the equitable distribution of resources and the managing of diversity.³⁷ It is therefore an idea worth further exploration and consideration, especially among African states facing ethnic diversity in their political arrangements.

Admittedly, the AU has not always been consistent in its approach and methodology, notwithstanding being instrumental in fostering attempts to restore constitutional order and the rule of law in many of its member states. In recent years, some AU member states have endured periods of political uncertainty and/or conflict, including Mali, Kenya, Guinea-Bissau, Zimbabwe, Madagascar, Côte d'Ivoire, South Sudan, the Central African Republic, Somalia, Sudan and Egypt. While some of these efforts have been under the leadership of the RECs in alignment with the principle of subsidiarity, they have largely been under the auspices of the AU. It is worth noting that this development is new and was unheard of during the days of

the OAU, which emphasized non-interference in the domestic affairs of its member states.

The AU has since shifted significantly away from that preoccupation. While still guided by the principles of state sovereignty, it has adopted a non-indifference paradigm, which means that it will not look away when a member state is flouting constitutional order and the rule of law to the detriment of its citizenry, particularly in cases of grave violations of fundamental human rights and international crimes.³⁸

Promoting participation through regular, transparent, free and fair elections

The authority and legitimacy of a state to govern hinge upon the will of the people, which is exercised through the conduct of free and fair elections.³⁹ The right of citizens to participate and choose their leaders is one of the cornerstones of a constitutional democracy. The AU's legal framework provides for the popular participation of the people in governance through the conduct of regular free and fair elections, public service, local and devolved government, and political pluralism.⁴⁰ The AU has contributed significantly to its member states' electoral processes, mainly through electoral monitoring and observation, technical support to electoral management bodies, and sharing comparable lessons and practices.⁴¹

Each year, the AU conducts about ten election observation missions across the continent. Electoral process observation has improved significantly with the introduction of long-term election observation and post-electoral audits, which are aimed at fostering a closer working relationship with member states to improve the quality of elections through preventive diplomacy, technical support and early warning on the potential for electoral violence. However, while most of these elections are declared free and fair, a number of challenges—especially related to post-election violence—have been noted.

The AU has increasingly been involved in facilitating negotiations with political protagonists, especially in the event of post-electoral disputes, as was the case in Kenya in 2008 and Côte d'Ivoire in 2010–11. AU efforts to restore the constitutional order and guarantee that the popular will is respected have not been without controversy. Member states still invoke the principle of state sovereignty, although such interventions have increasingly been welcomed as objective and impartial arbiters.⁴²

In recent years the AU has conceded that elections are not the only good measure of democracy in a country.⁴³ It has thus established programmes to support public service and administration reforms as well as local governance and devolution within the Department of Political Affairs, the aims of which are to ensure that democracy is sustainable and translates into meeting the needs of citizens. The African Governance Architecture and Platform envisages that the sub-clusters on public service and administration and local governance are critical to promoting good governance, the rule of law and democracy consolidation. The programme aims to ensure accountability and efficiency, and to enhance the performance of public officials, as well as to magnify the voices of citizens and local populations on how governments conduct their affairs.

Promoting transparency, accountability and anti-corruption

Constitutionalism and the rule of law are compromised by a lack of accountability, impunity and corruption, which most AU member states cite as obstacles to sustainable development, governance and democracy consolidation.⁴⁴ Fighting impunity on the continent is one of the main challenges faced by member states and the regional body. At the normative level, the AU complemented its Constitutive Act provisions with the adoption of the African Union Convention on Preventing and Combating Corruption (2003) as well as numerous resolutions reaffirming that the fight against impunity is at the core of its mandate.⁴⁵

The AU Board on Corruption takes the lead in efforts to help member states address corruption and financial impropriety through sharing comparable lessons and practices, and providing technical support to national institutions fighting against corruption. Admittedly, the fight against corruption at the continental level has had a limited impact, due to state cooperation challenges and limited resources.⁴⁶

While the African Court on Human and Peoples' Rights—which complements the protective mandate of the African Commission on Human and Peoples' Rights—has been a welcome addition to the continental legal framework seeking to address accountability on human rights violations, its effectiveness still largely depends on individual member states. In fact, while the court issues binding decisions (as it recently did in the case of *Christopher Mtikila versus Tanzania*⁴⁷), the implementation of such decisions is still largely dependent on the political will of the member states.⁴⁸

Recent contestations of the approach and interventions by the ICC, especially in Kenya and Sudan—where two of the AU member states’ heads of state and government face prosecution—threaten to reverse some of the gains made on the continent in addressing impunity.⁴⁹ The AU has expressed concern for the apparent lack of respect for the principle of subsidiarity and complementarity by the ICC, where the member states concerned have requested deferral of the cases in order to allow national processes to deal with them.⁵⁰ However, it is important to note that, while the AU has a political stake in the ongoing cases, the legal obligations in the present cases involve the individual member states and the ICC. Nevertheless, the AU has issued several resolutions seeking the deferral of the Kenyan and Sudan cases, and has on various occasions even urged member states not to cooperate with the ICC until the matter is resolved.⁵¹

The main issue at hand ostensibly involves the failure of the individual states to try the cases alleging breaches of international crimes at the domestic level, which has resulted in the cases being referred to the ICC.⁵² The AU, as the custodian of the regional treaties, has called into question the focus of the current ICC cases in Africa, and has accused the ICC of applying double standards and supporting a form of neo-colonialism.⁵³ The current stalemate and public spat between the AU and the ICC, which does not show signs of dissipating, continues to undermine efforts to address the fundamental questions of an impunity gap that invites comprehensive solutions at both the national and regional levels.

The AU has reiterated that the fight against impunity on the continent is of paramount importance. In recognition of the imperative to address cases of massive violations of human rights and international crimes, especially in countries emerging from conflict, there are efforts to extend the jurisdiction of the African Court on Human and Peoples’ Rights to include a criminal mandate.⁵⁴ A draft statute to amend the Protocol to the African Court on Justice and Human Rights that would vest the Court with an international criminal mandate is currently under debate.⁵⁵

Condemning and rejecting unconstitutional changes in government

The problem of unconstitutional changes in government in Africa through military coups, especially in the 1980s and 1990s, is likely to have inspired and driven African leaders to seek ways to deal with the phenomenon, which continues to threaten regional peace, development and the unity of

Africans.⁵⁶ Military coups and dictatorship had almost become synonymous with African leadership and governance, where countries' constitutions and rule of law were dispensed with at will by those who had come to power by force.⁵⁷ The OAU was at the time quite hesitant to interfere in what it regarded as domestic affairs of member states, and thus jealously guarded the principle of non-interference in state sovereignty.⁵⁸ The AU has shifted to the principle of non-indifference and made important interventions in several member states that have failed to uphold their Constitutive Act commitments to maintain constitutional order relative to a change of government.⁵⁹

The AU's legal framework condemns and rejects unconstitutional changes in government,⁶⁰ which it considers one of the most serious breaches of its norms—to the extent that it expressly provides for sanctions in the event of a violation.⁶¹ In recent years, the union has upheld this stance when member states have flouted that norm.⁶² The protocol establishing the AU Peace and Security Council (PSC) provides that the PSC, in conjunction with the chair of the AU Commission, shall 'institute sanctions whenever an unconstitutional change of Government takes place in a member state, as provided for in the Lomé Declaration'.⁶³

The overall guiding legal framework for AU interventions in cases of unconstitutional changes in government comprises the Constitutive Act, the ACDEG and the Lomé Declaration. The charter provides the most comprehensive definition and elaboration of unconstitutional changes in government:

- any putsch or coup d'état against a democratically elected government;
- any intervention by mercenaries to replace a democratically elected government;
- any replacement of a democratically elected government by armed dissidents or rebels;
- any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
- any amendment or revision of the constitution or legal instruments that is an infringement of the principles of democratic change of government.⁶⁴

The only addition by the Democracy Charter to the criteria identified in the Lomé Declaration—the instrument often invoked by the PSC⁶⁵ to determine when a member state has experienced an unconstitutional change in government—is with respect to an 'amendment or revision of the constitution or legal instruments, which is an infringement of the principles

of democratic change of Government'. Since not all AU member states are party to the charter (so far only 21), the Lomé Declaration—which is soft law and therefore non-binding—continues to provide the guiding framework for determining violations of the continental norm on unconstitutional changes in government for states that have not yet ratified the charter.

It is instructive to note the new additional criterion in the Democracy Charter, which is of critical importance in addressing one of the key challenges to constitutionalism in Africa, where some incumbents cling on to power by amending their constitutions. However, the AU has yet to develop a coherent precedent and practice on how to deal with this particular problem.⁶⁶ It is expected that as the AU proactively engages member states through preventive diplomacy and the provision of technical support, it will develop useful guidelines and practices on addressing that particular challenge to constitutionalism and the rule of law.

In the event of unconstitutional changes in government, the AU may take several measures, including suspension of the member state from the activities of the union, punitive economic measures, prosecution of perpetrators in AU courts, or issuing an ultimatum to re-establish a constitutionally elected government within a stipulated time, as well as applying regional and international pressure to restore the constitutional democracy and the rule of law.⁶⁷ It is important to note that, while the AU has thus far been generally proactive and successful in taking action against AU members whose change of government is a result of a coup d'état, there have not been any interventions of such magnitude in cases where member states have amended or revised their constitutions to extend the power of the incumbents.⁶⁸

One of the important norms established by the AU is to bar perpetrators of unconstitutional changes in government from contesting elections held to restore constitutional democracy. Article 25(4) of the ACDEG provides that 'the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State'.⁶⁹

The North Africa uprisings of 2011, in which popular revolts led to the ousting of governments in Tunisia, Libya and Egypt, raised a political and legal dilemma for the AU. Indeed, pundits argue that the revolutions brought to the fore the limitations of the union's current conceptualization of unconstitutional changes in government.⁷⁰ It is not surprising, therefore, that ongoing conversations about extending the jurisdiction of the African Court on Human and Peoples' Rights with an international criminal



mandate have stalled. One point of controversy is the definition of the crime of unconstitutional changes in government, which does not seem to reflect the contemporary understanding of the term after the African Governance Charter definition and events in North Africa. However, the AU concedes that popular protests by citizens that are in sync with their 'legitimate aspirations' are 'consistent with the AU's commitment to promote democratization, good governance and respect for human rights'.⁷¹

Beyond the condemnation and suspension of member states that have flouted their regional commitments and obligations on unconstitutional changes in government, the AU has also actively sought to engage its members in a bid to restore constitutional order and the rule of law.⁷² For instance, in July 2013 the AU deployed a high-level panel comprising former presidents Alpha Omar Konare of Mali and Festus Mogae of Botswana, as well as former Djiboutian Prime Minister Dileita Mohamed, to Egypt to explore ways of restoring constitutional order and the rule of law after the ousting of the democratically elected president, Mohamed Morsi.⁷³ At the AU Commission level, various departments (especially the Peace and Security Department and the Department of Political Affairs) have equally been involved in providing technical support to member states through consultation and exploring ways of re-establishing constitutional order in countries currently under suspension for unconstitutional changes in government.⁷⁴

One of the AU's most significant contributions thus far relative to the promotion of the rule of law and constitutional order is arguably the reduction in the number of coups d'état since the OAU was transformed into the AU.⁷⁵ Although a lot more could be done to prevent unconstitutional changes in government beyond norms and standard setting, condemnation and sanctions, in the last decade there have been far fewer coups than in the previous era of the OAU.⁷⁶ While the comprehensive legal framework and stringent measures taken so far by the AU may not be solely responsible for this development, it cannot be dismissed as having played no part in the reduction. However, the AU needs to invest far more in preventive diplomacy and technical support for member states to uphold constitutional order than in redressing the repercussions of constitutional crisis and the breakdown of the rule of law.

Conclusion

This chapter argues that the AU has contributed significantly to strengthening the rule of law and constitutional order in Africa during its ten-year history.

That contribution, mainly in the form of setting standards and norms, has provided member states with the necessary tools, framework and guidelines to uphold constitutionalism and the rule of law. Granted, there remain gaps between the norms and implementation of those standards at the domestic level, which this chapter argues should be what the AU emphasizes next. As the OAU/AU celebrates its first 50 years and crafts a long-term development agenda, it is imperative to emphasize initiatives and measures that safeguard the rule of law and uphold the principles of constitutionalism among member states in order to achieve transformative and sustainable development.

Implementation should be accompanied by AU technical support for member states, especially those emerging from conflict, to restore constitutional order and the rule of law. This could be in the areas of redesign and training of state officials during constitution-drafting, legal and institutional reforms and transformation, as well as sharing comparable experiences among member states through dialogue. The AGA is well positioned to facilitate technical support, knowledge generation and sharing of comparable lessons among AU organs, RECs, member states and civil society in order to advance constitutionalism and the rule of law. Member states, AU organs, RECs and other stakeholders should thus accord the AGA and Platform the requisite resources and political support for it to be effective.

Preventive diplomacy is another area that requires further emphasis and commitment by the AU. Rather than wait to redress the breakdown of the rule of law and constitutional crises—especially in the case of unconstitutional changes in government—after they happen, the AU is well positioned to promote constitutional order and the rule of law on the continent by engaging more proactively in preventive diplomacy through such mechanisms as the Panel of the Wise.⁷⁷ While a comprehensive examination of each of the areas identified here is beyond the scope of this chapter, and the AU needs to do much more to promote constitutionalism and the rule of law, it must strengthen its capacity to help member states comply with their regional legal commitments and obligations. It also needs an appropriate and effective mechanism and framework to monitor and assess the level of compliance with AU norms and standards.

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Notes

- ¹ AU 2000, article 3(g), (h).
- ² Ibid., article 4(m).
- ³ AU 2007.
- ⁴ The AU and its building blocks—the RECs—have taken a more proactive stance in seeking to restore constitutional order in countries that have faced challenges to the principles of the rule of law and constitutionalism such as Somalia, South Sudan, the Central African Republic (CAR), Mali, Egypt, Libya, Madagascar, Kenya, Guinea-Bissau and Côte d'Ivoire.
- ⁵ Williams 2007.
- ⁶ These include the AU Constitutive Act (2000), the African Charter on Democracy, Elections and Governance (2007), the African Charter on Human and Peoples' Rights (1981), the African Union Convention on Preventing and Combating Corruption (2003), and the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002). Non-binding instruments such as AU decisions, declarations and resolutions include the OAU/AU Declaration on Principles Governing Democratic Elections in Africa (2002), the Algiers Declaration on Unconstitutional Changes of Government (1999), the Lomé Declaration for an OAU Response to Unconstitutional Changes of Government (2000), the Decision of the 12th AU Assembly on the Resurgence of the Scourge of Coups d'Etat in Africa (2009), the Decisions of the 14th AU Assembly on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage Such Situations (2010), and numerous Security Council resolutions suspending various member states for unconstitutional changes in government.
- ⁷ See <http://federation.eac.int/index.php?option=com_content&view=article&id=181&Itemid=144>, accessed 10 September 2013.
- ⁸ AU 2000, articles 3(g)(h); 4 (m).
- ⁹ AU 2007, article 2 outlines the charter's objectives in depth.

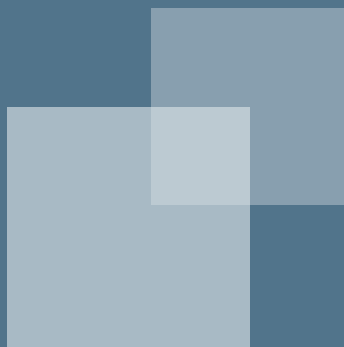
- 10 Ibid., article 3.
- 11 State parties to the charter as of 30 September 2013 included Benin, Burkina Faso, Cameroon, Chad, Djibouti, Ethiopia, Ghana, Guinea, Guinea-Bissau, Lesotho, Mali, Malawi, Mauritania, Nigeria, Niger, Rwanda, South Africa, Sierra Leone, Sudan, Togo and Zambia: see <http://www.au.int/en/sites/default/files/Charter%20on%20Democracy%20and%20Governance_0.pdf>, accessed 30 September 2013.
- 12 AU 2014a.
- 13 AU 2013c.
- 14 AU 2013b.
- 15 See Dicey 1968; Fombad and Murray 2010; Mangu 2006; UN 2004.
- 16 Fombad and Murray 2010.
- 17 Ibid. See also Okoth-Ogendo 1993; Olukoshi 1999.
- 18 ACHPR 1981. Only South Sudan has yet to accede to this instrument. See also ACHPR 2012. See also several resolutions by the Peace and Security Council (PSC) reiterating the need to uphold fundamental human and peoples' rights in member states, <<http://www.peaceau.org/en/resource/102-theme-unconstitutional-changes-of-government?p=2>>, accessed 15 September 2013.
- 19 The African Charter on Human and Peoples' Rights, the Protocol to the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, and the Protocol to the Establishment of the African Court on Human and Peoples' Rights.
- 20 ACHPR Resolution 213 on Unconstitutional Changes in Government.
- 21 AU 2013f.
- 22 AU 2013g.
- 23 Ibid., para 7(d) requests the AU and ECOWAS commissions to deploy, as quickly as possible, as part of the African-led International Support Mission in Mali (AFISMA) and with the support of the African Commission on Human and People's Rights (ACHPR), civilian observers to monitor the human rights situation in the liberated areas and to assist the Malian authorities to create the necessary conditions for lasting reconciliation among the different components of the Malian population, as well as for the consolidation of peace in the country.
- 24 Ibid.
- 25 AU 2014b.
- 26 *The Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies* (UN 2004) defines the rule of law as 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'.
- 27 UN 2004, para 6.
- 28 AU 2013d.
- 29 In particular, the Constitutive Act, the African Charter on Democracy, Elections and Governance, and the Lomé Declaration.
- 30 KNDR 2012.
- 31 Ibid.
- 32 See Vandeginste 2013.
- 33 Ibid. The fact that Kenya is seen as representing a politically strong actor in East Africa, and the influence of South Africa in the Zimbabwe crisis, are seen to have played a large part in the AU compromise to support a power-sharing agreement.
- 34 Lijphart 2004; Vandeginste 2013.
- 35 O'Leary 2005.
- 36 Nyong'o 2008.
- 37 AU 2013a.
- 38 AU 2000, article 4(g), (h). See Williams 2007.
- 39 Mangu 2006.
- 40 Ibid., article 3(g); AU 2007, articles 2(3) (6); 3(4) (7). See also the OAU/AU Declaration on Principles Governing Democratic Elections in Africa, 2002, <http://www2.ohchr.org/english/law/compilation_democracy/ahg.htm>.
- 41 The African Union Democracy and Electoral Assistance Unit has the mandate to observe elections in all

- 54 AU member states. See <<http://www.au-elections.org>>, accessed 10 September 2013.
- 42 Engel 2010.
- 43 IPI 2010, which is based on AU 2009a.
- 44 Kututwa 2005.
- 45 Ibid. See also du Plessis, Louw and Maunganidze 2012.
- 46 Mirugi-Mukundi 2006.
- 47 African Court on Human and Peoples' Rights 2011.
- 48 Wachira and Ayinla 2006.
- 49 Tladi 2013; Akande 2009.
- 50 Tladi 2009.
- 51 See, for instance, AU 2008, 2009b, 2010, 2012.
- 52 Tladi 2009.
- 53 Ibid.
- 54 AU 2009c, para. 9: the Commission (of the African Union), in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, is empowered to examine the implications of the court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the assembly in 2010.
- 55 Deya 2012; du Plessis 2012.
- 56 Udombana 2003.
- 57 Kufuor 2002.
- 58 Ibid.
- 59 AU 2007, article 25. Cases of such interventions in recent years can be discerned in Madagascar, Togo, Niger, Mauritania, Côte d'Ivoire, the Central African Republic, Egypt, Guinea-Bissau and Mali. See also Williams 2007.
- 60 AU 2000, article 4(p).
- 61 Ibid., article 30 states that 'a Government which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'.
- 62 As of September 2013, the following countries were under sanctions for unconstitutional changes in government: Madagascar, the Central African Republic, Egypt and Guinea-Bissau. See also Vandeginste 2013.
- 63 AU 2002, article 7(1)(g).
- 64 See Lomé Declaration (2000) and AU 2000, article 23.
- 65 AU 2002, article 7(1)(g).
- 66 Uganda and Cameroon are two of the AU member states that recently altered their constitutions to extend the temporal mandates of their incumbent leaders, with limited ramifications from the AU.
- 67 As of September 2013, the CAR, Egypt, Guinea-Bissau and Madagascar were under suspension.
- 68 Uganda and Cameroon, which made constitutional changes extending the incumbents' power and stay, are cases in point. One could perhaps argue that Uganda is not a party to the ACDEG and is thus not legally bound by its provisions, but Cameroon is a party to the ACDEG.
- 69 As of 2013, Madagascar is one of the AU member states that have been compelled to respect this provision.
- 70 Sturman 2011; Souaré 2009.
- 71 AU 2011.
- 72 See several resolutions and initiatives by the AU seeking to restore constitutional order in Egypt, the CAR, Madagascar, Guinea-Bissau and Mali, <<http://www.peaceau.org/en/resource/102-theme-unconstitutional-changesgovernment?p=2>>, accessed 20 September 2013.
- 73 AU 2013e.
- 74 The Department of Political Affairs, through the African Governance Architecture and Platform, is currently engaged in high-level technical consultation on the restoration of constitutional order in some countries, such as Guinea-Bissau in collaboration with ECOWAS. The most recent such consultation was held in June 2013 in Abuja, Nigeria.
- 75 Souaré 2009; Ikome 2007.
- 76 Ibid.
- 77 The Panel of the Wise is one of the critical pillars of the Peace and Security Architecture of the African Union (APSA). Article 11 of the Protocol establishing the Peace and Security Council (PSC) sets up a five-person panel of 'highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent' with a task 'to support the efforts of the PSC and those of the Chairperson of the Commission, particularly in the area of conflict prevention'.



Chapter 2

The Arab League and the Rule of Law



Chapter 2

Hesham Youssef



The Arab League and the Rule of Law

Introduction

Democracy, justice, equity, and economic and social development cannot be achieved in the absence of the rule of law. An environment in which the rule of law is observed is the key to achieving democracy and sustainable economic development in any society. Strengthening and enforcing the rule of law should be one of the main priorities of any government that aims to satisfy the aspirations of its people. However, in order to achieve this objective, the different components of the rule of law have to be identified, and a methodology to measure and evaluate progress has to be clearly formulated.

The Arab world suffers from various weaknesses in relation to the observance of the rule of law. The Arab Human Development Reports of 2002–05—published shortly after the terrorist attacks against the United States on 11 September 2001 and the sterile debate that ensued over whether reform in this region should be initiated from within or whether it would come as a result of pressure from outside—challenged the Arab world to overcome three deficits (freedom, women’s empowerment and knowledge).

The Arab League has broadly addressed issues pertaining to the rule of law for years, as discussed in this chapter. However, it does not yet comprehensively address this concept as a discipline using a coherent approach.

This chapter identifies the main bodies in the Arab League that address issues pertaining to advancing the rule of law, and discusses the provisions associated with the rule of law in the league’s charter, major decisions and declarations, and legal instruments. It then outlines the efforts and activities of these bodies, focusing on the league’s role in constitution building, development

of the judiciary, the protection of human rights and fighting corruption. It also evaluates different studies of the Arab world's performance in these areas, and identifies the region's challenges in this regard. It concludes by proposing recommendations to improve the effectiveness of the rule of law in the Arab world.

The Arab region: setting the scene

Before addressing the efforts of the Arab League in the area of the rule of law, it is important to discuss the environment in which these efforts are taking place. During the last three decades, this region has suffered two wars against Iraq, two wars against Gaza, two wars against Lebanon, prolonged intermittent political turmoil in Yemen, a civil war that led to the separation of the south of Sudan in 2011, another civil war that started in 1991 and led to a failed state in Somalia and a military coup in Mauritania. Numerous countries in the region are currently facing daunting challenges of transition—hopefully towards democracy and the rule of law.

It is also worth stressing that the Arab world is, in many important ways, one of the most diverse regions in the world. For example, it has the biggest income gaps and huge disparities in population size and density, education and health services.

The Arab world faces huge challenges including, in particular:

- the absence of a rule of law culture and inadequate access to information, which has led to a reliance on tribal/religious affiliations, violence and corruption rather than the law;
- the role of religion in society;
- the lack or weakness of democratic foundations and institutions: different societies are at varying stages in their path towards reform and democratization, and millions are treated as subjects rather than citizens;
- weak governance mechanisms where relations between the people and their rulers and governments are inadequate;
- weak human capacity and high levels of illiteracy and poverty, as well as the marginalization of minorities and other segments of society, which are often prevented from participating in the political and legislative systems;
- lack of separation of powers, even when it is inscribed in the constitutions and the law;



- inadequate financial resources;
- weak protection of human rights—in particular for women; and
- unequal guarantees for women politically, economically and in the areas of civil rights, rule of law and access to education and other social services.

The political changes evoked by the Arab awakening of 2011 have shaken the pillars of authoritarian regimes in a number of Arab countries. However, there is still a long way to go before the legal and cultural structure that sustained these regimes can be dismantled and before democratic values can be deeply rooted in these societies.

The following sections will discuss the league's bodies and important activities regarding the rule of law at the international, regional and national levels and identify provisions in the Arab League Charter and other league documents pertaining to the rule of law.

Arab League bodies

There are several main bodies in the Arab League that address issues pertaining to the rule of law, including the Arab Summit, the Council of Arab Foreign Ministers, the Council of Arab Ministers of Justice and the Council of Arab Ministers of Interior. Although the Council of the Arab League at the level of heads of state was not originally included in the 1945 charter, by 1964 the practice of convening Arab summits began and continued as the need arose. In 1999, Arab summits became formally instituted as the supreme decision-making body in the league in the 'Summit Regularity Annex to the Charter', which stipulated that regular summits would be held once a year in March.

The Council of Arab Foreign Ministers can be considered the main executive body of the Arab League. It is the political arm of the organization that is responsible for its day-to-day functioning and preparations for the summit meetings. Furthermore, a number of its subsidiary bodies are closely involved in issues that are directly associated with the rule of law, including the following.

- The **Standing Committee on Human Rights** was established on 3 September 1968. Non-governmental organizations (NGOs) and human rights organizations can be accredited as observers in the committee's meetings according to the criteria and rules adopted by the Council of Foreign Ministers. The accredited organizations attend the

meetings by invitation of the General Secretariat and the committee. However, if the committee deems it necessary, it can limit its meetings to member states only.

- The **Independent Human Rights Committee** was established by the new Arab Charter on Human Rights that entered into force in 2008. This committee is responsible for supervising the implementation of the new charter by states party to it, including reviewing periodic reports submitted every three years by ratifying states. In accordance with the provisions of the new charter, these reports should indicate measures they have taken to give effect to the rights and freedoms recognized in the charter and on the progress made towards respect for, protection of and promotion of those rights. An independent secretariat is assigned to support the committee in its work in order to ensure its independence.
- The **Group of Experts on Combating Terrorism** is a permanent specialized counter-terrorism body that addresses issues related to combating terrorism in the Arab world. It reports to the Council of Foreign Ministers. It gathers and analyses information relevant to combating terrorism and examines ways and means of advancing cooperation with international institutions and organizations working in this field.

The Council of Arab Ministers of Justice was established in September 1982. It aims to develop strategies and implement plans to guarantee the independence of the judiciary. The council's goals include the unification of Arab legislation, taking into account the varying circumstances in Arab countries, the protection of the sanctity of the judicial systems, the development of standards for the legal profession, the improved effectiveness of courts in order to bring justice to the people, and the strengthening of Arab cooperation in the legal and judicial fields.

The Council of Arab Ministers of Interior aims to advance and strengthen cooperation and the coordination of efforts among Arab countries in the field of internal security and the fight against crime. This council is responsible for formulating and implementing policies that develop joint Arab action in the field of internal security and adopts collective Arab security plans.

Arab League documents and declarations

Issues pertaining to the rule of law have been addressed in a number of basic documents, declarations and decisions by the main bodies of the Arab League and at different levels. Article 5 of the Charter of the Arab League stresses the

inadmissibility of the use of force in the settlement of disputes and addresses the league's role in the peaceful settlement of disputes. Article 2 of the charter indicates the areas of cooperation among Arab countries, including legal cooperation and in particular the implementation of court decisions and prisoner exchanges.

Additionally, the declaration of the Arab Summit adopted in Tunisia on 23 May 2004 regarding the process of development and modernization stressed Arab leaders' determination to deepen and strengthen the basis for democratic rule and the widening of participation in the political process. It also addressed improving the decision-making process in the context of the rule of law as well as achieving justice and equality among citizens, respecting human rights and the freedom of expression in accordance with international legal instruments and the Arab Human Rights Charter, and guaranteeing the independence of the judiciary in support of all the components of society, including NGOs. The declaration also stressed the need to include all segments of society—men and women—in public life to entrench the foundations of citizenship in the Arab world.

The Covenant of Accord and Solidarity endorsed by the Arab Summit held in Tunisia on 23 May 2004 emphasized the need to promote citizenship and equality, to widen the scope of participation in public affairs, to support the freedom of expression and respect for human rights in accordance with the Arab Human Rights Charter and other international covenants and instruments, and to work on strengthening the role of Arab women in building society.

The Doha Declaration of the Arab League Summit on 30 March 2009 commended the continuing efforts of the Arab countries to deepen good governance and to ensure transparency, accountability and popular participation. It furthermore confirmed the determination of the Arab leaders to pursue political and social reforms in Arab societies in order to ensure social cohesion, national harmony and civil peace.

The Doha Declaration of the Arab League Summit on 26 March 2013 likewise emphasized the importance of improving the system of governance in order to achieve positive interactions between citizens and the state, and to put an end to the manifestations of administrative and financial corruption. The declaration promoted transparency and accountability and called for improving the quality of governance in order to establish the rule of law and promote equality and social justice, and overcome the current Arab situation with determination and confidence.

The Arab Charter on Human Rights also includes a number of principles and rules that aim to enhance respect for human rights and the rule of law. Article 12 confirms that all citizens are equal before the law. It indicates that the parties shall guarantee the independence of the judiciary and protect it from any interference, pressure or threats and guarantee the right of litigation to any citizen subject to its jurisdiction. Everyone has the right to adequate guarantees to receive a fair trial, to be conducted by an independent and impartial court of competent jurisdiction, and each defendant is innocent until proved guilty by an irrevocable court decision in accordance with the law.

Article 24 of the Arab Charter on Human Rights stipulates that every citizen has the right to freedom of political practice, while article 33 confirms that the state and society shall protect individuals as well as the family and strengthen its ties and prohibit various forms of violence and abuse among its members, in particular against women and children. Article 33 also ensures protection for motherhood and childhood, the old and people with special needs, and ensures opportunities for physical and intellectual development for young people.

Article 37 stresses that the right to development is a fundamental human right, and that all states should adopt development policies and measures to guarantee this right. State parties should seek solidarity and cooperation at the regional and international levels to eradicate poverty and achieve political, economic, social and cultural development. In the fulfilment of this right, every citizen should participate in and contribute to the process of development and enjoy its benefits.

Arab League efforts to strengthen the rule of law

One of the objectives of the Arab League is to encourage its member states to respect international law in general and the UN Charter and its resolutions in particular, and to fulfil their international obligations in good faith. The league also makes huge efforts to encourage its member states to ratify and adhere to agreements and treaties in different areas (e.g., women, children, human rights) and to join international bodies that contribute to respect for and observance of the rule of law. Moreover, the league assists its member states in the convergence of their laws and in ensuring that these laws are compatible with international standards and obligations.



Commitment to resolving conflicts and disputes by peaceful means

For decades, the Arab League has attempted to resolve conflicts and disputes through peaceful means and has focused on peaceful resolutions to both conflicts between Arab countries and those between Arab countries and other parties. And, although reconciliation is not directly related to achieving the rule of law, in a number of cases it is a prerequisite for embarking on any meaningful effort to set a country on a path in this direction.

Lebanon was on the verge of civil war when the Arab League succeeded in reaching the Doha Agreement in May 2008, which ended the crisis and helped in choosing a president, forming a government and conducting parliamentary elections. Without this intervention, Lebanon would have entered a cycle of violence with grave consequences. In Iraq, the league's reconciliation efforts culminated in the convening of the reconciliation conference on 21 November 2005, which was partially successful. The league was unable to achieve reconciliation, but was successful in preventing the deterioration of the ethnic and sectarian strife into an all-out civil war at that time.

In 2005 and 2006, the Arab League attempted to achieve reconciliation in Somalia and acted as a mediator between the transitional government and the Islamic courts. The Ethiopian military intervention in December 2006 disrupted this effort, which had to be suspended. The league also worked closely with the United Nations (UN), the African Union (AU) and other international partners to address the dispute between the north and south of Sudan; this effort culminated in the 2005 Comprehensive Peace Agreement. The league also cooperated with the UN and the AU in a joint effort to achieve reconciliation in Darfur.

Furthermore, the league assisted Sudan in reforming its judiciary system after the atrocities in Darfur were referred to the International Criminal Court (ICC) by the UN Security Council. The relationship between Sudan and the ICC was quite complicated and had huge implications for the ICC and Afro/Arab efforts to resolve the crisis in Darfur as well as implications for the stability of the country as a whole. This relationship also affected relations between the ICC and countries in both Africa and the Arab world. This led the Arab League secretary general in 2008 to conduct extensive consultations with the president of Sudan, high officials, the opposition and Darfurian leaders, reaching an agreement that was enshrined in 'The Solution Package'.¹

This agreement reached with the government clearly outlined steps and measures to be taken by the government of Sudan, including the modification of the penal code to incorporate crimes against humanity, war crimes and genocide to allow the Sudanese legal system to deal with human rights atrocities in Darfur. It also included the establishment of a special chamber to prosecute those accused of committing these crimes. It was also agreed that this effort would be followed up in cooperation with the Arab League, the AU and the UN. This outcome was possible because international pressure was mounting on the Sudanese government, and it felt that involving the Arab League might help reduce this pressure.

Despite the effort made by the league to achieve reconciliation and the peaceful settlement of disputes, it did not hesitate when it was felt that resorting to military means was the only route. This was the case during the Iraqi occupation of Kuwait. The Arab League adopted a firm position against the Iraqi occupation of Kuwait in August 1990.² When Iraq adamantly refused to withdraw, the league supported a war to liberate Kuwait, leading to a decision by a number of Arab countries to join the coalition that fought against Iraq.

This was also the case in February 2011 during the recent revolution in Libya, when the league adopted a firm position on government attacks on innocent civilians with military aircraft, tanks and heavy artillery. This position facilitated a UN Security Council decision to allow the necessary measures to be taken to protect innocent civilians in Libya. Unfortunately, both the Arab world and the international community have failed to deal effectively with the atrocities committed against the Syrian people by the regime as a result of the revolution that erupted in March 2011, and the crisis is yet to be resolved.

Finally, in its effort to achieve peace in the Arab–Israeli conflict, the Arab League adopted the Arab Peace Initiative at the Beirut Summit in 2002. This initiative was welcomed by the international community, which considered it as one of the terms of reference to resolve the conflict. It also referred to the UN General Assembly to seek the advisory opinion of the International Court of Justice (ICJ) when Israel started building a wall in the occupied Palestinian territory. In 2004, the league—along with a number of Arab countries—made the case before the ICJ, which declared the wall illegal.

International humanitarian law

In the last decade, the Arab League has played a growing role in strengthening the commitment to and enforcement of international humanitarian law

in the Arab world. International humanitarian law is a crucial area in the pursuance of the rule of law, particularly in the light of growing violations of international humanitarian law that took place in a number of Arab countries during conflicts or as a result of the Arab revolutions and uprisings. In particular, the Arab League actively participated in the Rome Conference that established the ICC out of a belief in the importance of this mechanism to the international judicial system. The Arab League has maintained its cooperation with the ICC despite the reluctance of most Arab countries to ratify the court's statute, in part due to the UN Security Council's role in this process. There was international pressure on countries in the Arab world to ratify the Rome Statute, particularly in the light of the inability of national justice systems to end impunity for violators of human rights. Governments were concerned that this would mean a surrender of jurisdiction to The Hague, and therefore signify the failure of their national justice systems.

The Arab League also signed a memorandum of understanding in 1999 with the International Committee of the Red Cross (ICRC) with the objective of implementing a number of programmes and activities to disseminate the principles and rules of international humanitarian law and promote its application in the Arab countries. These programmes included the formation of national committees for international humanitarian law in 14 Arab countries and the formation of a group of governmental experts in the field of international humanitarian law, which has held annual meetings since 2001 to discuss and adopt a regional plan for the application of international humanitarian law in the Arab region. The ICRC and the Arab League also issue a joint annual report on the application of international humanitarian law at the regional level.

Constitution building

The importance of constitution building cannot be overstated, since a constitution is the embodiment of the social contract between the state and the people. It represents the underlying framework that describes how a nation should be governed. Constitutional provisions have huge implications for the rule of law and society at large. There has been an avalanche of constitutional developments in the Arab world since the start of the Arab revolutions, and many of these developments are still under way.

Constitution building in countries in transition and in post-conflict situations is a difficult and complicated process, since in many cases it has to deal with an irresolvable tension between what is required to secure peace and stability

in the short term, and the long-term objectives and aspirations of the people in these countries. Provisional constitutional declarations governed the transitional period in the countries where revolutions have taken place, as was the case in Tunisia, Egypt and Libya.

The general perception in a number of countries in transition is that constitution-building was managed in a rushed or compromised manner. Yet the general consensus is that all the ongoing effort is transitional and that stability will not be achieved until these countries have a constitution.

The National Constituent Assembly (NCA) in Tunisia officially started in February 2012 with an 18-month deadline. The fourth draft of the constitution was ready by 1 June 2013. The draft sets the framework for a new social contract and establishes the main elements of the country's future political system. The drafting of the new constitution was the focus of national debates until the political crisis began in which Chokri Belaid, a leading opposition figure, was assassinated in February 2013. Demonstrations began that were only loosely related to the constitution that the NCA was elected to draft. The opposition called for the dissolution of the NCA and the resignation of the government led by the Ennahda Party; constitutional issues were largely ignored. It is ironic that both Ennahda and the opposition acknowledge that the writing of the constitution was entering its final stages. But over 60 opposition NCA members withdrew from the assembly and in August 2013 its work was suspended pending a resolution of the crisis.

On 6 October 2013, a road map was agreed between the government and the opposition, and a national dialogue started allowing the Constitutional Assembly to reconvene with the understanding that the current government would resign and an independent transitional government would be formed to oversee the upcoming referendum and elections.

A constitution was adopted in Egypt after a controversial constitutional process and a disputed referendum took place in December 2012. However, after the overthrow of President Mohamed Morsi in July 2013, a new provisional constitutional declaration governing the new transitional period was put into place and a process of extensive amendment of the previously adopted constitution was undertaken by a new constitutional committee.

In Libya, attempts to write a new constitution have been repeatedly delayed because of political infighting within the General National Congress, which was elected for an 18-month term in July 2012. The congress resolved the long-standing dispute over the manner in which members of the Constitution Drafting Assembly would be selected in February 2013. It



opted for the election of a 60-member body with equal representation from the three historical regions of Libya, and planned to have 120 days to draft the constitution, which would be subject to a referendum. Among the issues that need to be taken into account when deciding on the political system that Libya will adopt are political and tribal rivalries and calls for more autonomy in the east. A referendum is set to take place in August 2014.

The UN has been actively engaged in assisting the Libyan people in the constitution-drafting process. The UN Support Mission in Libya (UNSMIL) chairs a constitutional support working group to coordinate and share information with international partners working on the issue. UNSMIL called on Libya to ensure that women in the country actively participate in the drafting of the new constitution. It is also worth mentioning that Libya sought Indian support in drafting the constitution.

In countries that have experienced different forms of public demands for reform, significant steps relating to constitutional change have also taken place. In Morocco, for example, an important dimension of the reform process was the drafting of a new constitution in July 2011, which was based on a consultation process involving political parties, civil society and trade unions, among other entities. The most significant improvement was abolishing the Ministry of Justice's control of the judiciary. Article 111 stipulates the right of judges to freedom of expression and association, and the constitution further establishes a Supreme Council of the Judiciary to secure judges' independence with respect to their appointment, conditions of retirement and discipline. The decisions of the Supreme Council of the Judiciary were made subject to appeal on the grounds of abuse of authority before the highest administrative court. In addition, the constitution established a Constitutional Court and article 127 of the constitution prohibits the establishment of exceptional courts. The new constitution also reinforced the rights of individuals appearing before the courts and the rules governing the functioning of the judiciary.

The implementation of a number of provisions in the Moroccan constitution will depend on issuing the necessary laws to be submitted and passed by the parliament and other regulations and procedures. Therefore, the situation requires further analysis and evaluation after these laws are adopted.

In Jordan, after a series of peaceful protests inspired by the Tunisian and Egyptian revolutions, a call for reform resulted in constitutional amendments in early 2011. The most prominent developments regarding the judiciary in the constitutional amendments were the creation of a Constitutional Court; the restriction of the promulgation of temporary laws to cases of

war, natural disasters and urgent expenditure that cannot be postponed; the constitutionalization of the state of security courts; the prohibition on trying civilians in a criminal case before military judges, with the exceptions of crimes of high treason, espionage, terrorism, narcotics and currency counterfeiting; and the establishment of an Administrative Court of Appeal, which will consider appeals against the verdict of the Administrative Court. However, as with the situation in Morocco, new laws and amendments to existing laws are needed to enact the new constitutional amendments. A thorough assessment of constitutional changes will have to await the passage and implementation of the necessary new laws in this regard.

The Arab League previously assisted the Palestinian Authority in drafting the Palestinian constitution by establishing a committee of some of the best constitutional experts in the Arab world as well as a number of international experts. The first draft was prepared in December 2000 and the final draft was concluded in May 2003. This process was made possible for two reasons. First, the Palestinian Authority did not have the necessary expertise to achieve this objective independently. Second, the Palestinian Authority wanted to send three messages to the rest of the world: that the Palestinians are ready to draft a constitution that adopts democratic principles, that they are ready to have a modern and effective constitution, and that they are ready to receive Arab assistance in this sensitive and important dimension of state-building.

The Arab League was also involved in drafting the most recent Iraqi constitution after the US invasion; the constitution was subject to a referendum in October 2005. While this involvement was successful, Arab League input was limited to the subject of the identity of Iraq, an issue that was extremely controversial in the context of Kurdish Arab sensitivities at that time.

The Arab League was not involved in drafting the constitutions that came as a result of the Arab awakening in Tunisia, Egypt or Libya. Moreover, it was not involved in the process of drafting new constitutions in Morocco, Qatar, the United Arab Emirates or Somalia, or in amending the constitutions in Jordan, Bahrain or other Arab countries.

Development of the judiciary

The process of constitutional change in many Arab countries—and the legal reforms it requires—provides an opportunity for discourse on judiciary reform to occupy centre stage in these countries. The objective is for the judiciary to be independent and fair, to command the trust of the people, and to replace suspicion and fear with confidence and a feeling of safety. Achieving



justice and an independent judiciary should be part of the political debate and should involve society as a whole—not only the judiciary and human rights activists and experts. Generalizing about the nature and status of the judiciary in the Arab world would be quite misleading, since each country is different. However, there are still a number of common characteristics of the challenges facing the judiciary in the Arab world.

The undue influence of executive authority over the judiciary

The constitutions of the vast majority of countries in the region include provisions stipulating the independence of the judiciary. However, it is clear that there are numerous cases of political interference in the judiciary, for example prerogatives given to ministries of justice over judicial councils in a number of countries. In some cases these ministries also control the appointment of and disciplinary actions against judges, judicial inspection, salaries, promotion, retirement, transfer or permission to work abroad, or permission to be seconded to work as legal advisors with other government bodies. These powers give the executive authorities huge leverage over the judges' professional and financial situations. With a few exceptions, judges in the region are not allowed the right to associate. In some countries, the executive authority has influence over the appointment of judges to the constitutional court.

A World Bank report, indicates that 'in the [Middle East and North Africa] region the judiciary is systematically shackled by executive dominance, is ignored, or, worse, becomes an agency of the executive itself. To counteract executive pressures, the country needs a minimum standard of guarantees for judges' positions (such as their irrevocability and security of employment).'³

The report also added that:

The executive... represented by the minister of justice, continues to exercise considerable authority over the judiciary, especially the civil, criminal, and administrative courts... So long as there is political interference in judicial proceedings, or the possibility of such interference exists, it is difficult to ensure the law and even the rule of law. In most MENA [Middle Eastern and North African] countries, the problem is not only that the judiciary lacks independence but also that the judiciary is not allowed to have exclusive power over judicial matters. The special and exceptional courts, the security services that bypass the courts, and the meddling within the jurisdiction of the courts are pervasive features in most MENA countries.⁴

However the report concluded that ‘in a region with strong respect for the rule of law, as in MENA, the judiciary should be able to play a powerful role in maintaining an appropriate balance of power’.⁵

The undue influence of the executive authority over the public prosecutor

The executive branch, through the ministry of justice, influences the office of the prosecutor general in varying degrees in different Arab countries. The public prosecutor in a number of countries where revolutions took place played a role in manipulating—and in some cases blocking—certain legal cases against violators of human rights during these revolutions, illustrating a lack of neutrality.

Exceptional and military courts try civilians in a number of Arab countries

Civilians are subjected to special courts without the necessary standard guarantees of fair trials in a number of Arab countries. There are those who believe that ‘a number of Arab countries have exceptional courts that exceed the number of regular/normal courts’.⁶ Others argue that:

Resort to exceptional forms of justice is far less frequent in the Arab world than it was a couple decades ago. Those countries that feel that security or other concerns necessitate special procedures have often worked to turn exceptional courts (which have procedures and jurisdiction defined on an emergency basis) into specialized courts (that are far more well-grounded in law). This is a clear step in the direction of improving the rule of law. However, such a strategy can work best if such specialized courts have procedures that resemble the regular judiciary as much as is practicable and also a degree of oversight and participation from professional and trained judges. Even in such cases, the move against a unified judicial system has its costs for the rule of law.⁷

The efficiency and integrity of the judiciary

Due to the long delays in the judicial system experienced by ordinary citizens and the lack of integrity and independence of the judiciary, there is a need to develop a socio-cultural environment that supports judges who are



independent and honest so that they are not secluded, threatened or set aside, and to ensure that they become the guardians of justice and the rule of law.

Transitional justice

A huge political debate has been going on in a number of Arab countries where revolutions took place on how transitional justice should be achieved. The issues of dealing with corruption of the ousted regimes—and ending the impunity of violators of human rights before and during the revolutions—were at the heart of the political debates in Tunisia, Egypt, Libya, Yemen and Syria. The turmoil there continues. The trials of those accused of corruption and human rights violations from the ousted regimes led to frustration, particularly in the light of heightened, unrealistic public expectations. An important aspect of transitional justice is to find ways to guarantee access to legal remedies for the victims of human rights violations (e.g., those who have been arbitrarily imprisoned, tortured or injured as well as their families) and provide various forms of reparation such as compensation, rehabilitation and alternative employment opportunities.

Dealing with judges who have breached their professional code of ethics and obligations, facilitated violations of human rights and collaborated with corrupt regimes is a delicate issue; some advocate vetting them during the judicial system reform process. Others warn against any exceptional measures that could violate the principle of non-removability. A third group takes a more pragmatic approach and recognizes that most judges had no choice, as they were trying to avoid becoming victims of the regimes themselves. In all cases, it is generally agreed that the vetting of judges, if deemed desirable, has to take place in accordance with a due legal process and be overseen by fellow judges.

Islamic political forces and the judiciary

With the rise of Islamic political forces and their anticipated growing role in Arab parliaments, there are questions about the manner in which the legislative agendas would evolve and the possible changes that may affect the legal systems as a result of these developments. There are those who believe that in many cases reforming the Arab judiciary requires considering a number of factors that are unrelated to the law, including the balance of power in society; the state of the administration; and the role of political parties, unions, professional bodies and other forces. Where the relationship

between politics and the judiciary is ambiguous, targeted and intensified programmes are required.

The major challenges related to the judiciary in the Arab world include how to build on the positive aspects of its legislative heritage, with its basis in the Islamic notions of justice and equity, and how to build on tribal traditions that can facilitate the advancement of the rule of law. According to one analyst, most Middle Eastern and North African countries have a sophisticated and professional judiciary, and many judges have a strong sense of professional identity.⁸

The role of the Arab League

The Council of Ministers of Justice is the main body in the Arab League system that is mandated to develop and reform the judiciary. The Council of Arab Interior Ministers also plays an important role, since these ministries are responsible for ensuring that court decisions are respected and implemented.

In 2006, the Council of Arab Ministers of Justice adopted a comprehensive plan for developing the administration of justice in Arab countries, which focuses on the following four components:

1. **Human resources:** This dimension aims to ensure thoroughness and diligence in the selection of judges, assistant judges and prosecutors in order to safeguard their impartiality and independence, improve their ability to perform their duties and secure decent living standards for all those working in the judiciary. This also applies to the selection of experts, forensic doctors and other judicial assistants.
2. **Justice mechanisms:** This dimension aims to modernize the justice mechanisms, including administration, in Arab ministries of justice. It also seeks to develop judicial institutes, judicial inspection bodies, administrative and development bodies; to increase the number of courts and chambers; and to apply modern standards in the management of the courts.
3. **Legislation and alternatives to the formal judicial system:** This dimension aims to reconsider laws governing the judicial system, particularly those governing judicial procedures and evidence. It also aspires to provide alternatives to the judiciary and to address the legislative gaps that are exploited in order to bring malicious lawsuits or to prolong court proceedings.



4. **Arab and international cooperation:** This dimension aims to enhance the exchange of experiences between Arab countries in the development and modernization of judiciaries and the administration of justice. It focuses on the benefits of shared international experiences and promotes the introduction of modern technologies, including the establishment of websites for the ministries of justice that would include all the relevant laws and regulations.

In 2007, the Council of Arab Ministers of Justice adopted the Sharjah document on the ethics and conduct of judges. This document included basic rules of judicial ethics, namely independence, impartiality, integrity, moral courage, humility, honesty and honour.

The Arab Strategy for the Development of the Judiciary

In 2012, the Council of Arab Ministers of Justice adopted the Arab Strategy for the Development of the Judiciary as a guiding document for the development of justice systems in the region. The strategy acknowledges that the current judicial systems in the Arab countries suffer from a lack of effectiveness and efficiency, weakness in human resources, and problems related to the governance and management of judiciary systems, all of which adversely affect the image of justice.

The main objective of the strategy is to help the judiciaries in the Arab countries become accessible, effective, modern, transparent and reliable. It also includes regulatory aspects related to the development of the judiciary and justice systems, as well as programmes for their implementation, which aim to develop justice systems and the administration of justice. These programmes include good governance of the judicial management system, decentralization of the administration of the judicial system, and the use of modern technology in the administration of justice to provide a more efficient and effective service to citizens.

Furthermore, in its endeavour to unify Arab legislation, the Council of Arab Ministers of Justice has adopted a number of guide laws to help Arab countries develop and modernize their laws. Annex 1 includes a list of these draft laws. In 2005, for example, the Council of Arab Ministers of Justice adopted a guide Arab law to address crimes within the jurisdiction of the ICC in order to help Arab countries include these crimes in their national legislation.

The Council of Arab Ministers of Justice has also adopted a number of important regional agreements and conventions. These include, for

example, the Riyadh Arab Agreement for Judicial Cooperation (1983), the Arab Convention against Terrorism (1999) and the Arab Convention on fighting Corruption (2013). Judicial cooperation between the Arab countries is based on the Riyadh Convention on Judicial Cooperation between the Arab countries (1983), which includes provisions on the implementation of the judicial rulings and the extradition of accused and convicted persons in this framework. The Council of Arab Ministers of Justice also adopted the Arab guide law of cooperation in criminal matters. For a complete list of agreements and conventions, see Annex 2.

Protecting human rights

Almost three years after the Arab awakening, some believe a huge transformation has taken place, while others argue that the road to democracy and the protection of human rights is still a long one and will probably require more effort and perhaps even more sacrifices. The most prominent developments are reflected in broad constitutional and legislative reforms that include a number of positive elements and are approached in a serious manner, reflecting an intent to implement these fundamental reforms.

However, human rights organizations argue that, even in countries where revolutions have taken place, political protests, social movements and freedom of expression continue to face repressive measures. Some argue that the transitional authorities have made no significant progress in establishing adequate legal protections for such freedoms, and that human rights defenders and union and civil society activists continue to face legal and security provocations in a number of countries in the region. Moreover, the region has also witnessed increased political and sectarian violence.

It is true that the countries in transition have yet to adopt holistic strategies for achieving transitional justice and addressing the crimes committed by former regimes. While the extent to which transitional authorities would be able to uncover the truth regarding past violations is unclear, it is not yet a lost case. Furthermore, the picture is complicated and rather mixed regarding the extent to which the freedoms of association and expression have been expanded or restricted. It is also not clear whether there will be a genuine break with the patterns of abuse that pervaded these countries for decades, or whether efforts will be successful in dealing with the spread of political and sectarian violence.

It is worth mentioning that grave violations were committed by non-state actors, particularly some extremist Islamist groups, in countries that

experienced a security vacuum during transitional periods. There was also a tendency on the part of some groups to use violence to confront the use of force by security forces or to respond to the violence used by some extremist Islamist groups.

Islamic political forces' acceptance of international human rights and judicial standards needs to be followed closely. There are concerns in many circles about their degree of commitment to this objective, as they have been selective in their support of international human rights standards.

The role of the Arab League in the protection of human rights

The Charter of the Arab League (1945) makes no mention of human rights or their guarantee and protection as a priority area or objective of the league. The Arab League is currently considering fundamental modifications to the charter, including rectifying this omission.

The Arab Charter on Human Rights

In 1969, the Standing Committee on Human Rights proposed drafting a charter on human rights. The Arab Charter on Human Rights was adopted in 1994, 50 years after the league's establishment. The charter's adoption was meant to send a message, both regionally and internationally, recognizing the growing importance of respect for human rights to Arab countries and the Arab League. Civil society organizations and experts, in the Arab world and internationally, criticized the charter for what they considered its main weakness: its lack of an enforcement mechanism, in contrast to those available in the European and American Conventions on Human Rights and the African Charter on Human and Peoples' Rights.

In 2003, the Arab Standing Committee on Human Rights invited the Arab countries to submit proposals to amend and improve the charter. A new version was adopted at the Arab Summit in Tunisia on 23 May 2004, which entered into force in 2008. It included a number of important improvements, including the confirmation of equality between men and women, and the guarantee of children's rights and the rights of the disabled. The 2008 charter also established an independent Arab Human Rights Committee, which is responsible for supervising implementation by the states that have ratified the charter.

The new charter has been criticized by human rights organizations as falling short of international human rights standards in a number of key areas, including the continued lack of an effective enforcement mechanism. The Independent Human Rights Committee remains the only body for monitoring state compliance. There is no mechanism for petitions from a state party for violations of the charter or to allow citizens and/or residents of Arab countries to directly present their grievances. The charter also did not establish the hoped-for Arab Court on Human Rights.

Another critique is that the committee can only review human rights-related issues that the Council of the Arab League or the Secretariat transfers to it. Additionally, civil society is mostly excluded from effective participation in the league's decision-making process in the area of human rights.

Indeed, the Arab League's secretary general admitted in 2012 that the Arab Charter on Human Rights falls short of meeting international human rights standards, and stated that revising and amending it in conformity with international conventions is a pressing demand that cannot be neglected or ignored.

The Arab Human Rights Court

The 2013 Arab League Summit in Doha adopted a resolution to establish an Arab Court for Human Rights as proposed in an initiative from the Kingdom of Bahrain. Civil society organizations have stressed that the key issue is for the Arab world and the court to eliminate the gap with international standards to ensure an effective protection system in the Arab region. They furthermore stress that such a court would improve the Arab League's credibility in the area of human rights. Many meetings and workshops were organized to present the requirements for a successful Arab Court on Human Rights. An expert meeting was convened in September 2013 for the preliminary consideration of a draft statute for the court. Initial evaluations of the discussions on the statute indicate that a number of Arab governments are adopting a conservative approach in relation to the mandate and scope of the court's work.

Combating trafficking in persons

An Arab initiative to combat trafficking in persons is currently being implemented in collaboration with the UN Office on Drugs and Crime. A Comprehensive Arab Strategy to Combat Trafficking in Persons and a guide



law to combat trafficking in persons have been adopted by the Council of Ministers of Justice. The Arab League has also been active in supporting efforts to implement the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children in the Arab world. The Arab League is currently preparing the first Arab annual report on the fight against trafficking in persons alongside developing the Arab Convention to Combat Trafficking in Persons. Arab countries are also encouraged to join international legal mechanisms and institutions and ratify relevant international agreements.

The Arab League and human rights civil society organizations

In 2012, 37 organizations working in the field of defence of human rights in nine Arab countries, including four regional organizations, sent a letter to the secretary general of the Arab League and Lakhdar Brahimi, the chairman of the committee mandated to prepare a plan for reforming the League to the Arab Summit in Qatar in March 2013. The letter indicated that the requirements to award consultative status to NGOs to work with the league needed to be revised in order to improve NGO cooperation with the body. NGOs requested permission to attend the formal meetings of league bodies, and to ensure that their opinions regarding issues on the agenda are heard and taken into consideration.

The letter stressed that advancing the league's role in the area of human rights should entail transparency measures and far-reaching reform of the Standing Committee on Human Rights, and proposed that it appoints special rapporteurs or specialized and thematic working groups with the competence to receive complaints and petitions and investigate human rights problems within their jurisdiction, pursuant to UN and AU norms.

Fighting corruption

Corruption in the Arab world can be divided into three main types: (1) petty corruption, (2) massive corruption that takes place in multi-million dollar contract negotiations between state officials and private businesses, and (3) political corruption, which plagues the economic health of most countries in the Arab world. The causes of corruption vary across Arab countries, but are often linked to state intervention and the structure of economies and the public sector. There is a lack of transparency and procedures to guarantee competition in government procurement and contracts. Another problem

is the absence of strong enforcement mechanisms for anti-corruption laws, which allows violations to go unpunished even when the laws are adequate.

Corruption cannot be fought in an effective and sustainable manner without addressing the right to access information, financial disclosure, conflict-of-interest regulations and the professionalization of public office.

Overall, anti-corruption policies and efforts can be assessed by analysing the following factors, which provide clear evidence of the lack of significant progress in a number of Arab countries in the fight against corruption:

- The **Corruption Perception Index** (CPI). Since 1995, Transparency International has published the CPI annually, ranking countries from 10 (low corruption) to 0 (highly corrupt) according to their perceived levels of corruption, as determined by expert assessments and opinion surveys. Between 2003 and 2012, the situation improved in the United Arab Emirates (UAE), Qatar, Jordan, Morocco and Algeria,⁹ and Lebanon remained constant at 3.0. The situation worsened for Egypt, Iraq, Kuwait, Saudi Arabia, Syria, Tunisia, Yemen, Oman and Bahrain.¹⁰
- The **World Bank Governance Indicators** capture six key dimensions of governance: voice and accountability, political stability and lack of violence, government effectiveness, regulatory quality, rule of law and control of corruption. The indicators measure the quality of governance in over 200 countries based on close to 40 data sources produced by over 30 organizations worldwide and have been updated annually since 2002. From 2000 to 12, the indicators improved for Kuwait, Oman, Bahrain, Lebanon, Morocco and Algeria.¹¹ The indicators remained unchanged for Jordan (0.04) and worsened for Qatar, the UAE, Tunisia, Saudi Arabia, Egypt, Syria, Libya, Yemen and Iraq.¹²
- The **Global Integrity Index** assesses the existence and effectiveness of and citizen access to key national-level anti-corruption mechanisms used to hold governments accountable. It does not measure corruption, but rather examines the measures used against it in the form of government accountability, transparency and citizen oversight. The outcome was weak for the UAE and very weak for Jordan, Morocco, Kuwait, Algeria, Egypt, Iraq, Lebanon, Tunisia, Qatar, Yemen and Syria.

Since corruption was one of the triggers of the Arab awakening, fighting corruption has been at the top of the list of priorities, at least rhetorically. However, efforts to fight corruption (including rigged elections) may be dissipating as security challenges and economic problems overshadow the



drive for reform. It is also unclear how willing, capable and committed the new political figures and leaders are to face the challenges of corruption. Furthermore, the question of gaining the public's trust, which remains a major challenge for reform actors, requires concrete successes and quick accomplishments. The nature of reform efforts will determine whether corruption will be curtailed or facilitated. Arab experience in formulating and implementing national anti-corruption strategies is still quite new, and there is still a long way to go.

The role of the Arab League

An Arab Agreement to Fight Corruption was signed in 2010 and entered into force in 2013. This convention aims to help strengthen implementation of the United Nations Convention Against Corruption (UNCAC). The Council of Ministers of Justice also adopted a guide law to fight corruption in order to help Arab countries modernize their laws and harmonize them with the provisions of the league and the UNCAC.

In July 2008, high-level representatives from 60 governmental bodies from 17 Arab countries—including specialized anti-corruption agencies and commissions, audit bodies, inspection bodies, ministries of justice, ministries of administrative development and higher judicial councils—met in Jordan and established the Arab Anti-Corruption and Integrity Network (ACINET). ACINET represents a concrete step for Arab governments that committed themselves to modernization, development and reform during the Arab Summit held in Tunis in 2004. It provides Arab government anti-corruption bodies with (1) a permanent forum for exchanging knowledge, expertise and experiences on anti-corruption issues and (2) a regional platform to support national efforts to implement related regional and international best practices and instruments, especially the UNCAC. ACINET is supported by a parallel network of parliamentarians and representatives of non-governmental actors, including civil society organizations and the private sector.

Conclusions

The literature on rule of law reform differentiates between programmes implemented in post-conflict or fragile countries and those implemented in a non-conflict development context. Reform in post-conflict countries has had few lasting effects on establishing governments bound by law, achieving equality before the law, predictable and efficient rulings, law and order, and protecting human rights.¹³ While rule of law reform appears to have been

moderately more successful in the non-conflict development context, even in those cases there is little solid analysis in the literature evaluating why those strategies were relatively effective, or how they could be adapted to post-conflict settings.¹⁴ This differentiation is quite important, since Arab countries have either been suffering from conflicts, or are in a fragile situation or are in a development context.

Rule of law reform in the Arab world has suffered from a notable lack of strategy. A fundamental problem is that the goals are extremely complex, and the best way to proceed is not always clear, which makes it difficult to prioritize. Elements of the rule of law have an inherently interconnected nature. For instance, judicial training that allows judges to make better judgements is unlikely to have much impact if there is no judicial independence, if corruption dominates the legal system or if the police do not implement judicial rulings. Similarly, the benefits of increasing the capacity of the lower courts can be undermined if the final court of appeal is incompetent or corrupt. Furthermore, no reform will have any impact if citizens perceive the legal system as biased or unjust.

It is also becoming increasingly recognized that elections are insufficient to initiate or sustain transitions to peace and democracy without rule of law reform. As former president of Liberia Amos Sawyer said, ‘the state we produced turned out to be a criminal state, legitimized by elections’.¹⁵

Programmes have typically focused on institutional objectives and formal legal structures, without a nuanced understanding of the political and economic dynamics that prevented the creation of such structures in the first place, or of the reality of how disputes were settled, which often relied on informal mechanisms. The formal mechanisms may have completely disappeared or been discredited during conflict situations, and informal mechanisms that may have gained some credibility during the conflict can be crucial to restoring some degree of law and order. There is a need for an in-depth and a more systematic discussion of how institutions evolve, as well as a systematic evaluation of programmes in order to balance short- and long-term planning in programme design, evaluations and outcomes. It is also important to avoid the current strong focus on more easily quantifiable changes, such as buildings or computers, which are considered a readily identifiable mark of progress and are hence often favoured over more long-term and difficult capacity-building necessities.



Recommendations

Reform is an ongoing process that takes place in a number of Arab countries under extremely varied circumstances in terms of depth, scope and pace. These recommendations aim to contribute to the evolution of the rule of law in the Arab world.

In order to help Arab countries advance the rule of law, and develop and implement related regional or international norms and standards, international and regional partners (including the Arab League) must have access to accurate assessments of the prevailing situation in the various countries and of the needs and aspirations of the region's inhabitants.

Thus there is a need for information gathering, research and well-organized debates at the country and regional levels to examine and agree on strategies, plans and programmes to advance reform efforts in these fields. Ideally, the approach should be coherent and comprehensive in order to achieve sustainable change.

Raising awareness and convincing the public of the necessity and future benefits of reform is also crucial. Building a culture of the rule of law and transparency is not an easy task. It will require targeted and informed awareness campaigns, which can sometimes be more effective on a regional basis. The involvement of civil society organizations is also key. Furthermore, incentive systems (both positive and negative) must be generated to ensure that governments are transparent and that they systematically and periodically release data to the public.

Developing human capacity—through the training and continuous education of lawyers and judges, and improving law schools and the national and regional levels—is another key to successful reform efforts. Constitutional and legislative efforts are not enough to reform the judiciary in the region. Many countries have passed legislation and ratified international treaties without adequate training for judges on their importance and relevance.

There has been a striking lack of systematic, results-based evaluations of the reform programmes undertaken in the region. It would be extremely useful to compile comprehensive case studies of all the programmes by country and examine how the different rule of law reform projects have interacted and performed across post-conflict countries and in some of the more successful non-conflict countries.

Providing sustained investment to enhance local government capacity to collect statistics and develop comprehensive systems of indicators to inform policies is a key component of long-term rule of law advancement. Government motivation to integrate such data (official and privately produced, local and global, quantitative and qualitative) into their decision-making process will also strengthen the rule of law.

Change in the area of the rule of law is more difficult than in many other areas of development. It carries higher risks and requires longer timelines for transformation, which increases the need for quality international support. Unfortunately, much of the current international support neither delivers value for money nor improves countries' justice and security services. Therefore the international community, particularly the UN and regional actors (notably the Arab League) should exert more effort to exchange knowledge on their activities and programmes, and to facilitate more coordination and collaboration. Good practices, failures and success stories of countries and organizations should be shared across the various areas of the rule of law, particularly those that have pursued a similar path from authoritarianism toward democratic transitions.

Constitution building

Given the unprecedented level of activity on constitutional reform, the Arab world needs to assemble a team of high-level constitutional experts to evaluate and assist Arab countries in this important field. The Arab League should highlight the importance of more clearly integrating democratic principles in constitutions in a manner that guarantees the separation of powers and cooperation among them, reinforces their transparency and accountability, limits government power through the legislature and subjects it to legal restraints, develops systems of checks and balances, ensures that the transition of power is subject to the law, enables these powers to properly manage public affairs and funds, and ensures that the judiciary is subject to independent auditing and review as well as scrutiny by civil society and the media.

Reform of the judiciary

Arab countries could be assisted to strengthen their judiciaries by:

- ensuring that the high judicial councils (or the equivalent body that represents the judicial authority) enjoy full independence and oversee the appointment of judges and judicial inspections, and are responsible



for disciplinary measures against judges. Judicial councils should not be appointed by the executive authority and should represent all levels and branches of judges. The election (or other objective) criteria for selecting its members should be set, and the process should be credible and transparent. Furthermore, judicial control over the constitutionality of laws should be ensured by instituting constitutional courts that have the power to strike down laws that are inconsistent with the provisions of the constitution;

- taking the necessary steps to ensure the implementation of judicial rulings;
- eliminating exceptional courts and guaranteeing that civilians will not be tried before military courts;
- implementing best international practices with regard to the functioning and independence of prosecutors and the separation of powers to investigate and indict;
- modernizing courts through increased computerization of court administration and accessible databases for legal provisions and judgements; and
- ensuring that judges enjoy the right to form associations. Regional collaboration between judges' associations in the region needs to be supported and developed.

There is also a need to share experiences regarding transitional justice in the region and in the process of vetting judges who were part of the old regime. Legislative changes are not the only way to address the requirements for transitional justice. Truth and reconciliation commissions and restitution measures for victims could also be utilized.

Protecting human rights

The Arab League can help countries in the region strengthen their protection of human rights by:

- ensuring member states' consistent compliance with their international obligations in the area of human rights;
- making sure that the Arab Court for Human Rights is established in accordance with international standards and provides redress to victims of human rights violations, including violations perpetrated by non-state actors;
- considering the appointment of special rapporteurs with experience

in the development of human rights protection mechanisms in other regions and at the international level;

- endeavouring to hold open meetings where situations of human rights are considered;
- inviting Arab states that submit their reports in accordance with their obligations in the Arab Human Rights Charter to engage in a constructive and results-oriented dialogue with the independent Human Rights Committee and NGOs accredited with the league;
- developing treaty-based mechanisms that consistently review member states' compliance with obligations, and assist in the process of implementation and highlight capacity gaps; and
- increasing the Human Rights Committee's transparency by encouraging it to post state reports and all relevant documents and activities on its website. The technical and financial capacities required to fulfil mandates are often limited and should be enhanced.

Fighting corruption

Arab countries could be assisted in fighting corruption by:

- helping to formulate national anti-corruption strategies (or implement and evaluate them if they already exist) and analysing and strengthening synergy with other reform efforts;
- facilitating the ratification and implementation of the UN and Arab anti-corruption conventions for countries that have not already ratified them;
- establishing an Arab mechanism with the necessary jurisdiction to coordinate among Arab countries regarding the recovery of assets derived from corruption and supporting efforts related to asset recovery requests from other countries;
- creating an Arab research centre to gather information and analyse the state of anti-corruption efforts, including the gaps and progress achieved;
- expanding the participation of civil society and key stakeholders in anti-corruption efforts;
- conducting a thorough review of the role of anti-corruption agencies in the Arab countries in terms of their independence, powers, and the financial and human resources allocated to them, as well as their relationship with other regulatory and judicial bodies, the private sector and civil society;



- devoting more attention to the role of education in enshrining the values of citizenship and building a culture of integrity that rejects corruption, and encouraging the media to more effectively increase their engagement in anti-corruption efforts; and
- conducting and supporting results-driven research on identifying priorities, the factors causing corruption, catching up with the changes and innovation in corruption schemes, and measuring the progress and effectiveness of anti-corruption institutions and policies.

The struggle for democracy and the rule of law in the Arab world has been (and will continue to be) a long one. The experiences of the last few years in the Arab world suggest that the people will not rest until (and unless) they fulfil these aspirations.

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Notes

¹ KUNA 2008.

² Maddy-Weitzman 1991.

³ World Bank 2003.

⁴ Ibid., pp. 47–8.

⁵ Ibid., p. 168.

⁶ Arab Center for the Development of the Rule of Law and Integrity 2005.

⁷ Brown 2001.

⁸ Ibid.

⁹ The UAE improved from 5.2 to 6.8, Qatar from 5.6 to 6.8, Jordan from 4.6 to 4.8, Morocco from 3.3 to 3.7, and Algeria from 2.6 to 3.4.

¹⁰ Egypt worsened from 3.3 to 3.2, Iraq from 2.2 to 1.8, Kuwait from 5.3 to 4.4, Saudi Arabia from 4.5 to 4.4, Syria from 3.4 to 2.6, Tunisia from 4.9 to 4.1, Yemen from 2.6 to 2.3, Oman from 6.3 to 4.7, and Bahrain from 6.1 to 5.1.

¹¹ Kuwait improved from 0.07 to 0.84, Oman from 0.08 to 0.76, Bahrain from 0.23 to 0.37, Lebanon from –0.41 to –0.19, Morocco from –0.3 to –0.26, and Algeria from –0.95 to –0.57.

¹² Qatar's indicators worsened from 1.02 to 0.67, the UAE from 1.08 to 0.13, Tunisia from –0.03 to –0.21, Saudi Arabia from –0.29 to –0.42, Egypt from –0.39 to –0.68, Syria from –0.90 to –0.97, Libya from –0.73 to –1.13, Yemen from –0.91 to –1.18, and Iraq from –1.22 to –1.47.

¹³ Samuels 2006.

¹⁴ Ibid.

¹⁵ Samuels 2005.



Annex 1: Model laws to help Arab countries develop and modernize their laws

The Council of Arab Ministers of Justice has adopted the following model laws to assist Arab countries in developing and modernizing their laws:

The Casablanca system of organizing the hierarchy of the judiciary in Arab countries

The Kuwait document pertaining to the unified Arab Law regarding personal status

The unified Arab law for registration of real estate and its explanatory memorandum

The unified Arab model law to regulate prisons

The model law for minors committing offences

The unified Arab model law for the care of minors

The unified Arab civil law and its explanatory memorandum

The unified Arab penal code and its explanatory memorandum

The Algeria model Arab law of criminal procedure

The Algeria model Arab law of civil procedure

The Emirates Arab model law to combat cyber-crimes

The Arab guiding document for social security

The Arab model law for crimes that fall within the jurisdiction of the International Criminal Court

The Arab model law to face the crimes of trafficking in persons

The Arab model law of international judicial cooperation in criminal matters and its explanatory memorandum

The Arab model law for judicial assistance

The Arab model law to regulate the profession of judicial bailiffs

The Arab model law to regulate organ transplants and prevent and combat trade in human organs

The Arab model law to prevent human cloning for reproductive purposes

The Arab model law to combat corruption

The Arab model law for conciliation and reconciliation

The Arab model law to regulate the profession of notaries

The Arab model law to combat human trafficking (amended)

The Arab model law on narcotic drugs and psychotropic substances (amended)

Annex 2: Arab conventions relevant to the rule of law

The following Arab conventions have entered into force.

1. The Riyadh Arab Agreement for Judicial Cooperation (1983) replaced the agreements concluded within the scope of the Arab League in 1952 on the notification and enforcement of judgements and extradition for countries ratifying this agreement. The Riyadh Agreement encourages intra-Arab visits by judicial delegations in order to follow legislative and judicial developments. It confirmed the principle of the right of litigation and provided for judicial assistance and the attendance of witnesses and experts in criminal cases, the recognition of judgements, and the extradition of accused and convicted persons.
2. The Amman Arab Convention on Commercial Arbitration (1984)
3. The Arab Convention against Terrorism (1999): 18 Arab countries ratified this convention, which was deposited with the UN Secretariat and included as an official document of the UN General Assembly as a regional instrument related to combating terrorism. The Arab League focuses its efforts in the fight against terrorism on enhancing coordination and cooperation on the international and regional levels in this area. Successive resolutions were adopted at the summit level and by the Councils of Foreign Ministers, Ministers of Justice and Ministers of Interior. These resolutions were communicated to the UN and its relevant organs. A number of these resolutions confirmed the accession of Arab states to international instruments to combat terrorism and the commitment to apply their provisions at the national level.
4. The Arab Convention on Fighting Corruption (2013).

The following conventions were also signed at a joint meeting of the Councils of Ministers of Justice and Ministers of Interior on 21 December 2010 and are currently subject to ratification by the Arab countries:

- the Arab convention to combat money laundering and financing terrorism;



- the Arab convention for the fight against organized crime across national borders;
- the Arab convention for the transfer of penal inmates and those in correctional institutions; and
- the Arab convention on computer crime.

In addition, a protocol on fighting maritime piracy is currently being prepared for consideration by Arab governments.



Chapter 3

The Organization of American States: The Rule of Law and Legal Cooperation



Chapter 3

Department of Legal Cooperation, Secretariat for
Legal Affairs, Organization of American States



The Organization of American States: The Rule of Law and Legal Cooperation

Introduction

The inter-American system came into being at the end of the 19th century. Since then it has constructed a framework of international norms and cooperation institutions shared by the countries of the hemisphere, primarily with the aim of ensuring peace and fostering trade among them. The secondary goal of the system is to consolidate and strengthen national institutions, democratic rule of law and respect for the rights of inhabitants.

To that end, starting in the early years of the 20th century, multiple institutions were set up in diverse areas, including health, children, women's rights and legal cooperation. A whole range of agreements and treaties have also been adopted in areas that include legal cooperation on criminal matters, trade, the peaceful settlement of disputes, observance of the rights and duties of states based on their legal equality, and respect for the principle of non-intervention in domestic affairs.

With no wars among the American states throughout the 20th century, something which was not seen in any other region of the world,¹ the inter-American system was able to devote itself to the task of strengthening weak national systems in the grip of authoritarian regimes and helping them introduce mechanisms for observing human rights, access to justice (especially for the most defenceless) and combating the ills that corrode institutions—particularly corruption, electoral fraud and organized crime.²

Without a doubt, it was the support of the Organization of American States (OAS) that led all the American states to recognize democracy as the only legitimate system of government, and give the OAS the means and instruments to ensure its observance.

Following a brief introduction, this chapter describes the main factors that made the OAS an authority on defending representative democracy as a system of government. It also provides two examples of cooperation mechanisms.

Defending democracy

In 1948, the Ninth International Conference of American States adopted instruments that would define the inter-American system's role in supporting national institutions: the OAS Charter and the American Declaration of the Rights and Duties of Man (which was adopted several months before the UN Universal Declaration of Human Rights). The charter contained something that no other international organization had previously included: the express mention (in article 3(d)) of 'representative democracy' as a system of government for its member states, which then included the 19 Latin American countries, Haiti and the United States.³

Those developments were followed 11 years later by the creation within the OAS framework of the Inter-American Commission on Human Rights; its principal purpose was to promote the observance and protection of human rights (article 106). At that same meeting in 1959, the ministers of foreign affairs defined the core elements of representative democracy, including the separation of powers; periodic, free elections; access to justice; and respect for human rights. However, the years that followed were marked by dictatorships and domestic strife throughout the region that hampered initiatives in both respects. Finally, in 1969, the American Convention on Human Rights introduced a system of rules and institutions (a commission and a court) for the effective observance of human rights. The end of the internal conflicts in Central America and the return of the countries of the American Southern Cone to democracy led the states to provide the regional organization with mechanisms to prevent interruptions of the democratic order, attempt to avert crises that might threaten it, and provide it with the necessary legal instruments to combat multiple threats to democratic institutions.

In 1985 an amendment was introduced to the OAS Charter that made one of its purposes 'to promote and consolidate representative democracy' (article 2(b)), which authorized the General Secretariat to supervise the electoral processes necessary for the transitions under way. This launched the



programme of electoral observation missions that have monitored an ever-increasing number of elections in the region.

In 1991, the General Assembly adopted a resolution empowering the OAS to sanction any member state if the democratic order had been interrupted; that rule was then also incorporated into the OAS Charter (article 9). A new resolution approving the Inter-American Democratic Charter was adopted by the General Assembly in 2001, completing these measures and extending them to other scenarios. The application of this set of rules through the direct involvement of OAS organs has already staved off a large number of institutional crises, and when that was not possible, sanctions were imposed on the state concerned until democratic order was restored (Haiti in 1992 and Honduras in 2009).

The process of supporting the restoration of democratic institutions led the OAS to implement programmes in various areas, for example, updating electoral registers. In addition, the Inter-American Judicial Facilitators Program enabled rural populations with poor access to the judicial system to settle their disputes with the assistance of trained citizens, which is helping to reduce violence, has given people greater confidence in the judiciary, and has facilitated the consolidation of the rule of law.

With regard to strengthening domestic systems, the OAS Charter also requests the organization to seek the solution of political, juridical and economic problems that arise among its members (article 2(e)). The inter-American system has a vast, rich legacy of international legal standards that have been developed and adopted within this framework. These standards cover various aspects of legal cooperation on issues related to the daily life of the region's citizens, for example, standards on the protection of children and the family (i.e., adoption, the return of abducted children, child support), the prevention of violence against women, and rules to facilitate the movement of people and goods. In these cases, the inter-American standards are designed to strengthen the national legal order through the adoption of internal rules and the improvement (or creation) of national institutions that focus on citizens as the immediate beneficiaries.

In this respect, two successful examples of member states seeking OAS assistance can be highlighted, related to the adoption of international standards contained in inter-American conventions and their subsequent application in their respective domestic legal systems. The first example concerns legal cooperation with which to better apply standards on criminal

matters, while the second addresses the joint implementation of mechanisms to combat corruption.

Legal cooperation

Inter-American treaties as a framework for hemispheric legal cooperation

The inter-American system is very dynamic in encouraging and consolidating legal and judicial cooperation, particularly with regard to mutual assistance in matters of criminal law. The OAS has adopted various international conventions in this area that have created binding obligations on member states that have ratified these instruments. For example, important treaties cover topics such as the implementation of preventive measures, the serving of criminal sentences abroad, international trafficking of minors, the international return of children, the prevention and punishment of acts of terrorism, and extradition. Within this framework of treaties, the Inter-American Convention on Mutual Assistance in Criminal Matters⁴ has contributed the most to progressing legal and judicial cooperation in the hemisphere.

This convention, which was adopted in Nassau, the Bahamas, in 1992 and came into force in 1996, is an important tool in promoting the essential purpose of the American states in seeking a solution to the hemisphere's political, juridical and economic problems. It provides assistance based on requests for cooperation from the authorities responsible for investigation or prosecution in the requesting state. This may include notification of rulings and judgements; the taking of testimony; the immobilization and sequestration of property, freezing of assets and assistance in procedures related to seizures; searches or seizures; the examination of objects and places; service of judicial documents; the transmittal of documents, reports, information and evidence; and the transfer of detained persons for the purposes of the convention. Assistance is provided for all punishable crimes—except military crimes—that carry a prison term of a year or more, and over which the requesting state has jurisdiction at the time the assistance is requested. Requests for assistance must be executed in conformity with the applicable law of the requesting state. This convention serves as the basis for the region's foremost mechanism in legal and judicial cooperation: the Meetings of Ministers of Justice or Other Ministers or Attorneys General of the Americas (REMJA).⁵



The REMJA Process

Ministers of justice, attorneys general and prosecutors general of the member states participate in the REMJA Process to consolidate the rule of law in the Americas by strengthening mechanisms for providing access to justice and international legal cooperation, particularly on criminal matters. This is accomplished through the exchange of information and experiences, policy coordination, and the creation of effective cooperation processes and institutions.

The first REMJA was held in Buenos Aires, Argentina in 1997.⁶ The process is governed by the Document of Washington, adopted in 2008, which provides a legal framework that governs, inter alia, the composition, organization and workings of this process; the mechanisms and procedures for setting its agenda and following up on its recommendations; and coordination and cooperation between it and other organs, agencies and entities of the inter-American system and other international organizations.

The Document of Washington tasks REMJA with formulating recommendations to OAS member states in order to ensure that the public policies and cooperation measures they adopt in the REMJA areas of responsibility are increasingly effective, efficient and expeditious. REMJA follows up on these recommendations and assigns specific mandates either to its working groups or through technical meetings. REMJA also promotes coordination and cooperation activities among organs, agencies, entities and mechanisms of the inter-American system, and with other international organizations in the area of justice and legal cooperation.

The REMJA Process has served as the principal hemispheric forum on justice and legal and judicial cooperation, and has become a constant and ongoing cooperation process that has produced concrete results toward the consolidation of the rule of law in the Americas, notably in three main areas. The first area is the creation of the Justice Studies Center of the Americas, based in Santiago, Chile, in 1999, which has produced significant results through its work on the reform of judicial systems, especially in the area of criminal law. Second, since 2003 REMJA has conducted a training programme for officials in OAS member states who are responsible for investigating and combating cyber-crime. The programme has consisted of technical workshops to facilitate the development of legislation, strengthen capabilities for investigating and prosecuting these crimes, and training in the appropriate handling of electronic evidence. Third, the REMJA Process has fostered legal cooperation on family law, including the creation of an

information exchange network to facilitate international legal cooperation on adoption, the return of minors, and alimony and child support.

Legal cooperation in criminal matters within the REMJA framework

REMJA also has a working group on legal cooperation on criminal matters and a Criminal Matters Network.

The REMJA Working Group on Mutual Assistance in Criminal Matters

Although the OAS framework includes numerous treaties on legal and judicial cooperation, the REMJA Process set up the Working Group on Mutual Assistance in Criminal Matters in 2003 to bring together the central authorities and other governmental experts with responsibilities in these areas to discuss better ways to cooperate and ensure the effectiveness of those treaties.⁷ It has become the principal hemispheric forum on matters associated with mutual assistance, extradition, and the strengthening and promotion of legal cooperation in criminal matters.

Using the information supplied to it by states, the working group evaluates existing difficulties in this area and issues concrete, practical recommendations to ensure effective, efficient and expeditious cooperation, and follows up periodically on their implementation. It has also developed a number of legal cooperation tools that have been made available to the states, including guidelines on best practices in the collection of evidence; investigations; the freezing, confiscation and seizure of assets; and a model law on mutual assistance in criminal matters.

At its last meeting, the working group decided to move forward with, among other things, the preparation of an efficient and expeditious inter-American legal instrument on extradition, a draft protocol to the Inter-American Convention on Mutual Assistance in Criminal Matters relative to the Use of New Communication Technologies and Hearings by Videoconference, and legal guidelines that serve as a model for the establishment of joint investigation teams. It also agreed to continue taking advantage of communication technologies for the development and use of new tools to facilitate legal cooperation in the framework of the Criminal Matters Network.



*The Hemispheric Network for Legal Cooperation on Criminal Matters
(Criminal Matters Network)*

In 2000, REMJA resolved to strengthen cooperation and mutual confidence in the field of mutual assistance in criminal matters and extradition 'by establishing an information network composed of competent authorities and mandated to prepare specific recommendations in the area of extradition and mutual legal assistance for consideration by said authorities prior to [the] plenary session of the Fourth REMJA. That network containing information on the different legal systems in the Hemisphere should rely as far as possible on electronic communications media, especially the Internet'.⁸

The following year, the democratically elected heads of state and government of the Americas met in Quebec City, Canada, at the Third Summit of the Americas, and decided to 'Establish, in the OAS, an Internet-based network of information among competent legal authorities on extradition and mutual legal assistance to facilitate direct communications among them on a regular basis and to identify common problems in handling specific cases and issues that merit collective attention and resolution'.⁹

The Hemispheric Network for Legal Cooperation on Criminal Matters (Criminal Matters Network) was established within REMJA, which developed a pilot project focused on creating a criminal matters information exchange network. Four countries from different regions in the hemisphere volunteered to participate in the pilot project: Argentina (South America), the Bahamas (Caribbean), Canada (North America) and El Salvador (Central America).

REMJA-IV, held in Trinidad and Tobago in 2004, recommended that the pilot project be continued 'so that said network may extend to all countries of the Americas'.¹⁰ It also recommended that the network gradually incorporate useful information on areas related to mutual legal assistance in criminal matters, and that further consideration be given to the idea of creating a secure private network for use by authorized government officials from the American states.¹¹

Since then, the Criminal Matters Network has been expanded to 31 OAS member states (100 per cent of the OAS member states from North, Central and South America, as well as 71 per cent of OAS member states from the Caribbean) through the signature of over 45 memoranda of understanding with different institutions in the member states, such as offices of public prosecutors and attorneys general, and ministries of justice and foreign affairs.

The network is made up of four components: a public website, a private website, a secure electronic communication system and secure videoconferencing.

The public component of the network is a virtual library that provides legal information related to mutual assistance and extradition for the 34 OAS member states; it contains over 1,000 documents.¹² The site includes a general description of the legal systems of countries of the Americas and posts laws and bilateral and multilateral agreements that are in force concerning extradition and mutual legal assistance in criminal matters. It also contains a dictionary for legal terms commonly used in the field. This information is available in the four official languages of the OAS: English, French, Portuguese and Spanish.

The private component of the network contains information for individuals who are directly involved in legal cooperation in criminal matters, including details of meetings, a directory of points of contact in other countries, a glossary of terms, and training information on the secure electronic communication system.

The purpose of the secure electronic communication system is to facilitate the exchange of information between central authorities which deal with issues of mutual assistance in criminal matters and extradition. This system provides a secure, instant email service to more than 80 central authorities and creates a space for virtual meetings and exchanging pertinent documents. It offers the highest possible level of data encryption security; the OAS General Secretariat manages its central infrastructure, and the users decide for themselves with whom to share their information.

A pilot phase of the secure videoconferencing was developed with the participation of Argentina, Brazil, Chile, Colombia, Paraguay and Peru. This tool facilitates live, secure communication (image and sound) using a videoconferencing software client. It is intended to become an essential tool for conducting testing and collecting testimony and declarations as part of the mutual legal assistance and extradition processes.

The UN considers the Criminal Matters Network to be one of the main concrete results of the REMJA Process as well as a promising practice.¹³ This collection of electronic tools has helped make cooperation between OAS member state authorities in international judicial matters more efficient.

The network is constantly being updated, strengthened and perfected. In this regard, efforts will continue to develop and incorporate new components and tools to strengthen cooperation and information exchange among



central authorities and international legal cooperation authorities in the OAS member states.

Cooperation against corruption

The Inter-American Convention against Corruption

The Inter-American Convention against Corruption¹⁴ was adopted in the OAS framework in 1996, and has been signed by all 34 member states (and ratified by 33). It was the first international legal instrument in this area and is the treaty with the highest number of ratifications in the hemisphere after the OAS Charter. Its preamble recognizes the international impact of corruption and the need for an instrument to promote and facilitate cooperation between states to confront it effectively. To that end, it establishes two purposes:

1. to promote and strengthen the development by each of the State Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and
2. to promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.

In its preamble and several of its articles, the convention expressly recognizes that corruption cannot be dealt with solely through repression or sanctions once the problem has arisen. Rather, preventive actions are also needed in order to modernize institutions and eliminate the root causes of corruption and the conditions that facilitate or encourage it. Thus, the preventive measures set out in article III are an important part of its provisions, in addition to those that call for the criminalization of corruption (articles VI and XI) and of transnational bribery and illicit enrichment (articles VIII and IX, respectively). The provision on transnational bribery represents significant progress and places the American hemisphere in the vanguard in terms of its legally binding commitment to punish this illicit practice in international business transactions.

The convention conceives the fight against corruption as a connected, coordinated process, and emphasizes the importance of the actions of all the players involved: individual states, the private sector, civil society and the international community.

It is also the principal inter-American legal instrument for extradition in corruption-related cases; for interstate cooperation and assistance in securing evidence and pursuing other formalities necessary to facilitate the investigation and prosecution of corruption; and for identifying, tracking, securing, seizing and confiscating assets obtained or derived from the commission of crimes of corruption and assets that are used to commit such offences or produced thereby.

With regard to the investigation or submission of information from banks and other financial entities, the convention takes a significant step forward in preventing bank secrecy from being used to conceal or protect the corrupt.

Regarding the right of asylum, the convention strikes an acceptable compromise between the values that asylum protects and the aim of fighting corruption. As was stated during the drafting discussions, the rationale and essence of asylum can in no way be undermined, but neither can asylum be used to conceal those guilty of corruption offences or help them evade justice. One particularly important provision is article XVII, which stipulates that the fact that the property obtained or derived from an act of corruption was intended for political purposes, or that it is alleged that an act of corruption was committed for political motives or purposes, shall not suffice in and of itself to qualify the act as a political offence or as a common offence related to a political offence.

Finally, the convention helps strengthen democratic governance by noting that ‘representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance’.

The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC)

The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC)¹⁵ is an intergovernmental body with a broad scope for civil society participation. It was established within the OAS framework on 4 June 2001 to help OAS State Parties (at the time 31) implement the provisions of the Inter-American Convention against Corruption through a process of reciprocal evaluation, based on the principle of equality among states. On the basis of these evaluations, specific recommendations are formulated for improving states’ legal and institutional instruments for tackling corruption, filling gaps and remedying



any shortcomings detected in that process.¹⁶ It is also a useful forum for the exchange of information and mutual cooperation among State Parties in the area of best practices for preventing and combating corruption.

All of the above is in accordance with the provisions contained in the Report of Buenos Aires,¹⁷ which envisages the establishment of the mechanism and establishes that its purposes are to promote the implementation of the convention; to follow up on the commitments made by the State Parties thereto and to study how they are being implemented; and to facilitate technical cooperation activities and the exchange of information, experiences and best practices; and the harmonization of the legislation of the State Parties.

The mechanism also functions under the framework of the goals and principles set out in the OAS Charter and to uphold principles such as sovereignty, non-intervention and the legal equality of states. Its characteristics include impartiality and objectivity in its operations and conclusions, together with the absence of sanctions. This guarantees the seriousness of the mechanism and upholds the notion that its purpose is not to assess or classify the states, but rather to strengthen cooperation among them in their efforts to combat corruption.

The transparency of its activities should also be highlighted. Thus the provisions contained in the Rules of Procedure of the Committee of Experts regarding the disclosure of materials, how the topics for review are selected, the questionnaire and the countries' responses thereto, the methodology used to review them, and the final reports on each country in each round of review are of great importance.¹⁸

The Rules of Procedure also establish a kind of 'due process' aimed at ensuring the balanced participation of its members in country reviews. The rules include different stages: the Technical Secretariat prepares a draft preliminary report, then experts from two countries selected at random form a review subgroup to provide feedback on that draft, and next the review subgroup meets with authorities of the country under review to clarify any discrepancies in the draft report. Finally, all members of the committee discuss the report at a plenary session, with a view to its adoption.

In each round of review, the committee follows a methodology that provides, inter alia, that the review will seek: (1) to determine whether the country has a legal framework in place to develop the provisions being recommended; (2) to assess whether that framework is adequate for the purposes of the convention; and (3) to offer concrete recommendations on filling any gaps or altering any inappropriate or ineffective developments detected.

In order to assess the consideration that the State Parties to the MESICIC give to the mechanism's recommendations, the Rules of Procedure contain important provisions for evaluating whether the measures adopted by states satisfactorily implement the recommendations or whether additional steps are required.

By the fourth round of reviews, the committee took an important qualitative stride forward by incorporating the practice of on-site visits, which enable it to appraise 'in the field' the actions that countries are taking to implement the convention's provisions and the MESICIC's recommendations. This approach allows it to gather information in the states visited not only from officials, but also from interviews with representatives of civil society organizations, the private sector, professional associations, academics and researchers, all of which is done in the manner provided for in the 'methodology for conducting on-site visits' adopted by the committee.¹⁹

Finally, it is worth highlighting that, although the mechanism is intergovernmental in nature, it provides ample opportunities for civil society organizations to participate, such as those contemplated in the committee's Rules of Procedure, which allow them to submit proposals regarding the selection of provisions to be reviewed in each round, the methodology for their review, and the questionnaire for gathering information from states. They can also furnish information related to the questionnaire, within the same time limit as that set for the states to respond. Thus civil society organizations have recognized that the MESICIC contains the strongest formal requirements on civil society participation of international anti-corruption mechanisms.²⁰

As a result of the work of the MESICIC (in particular its Committee of Experts) since its creation in 2002, the following can be highlighted:

- completion of the first, second and third rounds of review, during which the implementation of the following convention provisions was evaluated and the corresponding reports were adopted for each country, which recommended improvements to their legal and institutional frameworks:
 - first round: standards of conduct to prevent conflicts of interest, ensure the proper conservation of public resources and report acts of corruption; systems for registering the income, assets and liabilities of persons who perform public functions; access to public information and mechanisms for civil society participation; mutual assistance and international cooperation; and the designation of central authorities for that purpose;

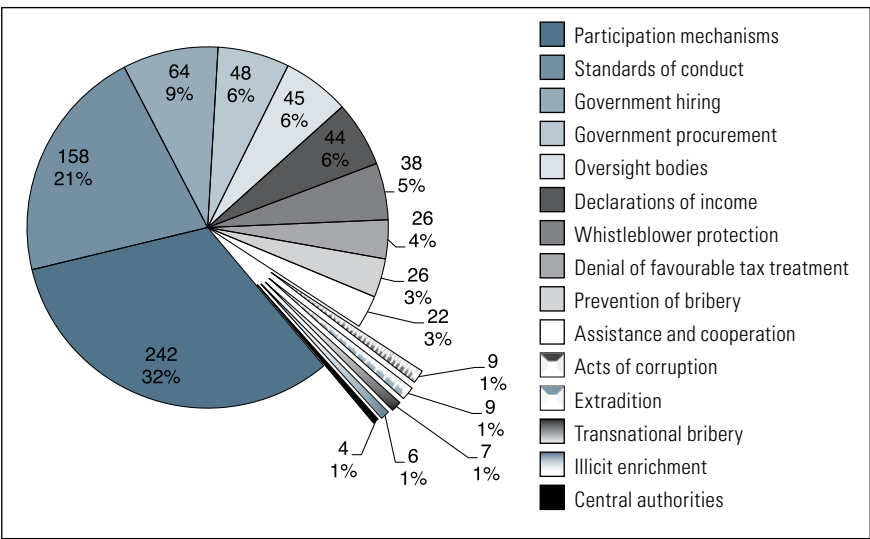
- second round: systems of government hiring; systems of government procurement of goods and services; protection of persons who report acts of corruption; and criminalization of acts of corruption; and
- third round: elimination of favourable tax treatment for the payment of concealed bribes; prevention of bribery of national and foreign government officials; transnational bribery; illicit enrichment; and extradition;
- follow-up on implementation of the recommendations from the first two rounds demonstrated that several countries have adopted new laws and legal measures in line with the convention:²¹
 - prevention of conflict of interest: 17 countries;²²
 - access to public information: 18 countries;²³
 - transparent, equitable and efficient government hiring systems: 20 countries;²⁴
 - transparent, equitable, and efficient government procurement systems: 17 countries;²⁵ and
 - protection of persons who report acts of corruption: 13 countries;²⁶
- the development of a cooperation programme to assist countries that joined it voluntarily to implement the recommendations made to them. Under the programme, 17 workshops have been held and attended by national official and civil society organizations, each of which involved the preparation of a national plan of action;²⁷
- the adoption of hemispheric reports corresponding to the first three rounds of review,²⁸ which synthesize the main recommendations, supporting activities carried out by the MESICIC Technical Secretariat and the results of follow-up measures;
- publication of the first two reports on progress in implementing the convention,²⁹ which summarize the steps reported annually by states to move forward with that process (see figure 3.1);
- progress with the fourth round of review, in which a comprehensive analysis is being conducted of the performance by the oversight bodies regarding their functions to prevent, detect and punish acts of corruption, including the on-site visits discussed above;³⁰
- the preparation of legal cooperation tools by the MESICIC Technical Secretariat to help countries combat corruption, including:
 - the systematization of the information provided by the state parties to the MESICIC on their provisions and measures related to the

convention topics dealt with in the rounds of review, thus facilitating their consultation and understanding;

- the preparation of guides for lawmakers on the convention provisions examined in the first two rounds of review to help countries implement recommendations requiring the adoption or amendment of laws or legal measures;
- the drafting of model legislation on five preventive measures set forth in the convention (access to public information; mechanisms for civil society participation in preventing corruption; conflicts of interest; systems for registering the income, assets and liabilities of persons who perform public functions; and systems for protecting those who report acts of corruption);
- hemispheric conferences with governmental and civil society experts from all over the region on issues such as the protection of whistleblowers in cases of suspected corruption, civil society participation and private sector responsibility in the fight against corruption, as well as training initiatives to help prevent this problem;
- the preparation of a set of training guidelines for individuals appointed to the MESICIC as experts by the member states, to provide them with a full understanding of how the mechanism operates;
- the dissemination, through a anti-corruption newsletter that is widely circulated, of developments in the MESICIC framework and future activities;
- making the Criminal Matters Network available to all countries for use in corruption cases, as well as the provision of training so that it can be fully utilized; and
- the development of the Anticorruption Portal of the Americas on the OAS website, which provides access to the existing cooperation tools and up-to-date information on all OAS/MESICIC anti-corruption activities, including country reports, hemispheric reports and progress reports on implementation of the convention.



Figure 3.1: Number of actions implemented by states in response to first three rounds of the MESICIC review



Source: OAS.

Conclusion

This chapter presents two examples in which all the OAS member states have worked together—on the basis of the inter-American law developed within the OAS framework with the support of the General Secretariat—to strengthen the domestic and international dimensions of their activities in order to develop new legal standards and allow the consolidation of their institutions within a democratic context governed by the rule of law.

In both examples, the concrete actions undertaken by the OAS have had an immediate twofold effect: on the one hand, these conventions have been ratified by a great number of states because of their perceived effectiveness, and, on the other hand, they have improved national laws and institutions, which has brought an immediate positive impact on democracy, governance and the rule of law.

In that regard, institutionalization and systematic continuity in the work of the legal cooperation mechanisms referred to in this chapter have been critical to their success. Both cases have been examples of continuity and perseverance, as opposed to isolated or sporadic measures. On the contrary,

both REMJA and the MESICIC represent genuine organized and systemic processes of legal cooperation among the states of the Americas.

The criminal matters cooperation mechanism in the framework of the REMJA process

The REMJA framework has consolidated a systemic process of hemispheric cooperation in legal matters. Among other things, this allows follow-up on progress in the implementation of the Inter-American Convention on Mutual Assistance in Criminal Matters and states' commitments thereunder.

From their very first meeting, the states' central authorities in this field adopted specific recommendations that the countries pledged to implement to ensure prompt, expeditious, efficient cooperation. Before each meeting, the states are required to complete a questionnaire that probes in detail countries' progress in implementing the recommendations as well as other specific developments made by them in this area. The Technical Secretariat then summarizes the advances made by states and identifies areas in which additional steps are needed. On the basis of this information, the authorities offer new recommendations regarding concrete actions to be taken to continue strengthening hemispheric cooperation in this field.

The collective reviews that have been carried out in this area have led to the adoption of new, concrete decisions for improving hemispheric cooperation in criminal matters. One of the most practical, useful and important decisions relates to the creation, consolidation and maintenance of the Criminal Matters Network. The network has been continuously improved as the result of an ongoing review process among states, supported by the REMJA Technical Secretariat, which has resulted in the introduction of new components and technological tools.

Furthermore, as a result of these collective review processes, the REMJA Working Group on Mutual Assistance in Criminal Matters has put forward recommendations and adopted specific lines of action to strengthen cooperation in this sphere, including the adoption of concrete legal cooperation tools such as model laws, guidelines on best practices and proposed hemispheric legal instruments.

At its biennial meetings, REMJA, as the main hemispheric forum for legal cooperation in criminal matters, considers progress in this field and the recommendations formulated by the working group. In turn, it makes recommendations to states and issues instructions to the working group and



the Technical Secretariat, which are expected to submit progress reports on the recommendations at the following REMJA meeting. All of these reports and recommendations are publicly available on the REMJA website.³¹

The MESICIC

With respect to the MESICIC, genuine case studies are carried out on a state-by-state basis in accordance with a set of standard rules and procedures. The reports based on the reviews of each state conducted in the three rounds completed to date, and thus far in the fourth round, examine their implementation of the convention's provisions and identify areas in which more work is needed and where objective results have been achieved. On the basis of this examination, detailed measures are recommended for surmounting any shortcomings.

Since the second round, each state has been required to provide information on the steps it has taken (and the results it has obtained) in implementing the recommendations made in the earlier rounds. In each case, the MESICIC Committee of Experts' country reports have offered an opinion on each of the recommendations and suggested measures for their implementation, and assessed whether (based on the actions reported) the appropriate steps have been taken and whether additional action is required.

The introduction of on-site visits to states has proved a major innovation, making it possible to collect first-hand information from both government institutions and civil society organizations, as well as to further consolidate the quality, solidity, legitimacy and usefulness of the reports on each state. To date, more than 100 case studies have been carried out in the country reports adopted by the MESICIC. These case studies, along with other MESICIC reports and recommendations, are publicly accessible on the Anticorruption Portal of the Americas on the OAS website.³²

The consolidation of the MESICIC as a best-practices forum should also be noted. This has been further strengthened by allowing each state the opportunity to report—using a standard format—any best practices it has identified, which are then included in a special section of the country report.

The MESICIC has set in motion a dynamic legal cooperation process that is continuously evolving and improving. As part of this effort, at the end of each round of review the MESICIC Committee of Experts adopts a hemispheric report that, among other things, summarizes the results of the evaluations in the country reports and offers collective recommendations for advancing

public policies and strengthening hemispheric cooperation against corruption.

Likewise, the Conference of State Parties to the MESICIC, the mechanism's supreme body, meets periodically to analyse its work and make concrete recommendations for its consolidation and improvement. In its periodic assessments, the conference has adopted a number of fundamental recommendations, including ones that concern the participation of civil society organizations, systemic follow-up on implementation of recommendations from previous rounds in the country reports and the conduct of on-site visits.

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Notes

¹ Hobsbawm 2000, p. 9.

² Arrighi 2011.

³ From the 1970s onwards, English-speaking Caribbean countries as well as Canada also joined, and the organization increased from 21 to 35 members.

⁴ OAS 1992.

⁵ The convention has been ratified or acceded to by the following 27 countries: Antigua and Barbuda, Argentina, Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, the United States, Uruguay and Venezuela.

⁶ REMJA meetings have since been held in Lima, Peru, in 1999; in San Jose, Costa Rica, in 2000; in Port of Spain, Trinidad and Tobago, in 2002; at OAS headquarters in 2004; in Santo Domingo, Dominican Republic, in 2006; in Washington, D.C., in 2008; in Brasilia, Brazil, in 2010; and, most recently, in Quito, Ecuador, in 2012.

⁷ The working group has since met in Brasilia, Brazil, in 2005; in Bogota, Colombia, in 2007; in San Salvador, El Salvador, in 2009; and, most recently, in Asunción, Paraguay, in 2012.

⁸ OAS 2000.

⁹ OAS 2001a.

¹⁰ OAS 2002.

¹¹ Ibid.

¹² See <<http://www.oas.org/juridico/mla>>.

¹³ UNODC 2008, p. 139.

¹⁴ OAS 1996.

¹⁵ OAS 2001b.

¹⁶ These reports are available at <http://www.oas.org/juridico/english/mesicic_reports.htm>.

¹⁷ OAS 1997

¹⁸ OAS 2007.

¹⁹ OAS 2011.

²⁰ Trivunovic et al. 2013.

²¹ This follow-up is described in the country reports from the second and third rounds of review, the hemispheric reports corresponding to those rounds and the committee's two progress reports on implementation of the convention. The numerical data and examples cited have been taken from these last two reports, all of which are available at <http://www.oas.org/juridico/english/mesicic_reports.htm>.

²² Including the United States, Canada, Costa Rica, Panama, Guyana, Trinidad and Tobago, Brazil, Bolivia and Chile.

²³ Including El Salvador, the Dominican Republic, Jamaica, Belize, Chile, Colombia and Brazil.

²⁴ Including Canada, Costa Rica, Belize, Argentina, Ecuador and Uruguay.

²⁵ Including Panama, Guyana, Jamaica, Paraguay, Peru, Bolivia and Mexico.

²⁶ Mexico, the United States, Costa Rica, Trinidad and Tobago, Guyana and Peru.

²⁷ The countries are Argentina, Paraguay, Nicaragua, Colombia, Honduras, Peru, Ecuador, Uruguay, Panama, El Salvador, Belize, Guatemala, the Dominican Republic, Suriname, Trinidad and Tobago,

Costa Rica and Bolivia. These national plans of action are available at <http://www.oas.org/juridico/english/mesicic_cida_project_plans.htm> and <http://www.oas.org/juridico/english/mesicic_cida_project_backg_en.htm>.

²⁸ These reports are available at <http://www.oas.org/juridico/english/mesicic_reports.htm>.

²⁹ Ibid.

³⁰ On-site visits have been conducted in Brazil, El Salvador, Mexico, Bolivia, Paraguay, Peru, Costa Rica, Argentina, Trinidad and Tobago, Honduras, Panama, Chile, Uruguay, Colombia and Guatemala. See *ibid.*

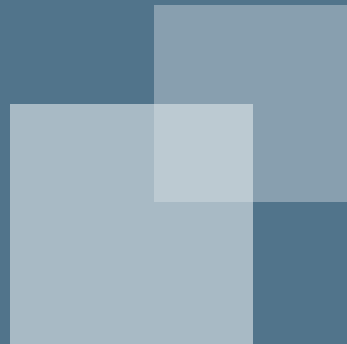
³¹ See <<http://www.oas.org/en/sla/dlc/remja>>.

³² See <<http://www.oas.org/juridico/english/FightCur.html>>.



Chapter 4

Promoting the Rule of Law, Democratic Governance and Human Rights in the Pacific: The Role of the Pacific Islands Forum



Chapter 4

Lorraine Kershaw



Promoting the Rule of Law, Democratic Governance and Human Rights in the Pacific: The Role of the Pacific Islands Forum

Introduction

The Pacific Islands Forum (PIF) is the premier intergovernmental organization in the Pacific region. Comprising 16 independent and self-governing states located in the North and South Pacific, the forum's role is to strengthen regional cooperation and integration in order to progress the members' shared goals of economic growth, sustainable development, good governance and security.

In the course of its 42-year history, the PIF has grown significantly in terms of its membership, the range of issues it addresses, and its policy development and decision-making architecture. It has also evolved to articulate a set of shared principles and values, which include commitments to the rule of law, democratic governance and respect for human rights. These commitments are now reflected in its constituent treaty and reinforced by other high-level instruments and declarations.

To date, the PIF has facilitated a broad range of responses and initiatives in support of the rule of law, democratic governance and human rights in the Pacific, including through: (1) initiation and oversight of responsive measures under the Biketawa Declaration of 2000; (2) the development of legal frameworks; (3) the facilitation of regional law enforcement cooperation; (4) promoting the ratification and implementation of international human rights treaties; and (5) exploring opportunities for regional cooperation and integration in legal and accountability institutions. This chapter discusses the forum's work in these five areas. In particular, it will describe the measures taken by the forum under the auspices of the Biketawa Declaration in

response to crises in the Solomon Islands and Fiji. Before doing so, the chapter provides a brief overview of the PIF, including the emergence of the rule of law, democratic governance and human rights as forum concerns.

Setting the scene

Institutional overview

The PIF was created in 1971 as an ad hoc meeting of the heads of government of five newly independent Pacific island countries plus Australia and New Zealand to informally discuss ‘matters directly affecting the daily lives of the People of the Islands of the South Pacific, devoting particular attention to trade, shipping, tourism and education’.¹ It now has 16 member countries² and allows non-sovereign associate members (such as New Caledonia and French Polynesia) to participate, to a certain extent, in forum meetings and activities. It also admits as observers some territories and intergovernmental organizations whose membership includes a significant number of PIF members.³

As stated in its constituent treaty—the Agreement Establishing the Pacific Islands Forum⁴ (the agreement)—the purpose of the PIF is to ‘strengthen regional cooperation and integration, including through the pooling of regional resources of governance and the alignment of policies, in order to further Forum members’ shared goals of economic growth, sustainable development, good governance and security’.⁵ The agreement also establishes the annual meeting of heads of government of forum members (referred to as forum leaders) as the organization’s pre-eminent decision-making body. The leaders’ meeting is chaired (and typically hosted) by the head of government of an appointed member, which holds the position of PIF chair until the next meeting.

Since shortly after the PIF first convened, it has been supported by various forms of a secretariat established under treaties agreed by forum members. Now known as the PIF Secretariat, its primary role is to ‘provide advice, coordination and assistance in implementing the decisions of the Forum Leaders’.⁶ The Forum Officials’ Committee, which comprises representatives from all forum members, oversees the operations of the Secretariat and provides high-level strategic advice to leaders.

While not specifically referenced in the agreement, the forum also encompasses a broad array of committees and meetings that contribute to identifying regional priorities and developing proposals for advancing



regional cooperation and integration. It includes official and ministerial-level meetings, some of which convene on an ad hoc basis to address discrete issues while others are established on a standing basis to address thematic or sectoral issues.⁷ The Forum Regional Security Committee (FRSC) is the key forum mechanism for discussing issues concerning the rule of law, democratic governance and human rights, and is discussed in more detail below.

The commonality and diversity of the forum's membership

A brief overview of the member countries gives context to a region that is geographically remote from most other regional 'hubs', and which does not feature regularly in mainstream media beyond the Pacific. Within the PIF community, the term 'Forum Island Country' refers to all members except Australia and New Zealand. Of the 14 Forum Island Countries (FICs), all are sovereign states except for Niue and the Cook Islands, which are self-governing countries in a state of free association with New Zealand. All Forum Island Country sovereign states are members of the UN, and are recognized as small island developing states.⁸ Five fall within the UN's classification of least developed countries.⁹

While sharing many geographic and cultural commonalities arising from proximity, FICs also demonstrate considerable diversity. For example, while they all have small populations relative to most parts of the world, there is a significant range within the region; Papua New Guinea has a population of approximately 6.7 million and Niue a population of 1,500. While all countries (except Tonga) experienced a colonial past, the forms of colonial administrations were diverse, as were the circumstances and timing of independence.¹⁰ Disparate cultural identities and groupings are a particular feature of the countries comprising the sub-region of Melanesia (Papua New Guinea, Vanuatu and the Solomon Islands). For example, Papua New Guinea has over 800 known language groups. By contrast, the countries of Polynesia (Samoa, Tonga, the Cook Islands, Tuvalu and Niue) and Micronesia (Nauru, Kiribati, the Federated States of Micronesia, Palau and the Republic of the Marshall Islands) are regarded as predominantly ethnically homogeneous.

While admittedly simplistic, the above description seeks to highlight the diversity of the PIF's membership, a factor that is often overlooked in discussions and critiques of the forms and effectiveness of regional cooperation in the Pacific region.

Recognition of the rule of law, democratic governance and respect for human rights as forum principles

While the forum's core function has always been to facilitate cooperation between its member countries, the range of issues that has become the focus of cooperative action has expanded throughout the course of its history.

As indicated above, the original motivation in creating the PIF was to provide an opportunity for newly independent Pacific island countries to discuss regional political issues (such as nuclear testing and decolonization) and proposals for economic cooperation between member countries (such as the development of regional shipping and aviation services). In its second decade, the forum expanded into the international realm by developing strong regional positions and undertaking regional initiatives related to international negotiations on the law of the sea and fisheries management, as well as nuclear non-proliferation.¹¹ In the following two decades, regional responses to issues such as sustainable development and climate change have featured prominently on the forum's agenda, as have regional initiatives to strengthen trading relationships (both within the region and beyond) and regional measures to address international security concerns, in particular terrorism and transnational organized crime.

In this latter phase, the PIF has also directed greater attention to articulating, documenting and, in certain instances, enforcing the forum's underlying principles and values. In 2000, forum leaders adopted the Biketawa Declaration, in which members committed themselves to guiding principles to prevent crises (broadly defined) and a mechanism for initiating regional assistance to members experiencing crises. The declaration represented a significant departure from forum leaders' earlier disinclination to engage on internal security matters and political crises in member countries. The principles articulated in the declaration include 'the rule of law' and a 'belief in the liberty of the individual under the law'.

In 2003, the Biketawa Declaration was supplemented by the Forum Principles of Good Leadership. Developed through extensive regional consultations, the principles represent a normative framework for the conduct of elected leaders, providing a benchmark to help member countries develop measures to strengthen good governance in their jurisdictions.¹² The principles include respect for 'democratic processes and institutions, the rule of law and the independence of the judiciary and the legislature' and a commitment to 'the protection of fundamental human rights'.



The forum's principles and values were further elaborated and formalized following a high-level review undertaken by an Eminent Persons' Group (EPG) in 2003–04, which led to the adoption of a Vision for the Pacific, which included the leaders' belief that the region 'can, should and will be a region of peace, harmony, security and economic prosperity, so that all of its people can lead free and worthwhile lives'.¹³ The vision also expresses leaders' intention that the Pacific region '[be] respected for the *quality of its governance*, the sustainable management of its resources, *the full observance of democratic values and for its defence and promotion of human rights*' (emphasis added).

The new directions proposed for the PIF in the leaders' vision also prompted the development in 2005 of a new constituent treaty for the forum (the 2005 Agreement Establishing the Pacific Islands Forum). The agreement replicates in its preamble the commitments to the rule of law, democratic governance and respect for human rights contained in the leaders' vision.

PIF approaches to promoting the rule of law, democratic governance and human rights

The PIF facilitates a broad range of responses and initiatives in support of the rule of law in member countries:

- the initiation and oversight of responsive measures under the Biketawa Declaration;
- the development of legal frameworks;
- the facilitation of regional law enforcement cooperation;
- promoting the ratification and implementation of international human rights treaties; and
- exploring opportunities for regional cooperation and integration in legal and accountability institutions.

The FRSC

Before describing these responses and initiatives in more detail, it should be noted that these have arisen primarily in the context of the PIF's discussions and policy development on regional security issues. Within the forum, the FRSC represents the top mechanism for directing and coordinating the development of regional policies and activities to address regional security threats. Since the first regional security declaration adopted by PIF leaders

in 1992 (the Honiara Declaration), the forum's approach to security has developed from the initial orthodox concept of 'state security' to the broader concept of 'human security'. While threats to state security—which in the Pacific context primarily include transnational organized crime, armed conflict and unlawful transfers of political power—continue to be priorities for member countries, the broader conception of human security has caused members to prioritize regional responses to issues such as sexual and gender-based violence and the vulnerability of urban-based youth to crime. The concept and objective of good governance have also been increasingly recognized as inextricably linked to the forum community's expectation of security.¹⁴

The FRSC comprises member countries and the various regional organizations with law enforcement and justice-related mandates, including the Pacific Islands Chiefs of Police, the Oceania Customs Organisation, the Pacific Immigration Directors' Conference and the Pacific Islands Law Officers' Network. International organizations operating in the security and law enforcement sphere¹⁵ also regularly participate in the annual meeting of the FRSC for the opportunity it provides to share information with senior officials from the foreign affairs, internal affairs and justice ministries of member countries.

The core function of the FRSC is to provide advice to PIF leaders on the wide range of security issues that affect (or may affect) the Pacific region. Within these broad terms of reference, the FRSC identifies opportunities for regional cooperation in addressing current and emerging security threats; facilitates the exchange of information about the types of technical assistance available to FICs on regional security priorities; shares information about the security environment of the individual countries; and provides a level of oversight of activities initiated under the Biketawa Declaration.

On the basis of advice from the FRSC, forum leaders regularly reinforce the importance of regional cooperation as a way to maintain and improve the region's security, and endorse specific strategies, such as increasing regional participation in relevant regional and international negotiations and treaties. For example, at their most recent meeting in the Republic of the Marshall Islands in September 2013, forum leaders 'committed to increasing efforts to address corruption, including through ratification and implementation of the UN Convention Against Corruption'.¹⁶ They also drew on the advice of the FRSC and reports from ministerial-level meetings in their deliberations on current measures under the Biketawa Declaration in relation to Fiji and the Solomon Islands.



Responsive measures under the Biketawa Declaration

As mentioned above, the Biketawa Declaration provides a high-level framework for PIF members to respond collectively to security and governance challenges experienced by a member country. The framework established by the declaration comprises three main elements:

1. a set of guiding principles for governance;
2. a range of actions that forum members can take in times of crisis or in response to a member's request for assistance; and
3. issues to be taken into account in developing a regional response to a crisis.

The guiding principles contained in the declaration emphasize 'the peaceful transfer of power, the rule of law and the independence of the judiciary, just and honest government'. They also highlight the importance of transparency, accountability, participation and equity in the exercise of governmental authority.

The declaration asserts a role for the PIF in collectively taking action 'in times of crisis or in response to members' request for assistance'. It empowers the secretary general of the forum, in consultation with the forum chair, to urgently initiate a process of consultation with the relevant member and the broader forum community with a view to facilitating a range of actions, including a statement of the members, a fact-finding mission, the convening of an EPG, third-party mediation, or the convening of a special high-level FRSC meeting or an ad hoc meeting of forum ministers. If a crisis still persists, the declaration empowers the secretary general to convene a special meeting for forum leaders to consider other options—including, if necessary, 'targeted measures'.

The declaration requires that any regional response to a crisis should take into account seven guidelines, which include: the need for consultation with the authorities of the relevant country; the importance of credibility and integrity on the part of forum representatives involved in brokering a resolution to the crisis; the development of a sufficient degree of consensus with those responsible for implementing the response at the domestic level; and the need for the response strategy to be coherent, consistent and cost effective. The guidelines also stipulate that the regional response should involve other key international and regional organizations and national actors.

Responsive measures have been initiated under the Biketawa Declaration three times since its adoption in 2000, in the Solomon Islands, Nauru and Fiji. More detailed discussion of the regional responses to security and governance crises in the Solomon Islands and Fiji follows in the second part of this chapter.

Promoting the development of effective legal frameworks

There has been a long-standing recognition within the PIF of the fundamental importance of national legal frameworks to underpin the implementation of policies designed to promote regional objectives, including those relating to economic growth, sustainable development, security and good governance.

The role of legal frameworks has been particularly emphasized in the context of strategies to address regional security concerns. For example, in the Honiara Declaration of 1992 forum leaders recognized the need to develop and enact new or improved national laws on transnational crime matters such as extradition, the proceeds of crime, mutual assistance in criminal matters, money laundering and illicit drugs. In the Nasonini Declaration of 2002, forum leaders responded to the heightened security environment following the events of 11 September 2001 and underlined the importance of members introducing legislation to combat serious crime (including money laundering, drug trafficking, terrorism and terrorist financing, people smuggling and people trafficking) in accordance with international requirements in these areas.

Notwithstanding political recognition of the importance of developing and enacting laws to facilitate a range of policy objectives, the national administrations of most Forum Islands Countries have to contend with significant human and financial constraints across all sectors, including the specialized field of the development and drafting of legislation. In recognition of these impediments, the forum Secretariat works in various ways to help FICs develop and draft legislation.

In terms of developing legislation, the Secretariat has coordinated, in consultation with members and other regional and international organizations, regional model laws on specific issues for which legislative action has been encouraged by leaders. For example, model laws have been developed in relation to extradition, mutual legal assistance, the proceeds of crime, transnational organized crime, terrorism, weapons regulation, drug control and sexual offences. Model legislation has also been prepared to assist member countries seeking to incorporate the Forum Principles of Good Leadership



into law. While serving as a resource on which members can draw to adapt to their specific circumstances, the model laws also facilitate the harmonization of legal regimes between the different jurisdictions, and as such improve members' ability to engage in international legal cooperation. FICs can also draw on the legislative drafting services provided by the PIF Secretariat, which employs a full-time legislative drafting officer whose primary role is to provide direct drafting assistance (upon request) to government law offices in member countries.¹⁷

It is acknowledged that, notwithstanding the availability of model laws and expert assistance to undertake legislative drafting, the progress of member countries' enactment of regionally prioritized legislation has generally been slow. Competing policy priorities, limited government resources and infrequent parliamentary sessions are just some of the factors regularly cited as impeding more expeditious implementation of regional legal commitments.

Facilitating regional law enforcement cooperation

A number of high-level forum instruments emphasize the importance of strengthening regional law enforcement cooperation to combat regional security threats and, by implication, maintain and strengthen the rule of law in the Pacific. For example, the Honiara Declaration on Law Enforcement Cooperation—which was adopted by PIF leaders in 1992 and remains the key framework for the forum's approach to regional/international law enforcement cooperation—recognizes that the 'potential impact of transnational crime was a matter of increasing concern to regional states [*sic*]' and that 'there was a need for a more comprehensive, integrated and collaborative approach to counter these threats'. The declaration further records forum leaders' intention that 'law enforcement cooperation should therefore remain an important focus for the region'. Subsequent declarations, including the 1997 Aitutaki Declaration and the 2002 Nasonini Declaration, have further reinforced the forum's commitment to strengthening regional law enforcement cooperation.

As mentioned above, the FRSC is the top regional mechanism for developing policy and coordinating activities on law enforcement cooperation, including the provision of technical assistance to law enforcement agencies in FICs. Current initiatives include improving the exchange of information between law enforcement agencies (both within national administrations and between different jurisdictions) to enhance countries' ability to prevent, investigate and prosecute transnational crime; and increasing the capacity of law enforcement agencies to manage their borders and combat cyber-crime.

Promoting human rights

In recent years, the forum has become increasingly engaged with human rights issues, in particular members' participation in the international human rights system.

Prior to the Auckland Declaration of 2004 and the 2005 agreement (described above), express references to human rights and human rights treaties in the official documents of the forum arose primarily in three different types of discussions: about decolonization and independence;¹⁸ about leadership and state stability, that is, the Biketawa Declaration and the Forum Principles of Good Leadership; and about specific policy issues with incidental reference to a corresponding international treaty (e.g., PIF leaders' endorsement of regional strategies on children and people with disabilities). However, the Auckland Declaration and the 2005 agreement both expressly identified leaders' aspiration that the Pacific be a region that is respected for 'its defence and promotion of human rights'.

In 2005, leaders also endorsed the Pacific Plan for Strengthening Regional Cooperation and Integration¹⁹ as a regional framework for promoting regional cooperation and integration in economic growth, sustainable development, good governance and security. The plan identified 'the ratification and implementation of international human rights treaties' by FICs as an implementing strategy for the objective of good governance.

These political-level statements and policy directions have provided a platform for increasing regional resources to assist FICs engage with the international human rights system. In 2012, the European Union (EU) entered into a three-year arrangement with the forum Secretariat to help FICs ratify and implement human rights treaties. Under this arrangement, the PIF Secretariat is responsible for overseeing the delivery of a broad range of training and technical assistance. This work is undertaken in partnership with the two other key human rights agencies in the Pacific: the UN Office of the High Commissioner for Human Rights and the Secretariat of the Pacific Community's Regional Rights Resource Team.²⁰

There have been some significant achievements in the past few years related to the region's engagement with the international human rights system, for example, Palau's signature of nine international human rights treaties in 2011. However, much work lies ahead for the governments of FICs to ensure that policy and legislative development take into account the obligations they have assumed as parties to these treaties.



Exploring opportunities for regional cooperation and integration in legal and accountability institutions

Most FICs have limited human and financial resources, which significantly affects their ability to provide many public services and maintain key public institutions, including those involved with maintaining the rule of law. As mentioned above, smaller jurisdictions face serious difficulties in updating and reforming their legal frameworks due to a shortage of experienced parliamentary counsel. In addition, a number of countries are unable to sustain permanent judges for their high courts, and most do not have a permanent court of appeal, but rely on expatriate judges to sit on these courts. Similarly, most jurisdictions experience considerable difficulty in sustaining accountability and integrity institutions, such as auditors general and ombudsmen.

The Pacific Plan (described above) encourages national governments, regional and international organizations, and development partners to deepen their cooperation and (where relevant and appropriate) to consider pooling resources to establish regional services and institutions to improve economic growth, sustainable development, security and good governance in the region. Under the governance pillar of the plan, a number of activities have been undertaken to explore options for deepening regional cooperation, and possibly establishing regional or sub-regional institutions, in the legal and accountability sphere.

The Pacific Islands region has a range of specialized networks or associations that promote technical cooperation in the legal and accountability sphere. For example, the Pacific Islands Law Officers' Network, the Pacific Judicial Conference and the Pacific Prosecutors' Association each provide different actors within the legal sector the opportunity to meet and share information and experiences, and develop joint solutions to commonly experienced problems. In the accountability sphere, the Pacific Ombudsman Alliance serves as an important forum for dialogue, cooperation and facilitation of technical assistance for ombudsman and allied institutions. Similarly, the Pacific Association of Supreme Audit Institutions works to strengthen regional cooperation in this area and build and sustain public auditing capacity.²¹

Regional cooperation in the legal sector

In the context of the Pacific Plan, PIF leaders agreed in 2007 to 'deepen regional cooperation between key actors in the legal sector in the region' and directed research and analysis for 'the possibilities for regional support,

including through pooling of resources and regional integration, in legal institutions and mechanisms providing legislative services, and in the area of judiciaries, courts and tribunals'.²² In response to this direction, the forum Secretariat has conducted extensive research and consultations on options for regional cooperation and integration in the field of legislative drafting, and commenced initial research on the viability of a regional court of appeal.

Consistent with the emphasis in the Pacific Plan on pooling resources to address national capacity constraints, the PIF Secretariat proposed establishing a regional legislative drafting service. Despite the cost-savings potential of such a service, consultations to date have indicated reluctance on the part of most jurisdictions to establish such an institution. This reluctance is understandable given the relatively recent history of independence among the forum's membership and countries' interest in developing national institutions and expertise.²³

While the possibility of a regional legislative drafting service has not been pursued, the Secretariat has worked closely with the government legal offices of member countries and other regional and international organizations to address the common concerns raised by senior legal officials concerning the development of laws in their respective jurisdictions. For example, in response to the regularly voiced concern that there are insufficient opportunities for legislative drafters to meet and discuss professional issues, the Secretariat convened a meeting of legislative drafters from the region in 2012. At this meeting, senior legislative counsel from most FICs discussed the issues they faced in accessing and delivering high-quality legislative drafting services, and identified ways to address common challenges and constraints (documented in the Regional Action Plan on Sustainable Legislative Drafting Capacity). On the basis of the success of the 2012 meeting, the Secretariat intends to convene these meetings on a biennial basis, monitor the progress of the Regional Action Plan and provide support to forum members as required in undertaking national activities identified in the plan.

Regional deliberations on the viability of a regional human rights commission

A regional human rights commission is also the subject of exploratory consideration. While there have been calls for such an institution to be established from civil society, academia and eminent persons for some time, the issue only formally featured (albeit as a medium-term priority) on the forum's policy agenda in the context of the Pacific Plan.



On the basis of a recommendation from the FRSC that the concept should be explored further, the PIF Secretariat convened the inaugural meeting of the Regional Human Rights Mechanisms Working Group in 2013. The functions of the working group include: undertaking scoping and research on the establishment of regional human rights mechanisms; facilitating consultations and educational activities on the purpose and functions of national and regional human rights mechanisms; and, based on the consultations, developing appropriate models and relevant budgets towards advancing the development of regional human rights mechanisms for consideration by forum members, the forum Secretariat, the Secretariat of the Pacific Community, civil society organizations and the UN Office of the High Commissioner for Human Rights.

At this early stage in the process it is difficult to anticipate the ultimate form of a regional human rights institution that might be agreed by forum members. Different stakeholders have significantly different expectations and concerns. Civil society organizations and human rights advocates stress the importance of an institution with a clear enforcement role, and governments are concerned about the impact of a regional enforcement body on sovereignty and national decision-making. An incremental approach is likely to be favoured, with education and provision of technical assistance featuring as the primary focus of a regional human rights institution.

Case studies of responsive measures under the Biketawa Declaration

The following section provides a broad overview of the circumstances in the Solomon Islands and Fiji that led the PIF to initiate responsive measures under the Biketawa Declaration. The two situations represent two distinct forms of security crises, and have accordingly prompted quite different regional responses. Evaluating the effectiveness of these measures lies beyond the scope of this chapter; rather, its intention is to document (and so fill an information gap) the forum's roles and actions in these different situations.

The Solomon Islands

In 2003, the Solomon Islands became the first PIF member country to receive regional assistance under the auspices of the Biketawa Declaration. This assistance was in response to an internal security crisis that had been triggered five years previously, and which had persisted and worsened despite various forms of international intervention in that period.

By way of background, the Solomon Islands is an archipelagic state situated in the south-west Pacific Ocean (approximately 2,000km north-east of Australia). A former protectorate of the United Kingdom, it became independent in 1978 and established a parliamentary system of government that recognizes the queen of England as its head of state (represented in the Solomon Islands by the governor-general). It has a population of approximately 550,000 people. Within the predominantly Melanesian population, there are many different language and cultural groups. Tensions between different ethnic groups have been widely recognized as the principal factor leading to the breakdown of law and order and political instability in the late 1990s and early 2000s.

The use of the largest island in the Solomon Islands—Guadalcanal—as a military base in World War II led to it subsequently hosting the capital, Honiara, bringing with it a large influx of people from other islands. Over time, resentment grew among the indigenous population of Guadalcanal against the settlers (particularly those from the island of Malaita) due to their successful exploitation of economic opportunities and occupation of undeveloped land in and around Honiara. In late 1998 tensions escalated into violence, and an armed militant group of Guadalcanalese embarked on a campaign of forcible evictions of up to 20,000 Malaitans from their homes. Although negotiations were pursued between the opposing groups and a multinational Police Monitoring Group was deployed, the tensions deepened and led to the formation of an opposing Malaitan militant group (the Malaitan Eagle Force, MEF).

By the beginning of 2000, the national government had effectively lost control of Guadalcanal; the MEF controlled Honiara and Guadalcanalese militants controlled the rural areas. The Royal Solomon Islands Police Force sided largely with the Malaitans, which was regarded as a significant cause of the deterioration of security on Guadalcanal. Police also played an active role in the MEF's overthrow of the government in 2000. Although a ceasefire was subsequently negotiated between the militant groups in 2000, and a peace agreement was reached and general elections were held in 2001, the economy and security continued to degenerate.

In April 2003, the then prime minister of the Solomon Islands requested assistance from Australia to restore law and order, which initiated the development of the Regional Assistance Mission to Solomon Islands (RAMSI), funded by the governments of Australia and New Zealand. RAMSI was focused on restoring law and order, strengthening the justice system, and restoring the economy and basic services. An important feature of RAMSI was its regional composition; it included military, police and civilian



personnel from the 15 forum countries. RAMSI commenced its operations in the Solomon Islands on 24 July 2003.

RAMSI was initially endorsed by the forum pursuant to the Biketawa Declaration through a meeting of PIF foreign ministers on 30 June 2003, and later by leaders at the 2003 forum meeting in Auckland, New Zealand. Leaders issued a Forum Declaration on Solomon Islands, which included their view that ‘the 2000 Biketawa Declaration had proved its value by enabling the rapid mobilisation of support to address the serious situation [in the Solomon Islands]’.

The PIF's role in overseeing RAMSI

In addition to providing critical political endorsement for the establishment and deployment of RAMSI, the forum has also provided high-level oversight of RAMSI in varying forms during its ten-year history. While a mechanism for regional oversight was envisaged in the early stages of RAMSI's development, this was not prioritized at first. However, it became an increasingly significant issue for the Solomon Islands government, which became increasingly concerned about the size of the mission, the dominance of Australian personnel, the limited forms of monitoring of the mission and perceptions among the community that RAMSI was operating like a ‘parallel government’. The Solomon Islands government communicated these concerns to forum leaders at their annual meeting in 2006, prompting leaders to agree that a consultation mechanism should be established between the Solomon Islands government, RAMSI and the PIF, and that a task force should be established to review RAMSI.

Ultimately, a three-tier model of oversight was established:

- a triumvirate of the RAMSI special coordinator (head of mission), the forum representative to Solomon Islands and a representative of the Solomon Islands government to monitor the development activities of RAMSI;²⁴
- the Enhanced Consultative Mechanism (ECM), comprising senior officials from the Solomon Islands government, RAMSI and the forum. It is a high-level group chaired by a representative of the forum chair and includes representatives of the past, present and incoming forum chairs. It discusses the broad policy directions of RAMSI and reviews its progress; and

- the forum Ministerial Standing Committee, comprising representatives of the past, present and future forum chairs plus the Solomon Islands and Australia. The committee has provided ministerial-level oversight and governance to the RAMSI operation.

The process of downsizing RAMSI was initiated in 2012, and by 1 July 2013—a decade after RAMSI’s initial deployment—the military component had been withdrawn and the civilian development initiatives had shifted from RAMSI to bilateral programmes funded by Australia or other donors. RAMSI thus now consists solely of the Participating Police Force, which consists of police personnel from forum member countries who provide support to the Royal Solomon Islands Police Force. At their 2013 meeting, forum leaders agreed that the Ministerial Standing Committee on RAMSI did not need to meet again.²⁵ However, the PIF will continue to maintain the ECM to review developments over the ensuing year and make recommendations to forum leaders on future arrangements.

RAMSI has been widely credited with enabling the Solomon Islands to restore law and order, improve economic governance, repair and reform the machinery of government, enhance government accountability, and improve the delivery of services in urban and provincial areas. However, few would deny that there remain many challenges for the Solomon Islands as the role and influence of RAMSI significantly declines.

Fiji

The current military government of Fiji is the subject of ‘targeted measures’ under the Biketawa Declaration, which were collectively agreed by forum leaders in 2009. The measures provide that:

- the leader, ministers and officials of the Fiji government are unable to attend forum meetings; and
- the Fiji government is unable to benefit directly from forum regional cooperation initiatives or any new financial or technical assistance, other than assistance towards the restoration of democracy.

These measures do not suspend or alter Fiji’s legal status as a member of the forum; rather, they impose limits on the military government’s participation in specific forum meetings and activities.

The leaders’ decision to implement targeted measures was made following a lengthy process of consultations between the PIF and the military government



in Fiji, which began shortly after the military coup in December 2006. Indeed, the Biketawa Declaration was invoked just before the coup, in the light of the military's threats to overthrow the Fiji government.

By way of background, the Republic of Fiji Islands is a group of around 800 volcanic and coral islands situated in the south-west Pacific Ocean. It has the second-largest population of the FICs (at about 850,000). Under British administration for almost a century, Fiji became independent in 1970 and adopted a constitutional democratic form of government based on the Westminster model. It was one of the founding members of the forum and established itself as a regional hub for many FICs, hosting various regional institutions such as the forum Secretariat and the University of the South Pacific, and serves as the regional headquarters of various international bodies.

Since independence, democratic rule in Fiji has been interrupted somewhat frequently.²⁶ In its most recent coup, Prime Minister Qarase was ousted from government by the military, led by Commodore Voreqe Bainimarama. The following provides a brief overview of the actions taken by the forum in response to the coup.

Crisis prevention before the 2006 Fiji coup

In November 2006, the then prime minister of Fiji, Laisenia Qarase (who at the time was also chair of the forum), requested that, in accordance with the Biketawa Declaration, a meeting of PIF foreign ministers be convened to address a serious crisis in the relationship between the government of Fiji and the commander of the Royal Fiji Military Forces, Commodore Bainimarama, which had been steadily deteriorating during 2006. On 1 December 2006, the foreign ministers met in Sydney and expressed their firm support for the democratically elected government of Fiji, and urged that the differences between the parties be resolved through negotiation. The forum also offered to help further the dialogue between the Fiji government and the Royal Fiji Military Forces, and to provide any other assistance requested by the government. An EPG was convened to recommend a resolution of the standoff between the government and the military.

Four days later, Commodore Bainimarama announced that he had assumed executive power, dismissed the elected government of Fiji and declared a state of emergency. In the light of this situation, the forum secretary general, following consultations with the chair, recommended that the forum suspend the prime minister of Fiji's position as chair, given his practical inability to fulfil his duties. Forum leaders agreed to this course of action. Forum foreign

ministers also endorsed new terms of reference for the EPG and suspended Fijian military personnel from RAMSI.

Initiation of dialogue between the forum and the military government

Drawing on the recommendations of the EPG (which had conducted consultations in Fiji from 29 January to 1 February 2007), PIF foreign ministers agreed on 16 March 2007 to establish a Forum–Fiji Joint Working Group to engage with the ‘interim government’ about credible mechanisms for returning to democracy as soon as possible.

The first meeting of the working group—which consisted of officials from the Fiji government and from diplomatic missions of FICs based in Suva—was held in April 2007. Its fortnightly meetings focused on five issues: returning Fiji to democracy; restoring civilian rule; upholding the 1997 constitution; stopping human rights abuses and addressing allegations of abuse; and supporting a credible and independent anti-corruption commission.²⁷ The working group commissioned an Independent Technical Assessment of the Electoral Process (which concluded that elections could be held within the first quarter of 2009) and a scoping mission to determine the resources needed to conduct an election by March 2009. The interim government indicated that it accepted in principle the findings of the assessment report and, in the light of the findings of the scoping mission, established an Election Donor Coordination Committee.

Establishment of the PIF Ministerial Contact Group on Fiji

At the 2007 forum leaders’ meeting—the first following the coup—leaders welcomed the commitment by Commodore Bainimarama to hold elections in March 2009 and to accept the outcome. Leaders directed forum foreign affairs ministers to meet in early 2008 to review the progress being made by the interim government in Fiji in preparing for these elections. Forum foreign affairs ministers subsequently agreed to establish a Ministerial Contact Group (MCG) to ‘monitor the progress of Fiji’s preparations for the election and the return to democracy, and report to the 39th [2008] meeting of Forum Leaders’.

The MCG—which currently comprises ministers from Australia, New Zealand, Papua New Guinea, Samoa, Vanuatu and Tuvalu²⁸—first visited Fiji in July 2008. The talks focused on the interim government’s willingness and preparedness to hold elections by March 2009. Ministers observed that the



visit reflected forum members' continued commitment to hold constructive dialogue with Fiji, and to support and encourage Fiji to return to democracy by holding elections.

Shortly after the first MCG visit, the interim prime minister of Fiji held a media conference, expressing disappointment with the MCG's report and stating that elections would not be held until electoral reforms had been implemented through a process called the 'People's Charter'. The prime minister's retreat from his earlier promise to hold elections by March 2009, as well as his refusal to attend the 2008 PIF meeting in Niue, prompted a statement of strong concern by forum leaders, who directed the MCG to continue to monitor the situation and report back. Leaders also agreed to consider the need for a special leaders' meeting in the light of advice from the MCG.

At the invitation of the Fiji government, the MCG undertook a second visit to Fiji in December 2008 and met a range of stakeholders including the interim prime minister and members of the cabinet, officials from the Electoral Commission and the Office of the Supervisor of Elections, and political leaders, including the deposed prime minister and leader of the opposition. The MCG publicly expressed 'disappointment that the Fiji Interim Government had confirmed that it did not intend to hold elections by March 2009, in line with its previous commitments to forum leaders', but emphasized that their visit was undertaken in the light of 'forum members' continued commitment to constructive dialogue with Fiji, and to support and encourage Fiji to return to democracy, within the framework of the decisions of Forum leaders'.²⁹

The leaders' decision on Fiji

The forum agreed to convene a special retreat in January 2009 to discuss the situation in Fiji. The interim prime minister of Fiji did not attend, but sent the attorney-general as his representative. At the special retreat, held in Papua New Guinea on 20 January, the PIF:

- called on the interim government to provide a new timetable for elections, agreed with all key political stakeholders, and undertake and sustain serious and credible election preparations;
- agreed to the imposition of targeted measures to take effect unless:
 - the Fiji interim government nominated an election date by 1 May 2009;

- the election was held by the end of December 2009; and
- the above actions were publicly declared by 1 May 2009.

The failure of the interim government to comply with this timetable resulted in the automatic commencement of the targeted measures on 2 May 2009. While not a triggering event per se under the terms of the leaders' decision for the activation of targeted measures, the interim government's abrogation of the constitution of Fiji on 10 April 2009³⁰ was described by the forum chair in his announcement of the commencement of the targeted measures as a 'disturbing' development.

Since the leaders' decision on Fiji in 2009, PIF leaders have continued to discuss the situation in Fiji at their annual meetings—taking into account reports of the MCG, which has subsequently visited Fiji in 2012 and 2013—and make public statements that both offer Fiji the forum's support in its efforts to restore a democratic government and communicate the forum's expectations of a credible election process. The scope of the targeted measures has remained substantially the same since 2009, although a slight adjustment was made in favour of Fiji in 2011 to permit it to participate in a specific set of trade negotiations (known as PACER Plus) at the officials level, given Fiji's important economic role and links to prospects of broader regional economic integration.

On 6 September 2013, the president of Fiji assented to a new constitution that includes the requirement that parliamentary elections be held no later than September 2014. The release of the constitution has been described by forum leaders as an important step towards free and fair elections, and they have expressed a commitment to revisit the targeted measures after free and fair elections are held in Fiji.³¹

The measures related to Fiji represent the first time the forum community has officially censured a fellow member under the framework of the Biketawa Declaration. While the leaders agreed on the measures after a process of consultation, it is acknowledged that the measures have generated controversy across a broad range of stakeholders, including among members themselves in different forums. With elections imminent at the time of writing, 2014 is anticipated to be a significant year for Fiji and the forum.

Conclusion

While promoting the rule of law, democratic governance and respect for human rights did not feature as prominent concerns in the early days of the PIF, these issues have become increasingly central to the forum's agenda. The



adoption of the Biketawa Declaration in 2000 in particular represented a significant step for the forum in terms of articulating shared principles of political governance and recognizing the possibility of regional action to address crises in member countries. Under the framework of the Biketawa Declaration, the forum has responded collectively to a serious breakdown of law and order in the Solomon Islands and to a military coup in Fiji.

In addition to generating political responses to rule of law issues, the forum provides an important space for member countries to cooperatively address issues arising from the critical lack of human, technical and financial resources that most members experience, and which represent a serious impediment to their efforts to maintain the rule of law, democratic governance and human rights. Through the forum, cooperation can take many forms, for example the development of regional resources (such as model laws), the provision of technical assistance or the exploration of new policy proposals (such as the establishment of regional institutions). These forms of cooperation serve as a crucial link between the political-level commitments made by forum leaders and the realization of these commitments at the national level.

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Notes

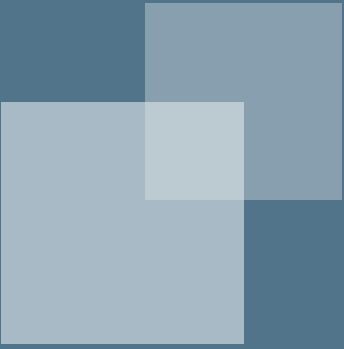
- ¹ South Pacific Forum 1971.
- ² Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Republic of the Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu.
- ³ Observers include Tokelau, Wallis and Futuna, the Commonwealth, UN, Asian Development Bank, Western and Central Pacific Fisheries Commission, World Bank, the African, Caribbean and Pacific Group of States, American Samoa, Guam and the Commonwealth of the Northern Marianas. Timor-Leste has been recognized as a special observer since 2002.
- ⁴ PIF 2005a.
- ⁵ Ibid., article II.
- ⁶ Ibid., article VIII.
- ⁷ Examples include the FRSC, the Pacific Plan Action Committee, forum trade ministers, forum economic ministers and forum disability ministers.
- ⁸ Small island developing states were recognized as a distinct group of developing countries facing specific social, economic and environmental vulnerabilities at the 1992 UN Conference on Environment and Development.
- ⁹ Vanuatu, Samoa, Tuvalu, the Solomon Islands and Kiribati.
- ¹⁰ For example, Vanuatu was jointly governed by British and French administrations before attaining independence. The majority of the countries became independent in the 1960s and 1970s, although the independence of US ‘trust territories’ occurred significantly later, with the Federated States of Micronesia and the Republic of the Marshall Islands both achieving statehood in 1986 and Palau in 1994.
- ¹¹ A historical overview of the PIF’s priorities is provided in Shibuya 2004, p. 105.
- ¹² Draft legislation was also developed to help members seeking to incorporate the principles into legislation.
- ¹³ PIF 2004.
- ¹⁴ As a practical example of the interconnectedness of the issue, the 2013 Pacific Transnational Crime Assessment advised that a key factor influencing the increasing presence of transnational organized crime groups in the region was the willingness of some elected officials to authorize or condone unlawful activities (such as providing visas in exchange for bribes, etc.).
- ¹⁵ For example, the UN Office on Drugs and Crime, the UN Office for Disarmament Affairs and various counter-terrorism-related bodies of the UN.
- ¹⁶ PIF 2013, para. 46.
- ¹⁷ The legislative drafting officer can also support government law offices by facilitating the provision of technical assistance from other regional and international organizations, as well as coordinating the delivery of professional development and training for the drafters of legislation.
- ¹⁸ For example, when considering the UN’s initiation in 1990 of the International Decade for the Eradication of Colonialism, the PIF ‘renewed its proposal that an extensive study of the remaining non self-governing territories be undertaken by the United Nations and that countries be requested to consider adopting national legislation *to promote and safeguard the human rights of peoples living under colonialism*’ (emphasis added). The issue of West Papua’s autonomy from Indonesia has also been a recurring one on the forum agenda, with leaders expressing their concern about continuing violence in Papua and ‘call[ing] on all parties to protect and uphold the human rights of all residents in Papua’.
- ¹⁹ PIF 2005b.
- ²⁰ For example, in 2012 the EU fund provided technical assistance to Tuvalu and Tonga with national consultations to prepare national reports for those states’ appearances before the UN Human Rights Council under the Universal Periodic Review. It also assisted Tuvalu with developing its national report under the UN Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and provided advice to Tuvalu and Samoa on the ratification and implementation of the UN Convention on the Rights of Persons with Disabilities.
- ²¹ While these organizations are not PIF bodies, the forum Secretariat maintains a close working relationship with them.
- ²² PIF 2007.

- ²³ It was also noted that various forms of regional legislative drafting assistance currently exist, for example through the PIF Secretariat or dedicated Pacific desks of the Australian Attorney-general's Department and the New Zealand Parliamentary Counsel's Office.
- ²⁴ The position of forum representative was established in 2007, following the recommendation of the 2005 forum EPG review of RAMSI, which had been requested by the prime minister of the Solomon Islands in early 2005 to assess the impact of the intervention and the challenges facing RAMSI in the future. The EPG was appointed by the PIF chair and comprised eminent persons from Fiji and Samoa, and the secretary-general.
- ²⁵ PIF 2013, para 30.
- ²⁶ In 1987, Fiji experienced two military coups. The coup leader, Lieutenant Colonel Sitiveni Rabuka, abrogated the 1970 constitution and declared Fiji a republic. A short period of military government and two subsequent interim administrations followed, a new constitution was promulgated on 25 July 1990, and elections were held in May 1992. Subsequently, after extensive consultations, a new constitution was adopted in 1997. On 19 May 2000, a local businessman, George Speight, seized control of the parliament and held Prime Minister Mahendra Chaudhry and members of his government hostage for 56 days. In the following months, the 1997 constitution was abrogated, the president stepped down and three successive unelected interim administrations were in power.
- ²⁷ The Joint Working Group has not met since January 2009. In September 2009, the Fiji government formally advised the PIF Secretariat that it would not participate in the working group until further notice.
- ²⁸ Tonga was one of the original members of the MCG, but withdrew in 2010 and was replaced by Vanuatu.
- ²⁹ PIF Secretariat 2008.
- ³⁰ On 9 April 2009, the Fiji High Court found that Qarase's dismissal and Bainimarama's appointment had been illegal. In response, on 10 April 2009 Fiji President Ratu Josefa Iloilo announced that he had abrogated Fiji's 1997 constitution, revoked all judicial appointments and imposed public emergency regulations. He declared himself head of state and said that Fiji would be ruled under a New Legal Order. President Iloilo subsequently reappointed interim Prime Minister Commodore Bainimarama and all nine members of the previous interim cabinet.
- ³¹ PIF 2013, paras 34–9.



Chapter 5

**Not Nudging, Embracing:
The ASEAN Human Rights
Declaration as a Catalyst
for Reinforcing a Rights-
based Approach to
Constitutionalism**



Chapter 5

Michelle Staggs Kelsall and Christoph Sperfeldt



Not Nudging, Embracing: The ASEAN Human Rights Declaration as a Catalyst for Reinforcing a Rights-based Approach to Constitutionalism

Introduction

On 18 November 2012, the heads of the ten member states of the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration (the AHRD).¹ The AHRD was the love child of consensus-based decision-making and controversy, and as a result did not receive an overly warm welcome at its birth.² Critics of the AHRD have regarded it as a purely political instrument, aimed at serving political ends rather than promoting and protecting international human rights law within ASEAN countries. Much like the Universal Declaration of Human Rights (UDHR), drafted in 1948, the AHRD has largely been critiqued as, at best, severely limited in value, or, at worst, detrimental to the enforcement of human rights in the region.

While these criticisms are warranted, they are also somewhat myopic: they speak more to the palpable frustration felt by those engaged in the work of bridging the (often sizeable) gap between regional rhetoric and domestic practice than to the instrument's inherent value. Although a focus on the 'half-empty' glass has, to date, reminded regional actors of future aspirations, it is equally important to look at what is already in the glass, that is, to make use of existing regional human rights instruments in the process of engaging with a dynamic regional human rights discourse that has evolved considerably over the past 20 years. Motivated by this change in perspective, this chapter identifies the opportunities associated with Asia's first-ever regional human

rights declaration, and challenges those who advocate ignoring the document on both theoretical and practical grounds.

From a theoretical perspective, the criticisms assume that both the legal and the political import of the AHRD should be perceived as static and unchangeable—in short, the last word on human rights in the region, and a disappointing one at that. Yet this is not the case. Declarations, like constitutions, are open to interpretation. When examined as a living instrument, the meaning of which will change over time, the strength (or weakness) of the AHRD depends more on how reform-minded parliamentarians, policy-makers and human rights advocates interpret and use it in their work than on what the instrument says or promises.

In this regard, the AHRD can more usefully be seen as the latest development in an ongoing site of contestation—one in which the tensions between member states that are proactive on human rights issues and more conservative ones have been tackled (and are continuing to be tackled) on the regional stage. Viewing the AHRD in this light shifts the epistemological focus of the instrument from what it *should* be (normative) to what it *could* become (interpretive). In other words, one no longer focuses on what the AHRD should *say*, but rather on what it could *mean*, when used in specific contexts and by specific actors.

From a practical perspective, these criticisms assume that ASEAN's role as a regional body is to act as a supranational authority on human rights for all ten domestic jurisdictions. Although the ASEAN Charter has conferred legal personality onto ASEAN, as yet there is no regional mechanism to which citizens of ASEAN countries can bring a human rights claim.³ The extent to which regional instruments and declarations provide authoritative interpretations of national law must therefore be determined on a case-by-case basis, in each individual jurisdiction, by domestic legislatures and courts. While this has led many to diminish the value of regional discourse and instruments, doing so fails to utilize a growing body of instruments, declarations, statements and communiqués for positive political and legal ends—an important opportunity, considering the extent to which non-democratic leaders (who are generally less enthusiastic about human rights domestically) continue to profess their commitment to human rights regionally.⁴ It also fails to acknowledge the incredible achievements made by government actors, academics and civil society working in south-east Asia over the past 30 years to ensure the promotion and protection of human rights.⁵

While acknowledging much of the criticism with regard to many details of the declaration, this chapter suggests that the AHRD should generally be seen as a significant step towards instituting the universality of human rights in south-east Asia. It is less a ‘nudge’ from ASEAN to individual governments, and more a reminder of the fact that the region as a whole is fully committed to embracing the human rights discourse.⁶ The potential power of this embrace should not be underestimated, given both the diversity of member states within ASEAN and the commitment the region has made towards integration. In this regard, the declaration is worthy of particular scrutiny by policy-makers from the Pacific Islands Forum (PIF) and the South Asian Association for Regional Cooperation (SAARC) as those entities enhance regional cooperation on human rights and governance issues.⁷ It may also have wider policy implications for regional actors engaging with ASEAN, such as the European Union, when thinking about how best to move forward with regional cooperation on human rights concerns.⁸

This chapter proceeds as follows. The next section details the background of the drafting of the AHRD. Then follows an analysis of how the AHRD could be used to further strengthen the position of rights holders throughout the region. The chapter refers to the ongoing process of (re)-defining and (re)-interpreting the terms of the human rights debate ‘name changing’, and argues that the AHRD can best be used to: (1) enhance constitutional interpretation or set the agenda for constitutional reform within ASEAN member states and (2) further foster a rights-based approach to domestic policy and law reform. Thereafter, it provides examples of *who* might best be placed to use the AHRD, arguing predominantly that this group comprises ‘game changers’: politicians, diplomats, academics and human rights advocates (at both the domestic and regional levels) who seek to further instigate pro-rights reform processes. The chapter also looks at *how* ASEAN might go about doing this, and asserts that game changers can use the AHRD in many creative ways, for example (1) as an advocacy tool for external actors (civil society, development partners) when lobbying or negotiating with governments and (2) to set the agenda within ASEAN and encourage greater cooperation and coordination between the existing ASEAN human rights mechanisms. Finally, this chapter draws together conclusions and recommendations.

Historical overview: the road to universalism

Unlike Europe or the Americas in the late 1940s, south-east Asia at the beginning of the 21st century has not been scarred by a protracted international armed conflict, nor do its nations share ‘a common heritage of

political traditions, ideals, freedom and the rule of law...'.⁹ Instead, ASEAN comprises member states with very diverse political systems and traditions, which are united in a common purpose of increasing the economic wealth and prosperity of the region. Against this background, Le Luong Minh, ASEAN secretary-general, argues that 'ASEAN's approach to human rights has been one to ensure unity in diversity'.¹⁰

To understand the long road that led to the adoption of the AHRD, it is necessary to understand both ASEAN's primary mode of operation (commonly referred to as the 'ASEAN way') and the way the region has positioned itself vis-à-vis the international human rights system (generally known as the 'Asian values' debate).

Grounded in the 1976 Treaty of Amity and Cooperation in Southeast Asia, the ASEAN way refers to both diplomatic norms and fundamental principles that govern the relations between ASEAN states and decision-making at the regional level. The ASEAN way emphasizes a non-confrontational approach to intergovernmental relations and consensus-based decision-making, often following intensive consultations. It is grounded in the principles of mutual respect for the independence and sovereignty of all nations and non-interference in the internal affairs of other states. This regional context has shaped the promotion of human rights norms across the region and continues to influence the evolution of a regional human rights system within ASEAN.¹¹

Yet the 'Asian values' debate, which dominated ASEAN's thinking about human rights in the aftermath of the Cold War until the early part of the new millennium, represents a specific view of human rights that now appears to be defunct. This debate positioned ASEAN (and Asian states as a whole) as culturally distinct from their Western counterparts and hence exempt from accepting 'Western notions' of human rights. The debate first emerged in 1993 as a precursor to the UN World Conference on Human Rights in Vienna. It was sparked by the Bangkok Declaration, an instrument that expressed Asian (and by extension ASEAN) governments' concern that available human rights mechanisms 'relate mainly to one category of rights, namely civil and political rights'. The Bangkok Declaration therefore stressed the 'indivisibility of economic, social, cultural, civil, and political rights' and recalled that the 1986 UN General Assembly Declaration on the Right to Development 'has recognized the right to development as a universal and inalienable right and an integral part of fundamental human rights'.¹² It illustrated a shared view among ASEAN governments of a normative contestation of the West's understanding of human rights and specific regional circumstances and needs.

Although it undermined the universality of rights discourse, the Bangkok Declaration also affirmed Asian governments' commitment to human rights and acknowledged 'the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia'.¹³ The discussions around the Vienna World Conference in 1993 hence served as a catalyst for human rights promotion in ASEAN and created momentum for further intergovernmental agreements on a rights-based approach. Perhaps the most notable of these was the 26th ASEAN Ministerial Meeting's adoption of a joint communiqué in which it was announced that ASEAN 'should consider the establishment of an appropriate regional human rights mechanism'.¹⁴

In the nearly two decades that passed between Vienna and Phnom Penh (where the AHRD was signed), significant shifts occurred within both ASEAN and in the region as a whole. Box 5.1 details the key regional developments in human rights from 1983 to 2012. From the perspective of negotiations, it is perhaps key to note that ASEAN's membership nearly doubled during the 1990s, with the accession of Cambodia, the Lao People's Democratic Republic (Laos), Myanmar/Burma and Vietnam only after the human rights 'big bang' of 1993.¹⁵ This increased political diversity generally made agreements on human rights cooperation more challenging, and required further internal deliberations before new action towards a regional human rights system could be taken.¹⁶

Box 5.1: ASEAN's long road towards a regional human rights system

- 1983 **Declaration on the Basic Duties of ASEAN Peoples and Governments:** the first attempt to establish a human rights system in south-east Asia, made by a group of civil society and academics. ASEAN never officially considered the document.
- 1993 **Bangkok Declaration and Vienna Declaration and Programme of Action,** which reiterated the need for 'establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist'. The 26th ASEAN Ministerial Meeting subsequently reaffirmed this commitment.
- 1993 **Kuala Lumpur Declaration on Human Rights,** adopted by the General Assembly of the ASEAN Inter-Parliamentary Organization. Article 21 stresses the 'responsibility of member states to establish an appropriate regional mechanism on human rights'.
- 1995 Beginning of the **enlargement of ASEAN's membership** with the accession of Vietnam (1995), Laos (1997), Myanmar/Burma (1997) and Cambodia (1999).
- 1995 Creation of the **Working Group for an ASEAN Human Rights Mechanism,** which ASEAN recognized as a dialogue partner in 1998. The mobilization and cross-border networking of civil society provides additional bottom-up pressure with growing influence at the policy level, domestically and regionally.

- 1998 Fall of the Suharto regime in Indonesia, which was the most significant of many **domestic political changes** in some of ASEAN's key member states, which contributed to raising the importance of human rights on domestic and regional agendas.
- 2004 **Vientiane Action Programme**, which proposed a series of ambitious human rights measures, including the creation of a commission on the promotion and protection of the rights of women and children, as well as the elaboration of an instrument on the protection and promotion of the rights of migrant workers.
- 2004 Adoption of the **Declaration Against Trafficking in Persons Particularly Women and Children** and the **Declaration on the Elimination of Violence Against Women**.
- 2007 **ASEAN Charter**, which declared one of the purposes of ASEAN 'to promote and protect human rights and fundamental freedoms'.
- 2007 **Declaration on the Protection and Promotion of the Rights of Migrant Workers**, which led to the establishment of an ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers.
- 2009 Establishment of the **ASEAN Intergovernmental Commission on Human Rights**.
- 2010 Creation of the ASEAN **Commission on the Promotion and Protection of the Rights of Women and Children**.
- 2012 Adoption of the **ASEAN Human Rights Declaration**.

The 2007 ASEAN Charter conferred legal personality on ASEAN and stated that one of its purposes was 'to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States'. It also included a provision that mandated the establishment of a regional human rights body.¹⁷ After nearly two years of contentious discussions about the body's terms of reference—both among ASEAN foreign ministers and with civil society—ASEAN established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009 as an intergovernmental, advisory and consultative body. In many ways, the AICHR's institutional features continue to reflect the 'ASEAN way', in particular its primary focus on the promotion (rather than protection) of human rights and consensus-style decision-making.¹⁸ Along with the establishment of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), ASEAN has progressively moved towards institutionalizing an emerging human rights system.

Yet for many the missing building block within this system was the formulation of a common standard that would guarantee coherence and shared objectives for the future. Eventually, in 2012, ASEAN adopted the AHRD.¹⁹ Following a non-transparent drafting process, the final document received mixed-to-critical reviews from commentators and civil society—



showing that the declaration is not the perfect document for which many activists and observers had hoped. Since it is largely a political document, it is merely another small step in the cautious evolution of ASEAN's human rights system.

Seeing the glass half full: engaging name changers and game changers

If the starting point of the analysis is that the AHRD has a place in the development of a coherent human rights system within ASEAN, the next question is 'what place might this instrument take?'. As highlighted above, the AHRD has *interpretive* value from a theoretical perspective. In this regard, it provides a community of human rights professionals (from civil society, government, the judiciary or private law firms) within ASEAN with another lens through which to consider their governments' human rights obligations and regional cooperation on human rights issues. From a practical perspective, it offers an additional tool through which to: (1) advocate greater coherence and clarity from their governments on issues of cross-border concern, including migration and environmental rights; (2) advocate stronger rights-based approaches to domestic law; (3) pursue stronger consensus-building on human rights issues (at the bilateral and regional levels); and (4) consider the basis for a more coherent human rights framework for cooperation, as provided in article 39 of the AHRD.²⁰

In the next section, examples are used to consider the following: *what* the AHRD could be used to do, *who* would want to use it and *how* they might go about making this happen. The examples highlight just a few of many areas and opportunities arising from the momentum of a regional human rights declaration. In keeping with the 'glass half-full approach', these suggestions are made in the hope that they may provide food for thought and catalysts for further development, rather than serve as end points in and of themselves. They can also serve as discussion points that other regional actors (from Europe, Africa, the Americas and other parts of Asia) can use to explore how best to utilize declarations to further inspire constitutional amendments and regional and domestic reform.

Harnessing the name changers: redefining the human rights agenda through the existing legal architecture

Interpreting the AHRD as a 'living instrument', the meaning of which changes over time, could be seen to imbue the document with an

‘ideological sex appeal’ that is at once both vague and indisputable. The teasing imprecision of the phrase allows the declaration to be seen as ‘a coat of many colours’, appealing to all people at once yet unable to be pinned down by anyone.²¹ The use of the ‘living instrument’ term is not intended to replace the myopia identified above with a sense of misplaced optimism, but rather to view the AHRD as able to be anchored in domestic debates and discourses. In particular, the AHRD can be used to (1) create a middle path between domestic legal instruments and the state’s international human rights obligations (or lack thereof) and (2) further harness regional efforts, by various actors from within both ASEAN and civil society, towards serving positive ends domestically. The focus is specifically on how the AHRD can be used to secure stronger rights-based approaches to constitutionalism and law reform.

Viewing constitutional commitments in the light of the AHRD

Under international law, declarations are generally considered to be non-binding instruments, but further contribute to the understanding, implementation and development of the law. However, under article 2(1) of the ASEAN Charter—an instrument that is legally binding on all ASEAN member states—ASEAN countries have committed themselves to ‘reaffirm and *adhere* to the *fundamental principles* contained in the *declarations, agreements, conventions, concords, and other treaties of ASEAN*’ (emphasis added) that are adopted in pursuit of the purposes of the charter.²² Provided one applies a ‘living instrument’ theory to the intent of the ASEAN Charter, ASEAN member states are therefore obligated to comply with the principles contained in articles 1–9 (General Principles) of the AHRD when interpreting their national laws, or at the very least view those principles as significant guidance for their interpretation.²³

All ten ASEAN member states have promulgated constitutions, and nine out of ten states have included as part of their constitution provisions that guarantee fundamental citizens’ rights.²⁴ Table 5.1 compares the rights guaranteed under each country’s constitution and the general principles contained in articles 1–9 of the AHRD.²⁵ It also includes an overall assessment of the extent to which countries have included (1) civil and political rights and (2) economic, social and cultural rights as part of their constitutions when compared to the AHRD. This is not to suggest that the AHRD should be considered a ‘benchmark’ by which constitutions can be assessed. Rather, this comparison suggests ways in which the AHRD can help the game changers—reform-minded government officials, lawyers and

civil society advocates—further promote constitutional reform, or reform-minded constitutional interpretation, at the domestic level. It also aims to show possible points of bilateral intersection between ASEAN member states, for example when negotiating bilateral treaties and cross-border agreements related to issues such as migrant workers or the environment.

Table 5.1: Human rights guaranteed by the constitutions of ASEAN member states

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar/Burma	Philippines	Singapore	Thailand	Viet Nam
Does the constitution guarantee fundamental rights?	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Does the constitution specifically guarantee all persons:										
Freedom and equality in dignity and rights (principle 1)?	N/A	Yes (via UDHR)	No	No	No	No	Yes (qualified)	No	Yes (qualified)	No
Rights and freedoms without distinction of any kind (principle 2)	N/A	Yes (via UDHR)	No	No	No	No	No	No	Yes	No
Equality and equal protection before the law (principle 3)	N/A	Yes (citizens)	Yes	Yes (citizens)	Yes	Yes	Yes	Yes	Yes	Yes (citizens)
The inalienable, integral and indivisible rights of specific groups (principle 4)	N/A	Yes, partially	Yes, for cultural identity	No	No	No	No	No	No	No
An effective remedy for rights violated which is guaranteed to them (principle 5)	N/A	No	No	No	No	No	No	No	No	Yes
The responsibility of the state to promote and protect all human rights and fundamental freedoms (principle 6)	N/A	Yes	Yes	No	No	No	No	No	No	No
The universality, indivisibility, interdependence and interrelationship of rights (principle 7)	N/A	No	No	No	No	No	No	No	No	No

Limitations on the exercise of rights with due regard to just requirements of national security, public order as prescribed by law (principle 8)	N/A	Yes (via UDHR)	Yes	No	Yes	Yes	Yes	Yes	Yes	No
Impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicization in the realization of rights and freedoms (principle 9)	N/A	No	Non-discrimination only	No	Non-discrimination only, and only in relation to property and trade	No	No	No	Non-discrimination only, in treaties to which it is a party	No

Note: UDHR = Universal Declaration of Human Rights; N/A = not applicable.

Source: the authors.

As can be seen from table 5.1, no ASEAN member state has affirmed all of the general principles in its constitution. Cambodia comes closest; its constitution includes provisions that generally accord with seven of the nine principles, largely because article 31 obligates the state to ‘recognize and respect’ the UDHR, on which several provisions in the AHRD are based. Indonesia’s constitution includes provisions that guarantee just over half (five) of the general principles, whereas the constitutions of Thailand and the Philippines address only four. However, those countries’ constitutions include other guarantees. Thailand, for instance, provides for very strong protections of freedom of religion, and the Philippines includes strong rights for workers, including the right to welfare.

The table can be used to demonstrate the significance of the AHRD in two ways. First, it gives lawyers and reform-minded lawmakers an additional way to bring to the attention of courts and parliamentary assemblies the state’s obligation to uphold human rights. In countries such as Indonesia and the Philippines, which have relatively strong higher courts and parliaments, this may further bolster efforts to ensure that rights-oriented arguments are given the weight they deserve, while still keeping the arguments close to home. In this regard, the AHRD provides a ‘middle way’ between relying on either a country’s international human rights obligations or the text of its constitution. This may enable certain arguments before the courts to be given due weight without being perceived as somehow imposed by Western human rights advocates. This could prove significant in sensitive cases, where advocates need to tread carefully when introducing the notion of human rights. Indonesia’s Blasphemy Law is a case in point (see box 5.2).²⁶

Box 5.2: Case study for constitutions: Indonesia's Blasphemy Law

The Indonesian Constitutional Court was recently asked to hear a series of cases regarding the constitutionality of Indonesia's Blasphemy Law in relation to Shi'ite Muslims' practice of Islam in a manner deemed to offend Indonesia's Sunni majority. Since Indonesia's transition to democracy, over 150 individuals from minority religious groups have been convicted of blasphemy. The Blasphemy Law confers power on the minister of religion to warn or ban any group that has deviated from the teachings of a recognized religion, and criminalizes blaspheming a religion. In a series of recent cases, lawyers for the applicants have tried very different approaches to bringing the arguments to the attention of the Constitutional Court—for example, relying on international human rights conventions, procedural arguments or expert testimony from the Organization of Islamic States (OIS). Principle 4 of the AHRD, which refers to 'the rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalized groups' as an 'inalienable, integral and indivisible part of human rights', would seem to offer a different approach. It would further bolster the argument that article 28E(1) of the Indonesian constitution should protect the right of freedom of religion, without asserting a seemingly 'Western' value system in the courtroom, and would strengthen arguments from a regional organization other than the OIS.

Second, the AHRD may prove useful when considering possible submissions regarding constitutional reform. The extent to which this proves useful will largely depend on the state in question and its openness to hearing arguments relating to the constitutional amendments. Thailand, for instance, has amended its constitution several times in recent years, including in the late 1990s, when a large number of human rights protections were introduced.²⁷ However, in Myanmar/Burma, which is currently undergoing an extensive reform process, invoking regional commitments may again provide an important starting point when thinking about bridging the divides between disparate groups. Negotiations regarding amendments to the 2008 constitution will require careful consideration of a number of voices: with over 135 ethnic groups comprising Buddhists, Christians and Muslims, the minority rights will clearly be significant in these discussions.

The AHRD may also prove useful when considering migrant rights across the region. As can be seen from table 1, several countries' constitutions limit the rights and fundamental freedoms enjoyed within their borders to citizens of that country. A simple constitutional amendment that entitled 'peoples' (rather than citizens) to enjoy rights and fundamental freedoms in Laos, Malaysia, Singapore and Vietnam, to name a few, could go a long way towards providing (in principle) protections for migrants living in these countries. It may also prove useful for 'sending' states, such as Indonesia, the Philippines and Cambodia, to consider the ways in which migrants' rights could be further bolstered in 'receiving' states (namely, Malaysia, Singapore

and Thailand) by looking at provisions with which the AHRD extends migrant rights.

Law reform: inspiring change through the legislative framework

In addition to inspiring different approaches to constitutional drafting and interpretation, the AHRD can also be useful when considering drafting policy documents and national action plans, as well as new laws. Drawing again on the ‘ASEAN way’ to introduce what were once considered Western values, the AHRD provides government officials with an avenue for considering lawmaking in line with human rights norms that have been developed with an in-depth understanding of the local context.

One possible step is to petition for national legislation that explicitly references the AHRD, or which incorporates it into national law. This may be particularly important in countries with dualist jurisdictions (i.e., where the national legislature needs to incorporate a treaty into domestic law before it is accepted as law²⁸).

A second possible step is to assess to what extent a state considers its obligations under the AHRD in a positive or negative sense: namely, to what extent AHRD guides policy-makers and lawmakers on the content of draft legislation and which laws to repeal. Singapore and Malaysia’s colonial histories mean that their legislatures tend to consider rights and liberties in the negative rather than as enshrined in law; policy-makers there may also consider repealing legislation that offends the principles of the AHRD.

For example, in Malaysia, concerns raised by provisions in the recently enacted Security Offences (Special Measures) Act (2012) (SOSMA) can now be read in the light of articles 12 and 20(1) of the AHRD. Although SOSMA, which replaced the country’s Internal Security Act of 1957, ensures that suspects cannot be detained indefinitely without trial and further protects individual liberty in some areas, it does not appear to go far enough to ensure protections for detainees in others.²⁹ Bearing in mind that Malaysia has not ratified the International Covenant on Civil and Political Rights, and that the presumption of innocence is not specifically guaranteed in its constitution, article 20(1) of the AHRD (which specifically provides that a person charged with an offence shall be presumed innocent until proved guilty) gives lawyers an additional argument with which to question the legality of SOSMA. It also allows civil society advocates in Malaysia to question the government’s obligation, under the ASEAN Charter and the AHRD, to refrain from passing legislation considered to violate these fundamental fair trial rights.

Promoting legislative measures that align with a government's poverty reduction policies may be another avenue through which the AHRD proves significant. In Vietnam, for example, the rights of women are clearly specified under article 63 of the country's constitution. The country's 2006 Law on Gender Equality (the 2006 law) further endeavours to ensure that women's rights are taken into account and that women's empowerment is promoted at the national level. There is some evidence to suggest that women are being empowered through measures taken to improve their control over assets (see box 5.3).

Provisions in the AHRD could be used to further the agenda for women by promoting reforms that could complement the gains already made from these laws. For example, the General Principles section of the ARHD could be read together with articles 31(1) (which guarantees the right to education) and 14(5) of the 2006 law (which obliges the state to help female labourers in rural areas obtain vocational training) to further justify mandatory vocational training schemes for women that are not otherwise contained in the law alone. This is particularly important, given that the legislation provides that, where the government's international treaty obligations contain provisions other than those in the 2006 law, its international obligations must prevail.

Box 5.3: Case study for law reform: land law in Vietnam

Vietnam has been reforming its policies related to land use since the government embarked on its 'Doi Moi' agenda in 1986 and moved towards a market-based economy. Its 1993 Land Law further entrenched these reforms by granting households in Vietnam land use certificates (LUCs), which can be exchanged, leased, inherited, sold or mortgaged.

Women have benefited from the LUC system. Having women named as the head or joint head of the household on LUCs has improved their economic security,³⁰ and there has been a positive correlation between women named on the LUCs and their access to education and doing less housework. Household vulnerability to poverty has also been reduced. The AHRD could be used to further bolster arguments for awareness-raising campaigns aimed at increasing women's access to LUCs and other rights (including the right to education and vocational training), particularly as the country has passed a Law on Gender Equality that would support such campaigns.

Harnessing the game changers: mobilizing informal networks and setting the agenda within ASEAN

Having discussed ways in which the AHRD can influence member states' domestic legal frameworks—namely, *what* it might affect—this section focuses more generally on *who* the different actors are that may wish to utilize

the AHRD, and *how* they could use it ‘to promote and protect human rights and fundamental freedoms’, as stipulated in the ASEAN Charter. After identifying some of the key players in promoting and protecting human rights in the region, this section looks in particular at the following two aspects: (1) how the AHRD and the regional human rights discourse more generally could be used as an advocacy tool and a driver for change; and (2) how the AHRD could influence the intergovernmental human rights agenda.

From bleating to tweeting: using the AHRD as an advocacy tool and regionalism as a driver for change

Over the past two decades, the number of actors contributing to the process of regional integration has grown considerably. Most remarkable has been the growth of various civil society actors, including (but clearly not limited to) non-governmental organizations (NGOs). Reflecting the diversity in ASEAN, these civil society organizations (CSOs) comprise actors with very different roles and approaches: some focus on specific human rights, while others try to cover a broader human rights spectrum in ASEAN; some work predominantly at the national level and try to represent local constituencies at the ASEAN level, while others work more at the regional and international levels.³¹ This multitude of civil society actors has made a critical contribution to the development of the regional human rights system in ASEAN, mainly by expanding the human rights discourse across the region and advocating with national governments for a more proactive stance on human rights. However, not all countries are equally represented among those actors, as the space for civil society across ASEAN states varies. Nevertheless, the gradual opening up of Myanmar/Burma shows that the field is not static, with new opportunities arising in certain parts of the region.

Gathering and channelling this diversity towards influencing ASEAN’s policy-making process on human rights issues has been challenging, but at times quite successful. The Working Group for an ASEAN Human Rights Mechanism was instrumental in creating an ASEAN human rights body; other venues soon emerged. The annual ASEAN Peoples’ Assembly brings together NGO actors from various ASEAN states. Other well-known NGOs or NGO networks include the Solidarity for Asian Peoples’ Advocacies and the Asian Forum for Human Rights and Development (Forum Asia). Both provide critical monitoring of ASEAN’s emerging regional human rights system. More academic or think tank organizations have also begun to expand their engagement at the ASEAN level, building more on research and dialogue (see box 5.4).

Box 5.4: Academia and ASEAN: in search of research

Several universities within ASEAN are now engaging in research on legal issues pertaining to human rights, though there have been fewer moves to engage in attempts to create ASEAN-wide university networks conducting ASEAN-wide research. Two exceptions are the South-East Asian Human Rights Network, which focuses on connecting individual researchers, and the Human Rights Resource Centre, which aims to establish an institutional academic human rights network and has already conducted three ASEAN-wide baseline studies on the rule of law, women and children's rights, and business and human rights. ASEAN itself engages high-level participants (vice chancellors and deans) through the ASEAN University Network, which also has a human rights component.

Considering that the primary responsibility for the implementation of human rights in ASEAN rests with its member states, and that the initial mandate of the AICHR centres mainly on the promotion of human rights (and less so on their protection), the regional human rights system's effectiveness will rely for many years to come on an enhanced interplay between the national and regional levels. National human rights institutions (NHRIs) in particular have the potential to fill an important gap.³² These institutions can play an important role in leveraging support among ASEAN governments to take action to implement the provisions of the AHRD and the various other declarations (see box 5.5).

Box 5.5: The ASEAN NHRI Forum

Five ASEAN countries, including ASEAN's leading members (Indonesia, Malaysia, the Philippines and Thailand) now have NHRIs.³³ Myanmar/Burma is the most recent member of this group, but is still in the process of building an NHRI that complies with the Paris Principles. Many of these institutions have powers that regional bodies currently lack: they can monitor the human rights situation, receive individual complaints, investigate human rights violations and make recommendations to the state authorities. In the context of an emerging regional human rights system, the NHRIs of Indonesia, Malaysia, the Philippines and Thailand signed a Declaration of Cooperation in 2007, which soon brought into being the ASEAN NHRI Forum.³⁴

In this declaration, they committed themselves to collaborate on five areas of shared concern or that have cross-border implications: the implementation of economic, social and cultural rights and the right to development; the enhancement of human rights education; human rights aspects of trafficking in persons (especially women and children); the protection of the human rights of migrants and migrant workers; and international terrorism. The four NHRIs further declared 'regional strategies for the promotion and protection of human rights shall be gradually developed within and among the four national human rights commissions'.³⁵ In a joint position paper, these NHRIs recommended that the AICHR establish a process for regular engagement with NHRIs from ASEAN member states, possibly in a formal memorandum with the ASEAN NHRI Forum. In the absence of more protective powers for the AICHR, such cooperation could become a cornerstone for the future 'framework for human rights cooperation in the region', as envisaged by the AHRD.

How can the AHRD assist advocacy NGOs, research networks and NHRIs in their mission to support the ASEAN Charter's goal of promoting and protecting human rights and fundamental freedoms across the region? According to ASEAN's secretary-general, 'the ASEAN Human Rights Declaration is considered as a standard setting instrument for future ASEAN instruments on human rights as well as future cooperation on human rights between ASEAN and its partners'.³⁶ Although many observers have criticized the document for falling below international standards, its strength is that it originates from the region and has been agreed by all ASEAN member states. Thus it is becoming increasingly difficult for individual ASEAN governments to reject criticism of their human rights records on the basis that these rights are externally imposed.³⁷ The often frustrating work of narrowing the gap between ASEAN's rhetoric on human rights and member states' practice at the national level needs to continue. Invoking member states' aspirations and commitments, as enshrined in the AHRD, can be a new powerful tool in civil society actors' monitoring, research and advocacy work.

The AHRD confirms the special status assigned to a certain set of rights in ASEAN, such as those related to women and children's rights and the right to development. Instead of downplaying the association's focus on 'soft rights', civil society actors may consider using these openings as an entry point for both promoting further institutionalization and procedural development in human rights cooperation at the regional level, and using the regional human rights discourse to influence the situation at the national level.

Using the AHRD for further incremental progress in women and children's rights (e.g., enhancing the ASEAN human rights bodies' work methodologies, strengthening their standing vis-à-vis national governments, designing procedures for collaboration with a wider set of actors, and exchanging information with NHRIs and NGOs) may eventually benefit regional human rights cooperation more broadly. The ACWC's mandate in particular allows the body to be more proactive, including to promote the implementation of international and ASEAN instruments, advocate on behalf of women and children, encourage data collection, and promote measures for the prevention and elimination of all forms of violence towards women and children.³⁸ The AHRD expands the foundation upon which the ACWC and other regional bodies can base their work.

At the national level, the AHRD can be an additional advocacy tool by invoking regional commitments made by individual governments in ASEAN. This could, for instance, be used to advocate a reduction in ASEAN states' reservations to the Convention on the Elimination of All Forms of



Discrimination Against Women and the Convention on the Rights of the Child. The long list of reservations, and their general nature, has been a long-standing concern for both treaty bodies, which ultimately dilutes the assumption of a common legal standard among ASEAN states—on the basis that all member states have ratified these two conventions.³⁹ Additionally, as noted above, the right to development in the AHRD may provide an important way for ASEAN to contribute to international policy discussions on rights-based approaches to poverty reduction as the region moves towards economic and political integration by 2015.

Finally, the AHRD could be used as an important lens through which to examine the upcoming review of the AICHR's terms of reference in 2014. The declaration in many ways further clarifies the AICHR's mandate. It also reaffirms the dual pillars of promotion and protection of human rights across ASEAN. Although no leaps forward are expected, it will be interesting to see whether member states—using the usual step-by-step approach—are willing to begin a slow move from a focus on the promotion pillar towards consideration of the protection pillar, as will be eventually required by both the ASEAN Charter and the AHRD. Civil society actors will have to play an important role in this process.

Agenda-setting within ASEAN: consensus-based approaches and the imperative for continuous cooperation

The historical overview above has revealed a slow move towards integrating human rights into the regional framework of ASEAN—the adoption in 2012 of the AHRD is yet another important step on a long journey. The promotion and protection of human rights are now, at least on paper, among the goals of regional cooperation. Scholars find different reasons to explain this evolution. On the one hand, realist theorists point to the considerable gap between human rights rhetoric and practice among ASEAN member states, arguing that self-interested governments use human rights norms in a strategic manner as mere instruments with which to pursue political ends, such as securing international and national legitimacy. According to these arguments, states advance human rights norms only if it suits their cost-benefit analysis, which explains the modest record in implementation in ASEAN.⁴⁰ On the other hand, constructivist theorists argue that there is a slow process of socializing human rights norms among ASEAN states through the regional framework. This process changes the actors' behaviour and identity over time with regard to those norms. Some theorists observe a more optimistic 'norms cascade' in ASEAN over the past 20 years or so, in which support for human rights

norms gathers momentum slowly until it reaches a certain threshold, after which other member states adopt these norms more rapidly.⁴¹

The reality in ASEAN might be somewhere in between those two extremes, as each theory only helps explain certain aspects of a complex and dynamic regional policy-making process. Eventually, progress will be measured by how the human rights situation for ASEAN's people improves over time. This will require gradually moving beyond symbolism and ritualism around human rights. This section explores how the AHRD can contribute to this process by influencing the intergovernmental agenda-setting on human rights within ASEAN.

Because of behind-the-door nature of policy-making in ASEAN, it is often difficult to discern how member states decide to support a certain policy change. With few rules or means of enforcement available, interaction among ASEAN states has to rely primarily on non-legal means to advance human rights policies, such as peer pressure and persuasion. Considering that some of the founding members of ASEAN (such as the Philippines, Thailand and Indonesia) have taken on an increasingly proactive role in promoting human rights at the regional level, peer pressure remains an important means of advocating human rights norms and voluntary compliance among ASEAN member states—without openly disregarding the principle of non-interference.⁴² A few examples may illustrate how the AHRD may assist in this process.

First, it is important to recognize that ASEAN's regional integration process originated from concerns related to security and stability in the region. Although ASEAN has been quite successful in reducing the likelihood of interstate conflict in the region, the continuation of internal conflicts—often with regional implications—continues to threaten stability and development within ASEAN. In this context, member states should begin to acknowledge the link between human rights protection and regional security. Recent developments in Myanmar/Burma point to the urgency of developing regional approaches to such challenges. The AHRD may provide a new platform for promoting a more human security- and rights-based approach to sustainable conflict transformation and resolution.⁴³ Even ASEAN's foundational principles are not static—in particular when they seem to be at odds with the primacy of maintaining regional stability. During the ASEAN economic crisis at the end of the 1990s, former ASEAN Secretary-General Surin Pitsuwan argued that 'it is time that ASEAN's cherished principle of non-intervention is modified to allow it to play a constructive role in preventing or resolving domestic issues with regional implications ... when a matter of



domestic concern poses a threat to regional stability, a dose of peer pressure or friendly advice at the right time can be helpful'.⁴⁴

Second, sticking with ASEAN's consensus-based approach to intergovernmental decision-making, progressive member states often resort to more creative forms of persuasion and soft peer pressure.⁴⁵ For instance, instead of highlighting individual countries' shortcomings in their human rights records through 'naming and shaming', these countries have chosen less confrontational approaches such as identifying and sharing among ASEAN member states best practices and lessons learned from implementing human rights obligations at the national level. This approach is also found in the work plans of the ASEAN human rights bodies. The AHRD provides new opportunities for such exchanges.

Conclusion: towards a framework for human rights cooperation in the region

The ASEAN Charter turned ASEAN into a rules-based organization and introduced as one of its purposes 'to promote and protect human rights and fundamental freedoms'. The progressive realization of these rights now requires a more structured interaction among states and other regional stakeholders concerned with the promotion and protection of human rights. It is therefore the AHRD's objective to 'establish a framework for human rights cooperation in the region'. Although in many ways it represents the lowest common denominator on human rights, the declaration provides for the first time a shared *regional* position on human rights. Former ASEAN Secretary-General Severino likewise argues that 'while ASEAN's declaration has nothing coercive in it, the document seems to be definitely an advance from the previous situation, in which there was no regional position on human rights at all'.⁴⁶ Progressive member states and other like-minded stakeholders should use the momentum provided by the adoption of the AHRD to further expand and shape the emerging regional cooperation framework.

More specifically, the AHRD can help increase coherence across ASEAN's fragmented regional human rights system and the work of different regional human rights bodies. Various provisions in the AHRD can provide the foundation for an overarching strategy of cooperation between the AICHR, ACWC and ACMW. Such a nascent regional framework for human rights cooperation could be complemented by plans of action at the national, regional and/or sectoral levels.

Beyond ASEAN, the AHRD may inspire other regional integration processes in the Asia-Pacific. Its adoption broke Asia's long-standing absence from the global trend towards developing regional human rights systems, such as observed in the Americas, Europe and Africa, and more recently in the Middle East with the adoption of the Arab Charter on Human Rights. ASEAN's neighbours in the PIF and SAARC may watch this process very carefully, although their respective circumstances and constraints will differ from those in ASEAN. The PIF has already convened a working group to investigate a possible regional human rights mechanism in the Pacific, and its Secretariat has engaged in consultations with partners beyond the region. Likewise, SAARC already has a commitment to human rights in its founding charter, and its members have concluded several regional conventions, such as on trafficking in women and children for prostitution, and the promotion of child welfare, which could provide the basis for a future regional instrument on human rights and fundamental freedoms. ASEAN's incremental approach to developing a regional human rights system demonstrates that considerable differences in views resulting from a diverse membership may not necessarily result in a standstill. Although the slow progress and compromises on this long road may at times be frustrating for those who aim for more, the universality of human rights has taken roots in the Asia-Pacific, and more is undoubtedly to come.

This chapter has provided examples of how the AHRD can be harnessed, at both the domestic and regional levels, to safeguard that the significant strides taken to ensure human rights discourse within ASEAN are not forgotten. It has also endeavoured to see the 'glass half full' in terms of human rights in ASEAN. It may well, like the UDHR, shape the future of ASEAN's view on standard-setting in human rights, towards ensuring greater protections for the people of the region.

The chapter's primary recommendations are:

- ***To progressive governments and officials working at the regional level in ASEAN:*** Consider using the AHRD as a novel basis for cross-border engagement on human rights issues with other ASEAN governments, such as on issues that affect stability in the region, promote regional development or are a threat to the legitimacy and credibility of the association by undermining regional human rights commitments.
- ***To the ASEAN human rights bodies (AICHR, ACWC, ACMW):*** Use the AHRD as an additional foundation for progressively interpreting your mandate—in particular with a view to the upcoming review of the AICHR's terms of reference—and as a basis for action on human rights



in ASEAN, including a more proactive engagement with national governments that have signed up to the AHRD.

- ***To reform-minded politicians working at the domestic level within ASEAN:*** Consider drawing attention to the fact that your country has committed itself to the AHRD when endeavouring to pass legislation that further ensures human rights protections are enforceable within your jurisdiction. Also, consider using progressive parts of the AHRD to guide the drafting of policies, particularly where the AHRD goes further to protect the human rights of all people living in ASEAN. Finally, reconsider certain international treaty reservations made by your country in the light of the universal commitments spelled out in the AHRD.
- ***To lawyers working on human rights cases within ASEAN countries:*** Conduct a thorough review of your country's laws and constitution in the light of the ASEAN Declaration, particularly its general principles (which are legally binding), and consider avenues through which existing cases might benefit from positively interpreting the constitution and existing laws in the light of the AHRD, or through which parliament should consider constitutional reform/amendment.
- ***To CSOs and academic institutions working within ASEAN:*** Consider ways in which policy-oriented research can directly help member states of ASEAN find innovative ways to utilize the AHRD and other regional communiqués and instruments to bring the regional rights agenda back into the national sphere. Endeavour to use progressive parts of the AHRD as an advocacy tool, and further engage regional human rights bodies as well as national governments to respond to questions regarding the extent to which the AHRD should guide interpretations of national legislation.
- ***To bilateral and multilateral international partners working in ASEAN countries:*** Consider ways in which the AHRD supports further reform on human rights at the domestic level, particularly insofar as these reforms can be linked to poverty reduction. Rethink rights 'rhetoric' in terms of macroeconomic indicators (e.g., gross domestic product, GDP) and encourage government actors to further consider disparities in wealth in terms of the sustainability of their reform processes (and hence, their impact on individuals).
- ***To other regional organizations in the Asia-Pacific:*** Consider the evolution of ASEAN's regional human rights system as a source of inspiration, including by studying positive and negative lessons learned and engaging in intra-regional exchanges within the region. Such efforts could build upon existing intra-regional forums such as

the Asia-Pacific Forum of NHRIs. Consider the additional value of sub-regional human rights declarations in the pursuit of implementing universal human rights norms for the benefit of the people in your region, but also for enhancing regional stability and development.

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Notes

- ¹ Available at <<http://www.aichr.org/documents>>, accessed 20 September 2013. The ten member states of ASEAN are Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic (Laos), Malaysia, Myanmar/Burma, the Philippines, Singapore, Thailand and the Socialist Republic of Vietnam.
- ² A summary of the AHRD's drafting process and its critical reception can be found at Solidarity for Asian People's Advocacy 2013, pp. 26–39.
- ³ Phan 2009, pp. 468–501.
- ⁴ Similarly, many observers initially underestimated the UDHR's political and moral importance, which soon began to outweigh its legal significance. As a political document, the UDHR is now regarded as a first step towards binding obligations, which materialized during the 1960s in the form of the two covenants: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It soon became a powerful moral yardstick in national and global rights discourses. Thus when appreciating the impact and significance of the UDHR, the dynamic of norm setting and norm acceptance needs to be seen in the context of complex political processes—even more so in interstate relations, such as within ASEAN. See Bernstorff 2008.
- ⁵ Ciorciari 2012, pp. 695–725.
- ⁶ The term 'nudge' refers in particular to the scholarship of Richard Thaler and Cass Sunstein, who have argued persuasively that human beings are as much (if not more) influenced by irrational thoughts and social interactions as they are by rational thought processes. This shift in thinking about how people make decisions has wider implications for the view of the state that is often characterized as operating through a rational bureaucracy rather than an irrational group of actors pursuing multiple interests (Thaler and Sunstein 2008).
- ⁷ The PIF could apply a number of lessons learned from ASEAN's experience of formulating the AHRD to create its own declaration that accords with Initiative 12.5 of the Pacific Plan and strengthens its vision to see the Pacific Islands region as 'respected for the quality of its governance ... and for its defence and promotion of human rights': see <<http://www.forumsec.org/pages.cfm/political-governance-security/>>

human-rights/>, accessed 20 September 2013. Article I(b) of the SAARC Charter states that one of the objectives of the association is to 'accelerate economic growth, social progress and cultural development in the region and to provide *all individuals the opportunity to live in dignity and realize their full potential*' [emphasis added]: see <<http://www.saarc-sec.org/SAARC-Charter/5/>>, accessed 20 September 2013. This emphasis on the dignity of the individual is very much in keeping with respect for human rights, and a regional declaration affirming this commitment would reinforce SAARC's underlying goals.

⁸ Muntarbhorn 2012.

⁹ European Convention on Human Rights, preamble. See also Renshaw 2013, pp. 21–2. Similarly, the preamble of the American Declaration of the Rights and Duties of Man, which was ratified in 1948, recognizes the common aim of the American peoples as the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness.

¹⁰ Minh 2013.

¹¹ Ciorciari 2012.

¹² UN 1993.

¹³ UN 1993, para. 26.

¹⁴ ASEAN 1993, para. 18.

¹⁵ Discussions with Mr Marzuki Darusman, executive director of the Human Rights Resource Centre and former member of the ASEAN Working Group for a Human Rights Mechanism, 12–16 August 2013.

¹⁶ Domestically, the change was most visible in a shift towards institutionalizing human rights promotion and protection in key member states: national human rights institutions were established in the Philippines (1986), Indonesia (1993), Malaysia (1999) and Thailand (2001). See also Durbach, Renshaw and Byrnes 2009, pp. 211–38.

¹⁷ ASEAN Charter 2007, article 14.

¹⁸ Petcharamesree 2009; Yen 2011.

¹⁹ See <<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>>.

²⁰ ASEAN Declaration, article 39 reads: 'ASEAN Member States share a common interest in and commitment to the promotion and protection of human rights and fundamental freedoms which shall be achieved through, *inter alia*, cooperation with one another as well as with relevant national, regional and international institutions in accordance with the ASEAN Charter'.

²¹ Rehnquist 2006, p. 402.

²² ASEAN Charter 2007, article 2(1).

²³ The extent to which the ASEAN Charter will apply to domestic interpretations of law depends, in part, on whether a country is a monist or dualist jurisdiction. In a monist system, the act of ratifying the international treaty immediately incorporates that international law into a country's law. In a dualist system, international law will only apply once the legislature has passed implementing legislation to bring the treaty into force. Within ASEAN, Cambodia, Indonesia, Vietnam and Laos tend to be characterized as monist systems, though there is ongoing debate among some constitutional experts about this characterization. Brunei Darussalam, Malaysia, Myanmar/Burma, Singapore, the Philippines and Thailand, on the other hand, are considered dualist jurisdictions. Regardless of which system a country uses, article 26 of the Vienna Convention on the Law of Treaties provides that a state cannot use domestic laws to justify a failure to comply with treaty obligations.

²⁴ Hill and Menzel 2009; Human Rights Resource Centre 2011.

²⁵ Human Rights Resource Centre 2011, p. 27.

²⁶ The case in question is Case No 02/KLBH-UNIVERSALIA/VIII/2012, dated 27 September 2012. See Crouch 2013.

²⁷ Yet since that time constitutional amendment has largely been considered a means through which political parties attempt to consolidate power (Jory 2012). It therefore may take a particularly innovative reformer to consider how parliament may be made more open to constitutional amendments that consolidate a rights-based approach.

²⁸ See note 23.

²⁹ For example, the 24-hour period in which police can detain suspects without judicial oversight can be extended to a 28-day period. Overly broad provisions relating to who can be detained also limit the gains the law has made in ensuring the democratic rights and freedoms of Malaysia's people. See Spiegel 2012. Critics of SOSMA have argued that amendments to Malaysia's Penal Code since that time have further weakened the presumption of innocence. At the time of writing, the Malaysian parliament was also considering a series of amendments to the Prevention of Crime Act (1959) that would further erode

the gains made for civil liberties in SOSMA.

³⁰ Menon, Rodgers and Kennedy 2013. See also General Statistics Office of Viet Nam 2004 and General Statistics Office of Viet Nam 2008.

³¹ Ciorciari 2012, pp. 703–5.

³² For more information, see the website of the Asia-Pacific Forum, an association of NHRIs in the Asia-Pacific region, <<http://www.asiapacificforum.net>>, accessed 3 October 2013. See also Durbach, Renshaw and Byrnes 2009, pp. 211–38.

³³ In 2006, Cambodia proposed to establish a national human rights commission, but it has not taken this idea further. Likewise, Vietnam made references to eventually establishing its own NHRI. These remarks seem to indicate a slow shift in attitudes, which has also been observed in Cambodia, Laos, Myanmar/Burma and Vietnam.

³⁴ In 2010, Timor-Leste's NHRI was invited to join the Southeast Asia Forum.

³⁵ Declaration of Cooperation, 2007, <http://www.asiapacificforum.net/working-with-others/regional-mechanisms/listing_content/downloads/asean-nhri-forum/ASEAN_NHRI_Forum_Declaration_of_Cooperation.pdf>, accessed 18 September 2013.

³⁶ Minh 2013.

³⁷ Renshaw 2013, pp. 21–3.

³⁸ ACWC, Terms of Reference 2010, article 5.

³⁹ Linton 2008.

⁴⁰ Davies 2013, pp. 207–13.

⁴¹ Finnemore and Sikkink 1998, pp. 887–917.

⁴² Tan 2013.

⁴³ Ng 2012.

⁴⁴ Pitsuwan 1998.

⁴⁵ Tan 2013.

⁴⁶ Severino 2013.



Chapter 6

Developing Mechanisms for Regional Influence in National Processes of Constitutional Change: The European Union and Hungary



Chapter 6

Nora Hedling



Developing Mechanisms for Regional Influence in National Processes of Constitutional Change: The European Union and Hungary

Introduction

In the summer of 2013 the European Parliament (EP) took a powerfully critical stance against recent sweeping changes to Hungary's constitution. It adopted a resolution based on a parliamentary committee report known as the Tavares report, which focused on the degradation of the legal landscape under the new constitution and Hungary's consequent failure to uphold European values. The resolution establishes a number of mechanisms for engagement in the Hungarian process, and introduces the possibility of a loss of voting rights for Hungary if the constitutional and legal shortcomings are not corrected. Furthermore, it proposes a number of processes for improving the monitoring of and adherence to democratic values and the rule of law in member states.

This chapter provides a brief background on the recent changes to Hungary's constitution under the leadership of Prime Minister Viktor Orbán and the Fidesz Party, which have diminished a constitution that was previously celebrated in the eyes of the international community. In particular, it outlines concerns about the impact of the constitutional changes on the rule of law, especially the shifting balance of powers and institutional weakening, including threats to the powers of the Constitutional Court and the independence of the judiciary.

The chapter also summarizes the EP resolution, focusing on criticisms of the constitutional changes. It also discusses the role of the European Union (EU) in national constitutional processes, including the mechanisms available to the EU to affect national processes of constitutional change and the circumstances in which regional action is possible. In particular, it focuses on the new (and potentially influential) mechanisms introduced by the resolution for addressing rule of law problems in Hungary and other member states. Of particular interest is the resolution's call for the creation of new monitoring methods and mechanisms, including a 'Copenhagen Commission' of independent experts to assess member states' compliance with the European values at the heart of the Treaty on European Union (TEU).

The chapter discusses issues raised by the report, such as the need for additional tools to ensure adherence to democratic values, the difficulty of creating standards for adherence to the rule of law and the related concern about the equal treatment of member states. Moreover, these issues are explored with a view to drawing conclusions about the way forward for the EU. Issues analysed include the following. What are the practical consequences and challenges of promoting a culture of constitutionalism and protecting the values enshrined in the treaties? What measures are best pursued? What is important as the EU seeks to fill the gap in its ability to ensure adherence to the rule of law and the democratic values enshrined in the treaties?

Background

In 2010 the Fidesz Party, in coalition with the Christian Democrats, won a majority of votes in the Hungarian parliamentary election, which translated into a two-thirds majority of the seats in the parliament. With this majority, the government has enacted a series of sweeping constitutional changes. While these changes have, for the most part, strictly complied with the letter of the law and the legal procedures required by the constitution and relevant legislation, they have resulted in a worrying weakening of democratic institutions and what many have interpreted as a significant diminishment of the rule of law. Controversial measures have included displacing a number of judges by lowering the retirement age, circumventing the will of the Constitutional Court by introducing constitutional amendments to replace legislation that had previously been declared unconstitutional, limiting the Constitutional Court's judicial review powers by eliminating *actio popularis* (a complaint mechanism that allowed any citizen to bring a claim of unconstitutionality in the interest of the public) and limiting other forms of ex-post review. A National Judicial Office was created, and its president was

given the ability to transfer cases between courts. This power was purportedly provided in order to tackle judicial backlogs, but without clear legal standards for transferring cases such powers are vulnerable to abuse.¹

Hungary has also experienced constitutional changes that have raised concerns about the protection of fundamental rights. For example, the formalization of a narrow view of the definition of family potentially excludes a number of people who previously held familial rights, and media legislation was passed that seems to have eroded the freedom of the media. Furthermore, worry for the freedom of religion developed after a constitutional amendment gave the parliament the sole power to recognize churches. The Hungarian parliament was earlier denied this power by the Constitutional Court when it attempted to pass legislation classifying some religious organizations as recognized churches but leaving out others; the parliament in turn amended the constitution.²

Beyond the specific changes that have been criticized by both international organizations and academics³ as reductions of rights and a degradation of institutional balance, the process of constitutional change taking place in Hungary has also been called into question. The process has been seen as too rapid, considering the depth and breadth of the changes. The lack of meaningful consultation with the public or the opposition is also problematic.

The Hungarian government has accepted some degree of reproach and input from the European Commission (EC) and the European Court of Justice (ECJ). It has furthermore indicated a willingness to comply with some demands of the EU and other organizations (such as the Council of Europe's Venice Commission).⁴ For instance, the retirement age of judges was raised after an ECJ judgement declared that lowering it was in conflict with the treaties' requirement of non-discrimination. Moreover, in the autumn of 2013, the Hungarian government adopted the fifth amendment to its Fundamental Law, which backtracked on some of the constitutional provisions identified as problematic by the EP resolution and the EC. This amendment responded to criticisms involving the designation of religious organizations as churches, restrictions on election campaign advertising and the transfer of cases within the judiciary, among other things. It particularly addressed the issues identified by the EC as the most critical and has been recognized by many organizations, including the EC, as a positive step. Yet some critics have found the amendment to be of limited impact, both in the range of issues it addresses and in the manner in which it addresses them.⁵ For instance, although the constitutional provision banning campaign advertising from commercial media has been lifted, the law still requires that campaign

advertisements on commercial media are free and that equal time is allotted to all qualifying parties. In practice, these constraints make it unlikely that campaign advertising will appear on commercial media.

However, many of the criticized changes to the constitution, including many aspects identified in the resolution, remain in place—and have been defended by the Hungarian government as reforms. The government has pointed out that proper, established constitutional procedures have been followed in amending the constitution and passing legislation, and that the changes are comparable to those found in other functioning, consolidated democracies. Indeed, amending the constitution in response to a ruling that the desired legislation is unconstitutional does not, in itself, fly in the face of rule of law and democratic principles. Nor is *actio popularis* a requirement of a functioning democracy—the mechanism is far from universal among European countries.

The EP resolution

The Tavares report and the resulting resolution⁶ take clear aim at the Hungarian legal changes. The resolution details the government's constitutional reforms that have been called into question and urges that the changes be reviewed in context. It attacks the totality of the constitutional changes as amounting to a systematic degradation of the rule of law. The resolution reinforces its concerns with an accounting of the other bodies and officials (from both inside and outside the EU) that have expressed concern over the situation, providing information about infringement actions undertaken by the EC, letters of concern signed by ministers of foreign affairs of member states, and statements from international organizations such as the Council of Europe (CoE) and the Organization for Security and Co-operation in Europe (OSCE). By detailing the actions of the Hungarian government and the repeated statements and reactions of concern from the international community, the resolution builds a case that the Hungarian government has neglected its obligations to uphold the principles enshrined in TEU article 2 and other related provisions.

Article 2 sets out the founding values of the EU, including democracy, the rule of law and respect for human rights. These values are binding upon member states, which are required to uphold them even in areas of their exclusive competence. The resolution asserts that the common values of article 2, along with the European Convention on Human Rights and the Charter of Fundamental Rights, require 'a separation of powers between independent



institutions based on a properly functioning system of checks and balances'. It further names 'core features' of these principles, such as 'effective control of the conformity of legislation with the constitution', 'respect for legality (including a transparent accountable and democratic legislative process)' and 'an independent and impartial judiciary'.

Finally, the resolution puts forward a number of recommendations. It calls upon the Council of the EU and the EC to continue to engage with Hungary on the democratic deficits introduced by its constitutional reforms. In a section directed to the Hungarian government, it calls for direct action to remedy the problems raised in the resolution and urges continued communication and cooperation with the EU. The resolution proposes a number of mechanisms to be pursued moving forward. Specifically, it proposes an 'Alarm Agenda', which would essentially prioritize concerns related to potential infringements over all other discussions between the EC and Hungary, and a 'Trilogue' among representatives from the Council of the EU, the EC and the EP to assess information sent and reforms made by the Hungarian government. On the wider question of preserving EU values in all member states, the resolution proposes the creation of a Copenhagen Commission that would monitor member states for compliance with democratic principles. Finally, the resolution prepares the way for initiating a TEU article 7 procedure that could ultimately result in sanctions against Hungary. These proposals are discussed in greater detail below.

Key issues

A number of important issues arise when considering the involvement of regional organizations and treaties in national constitutional processes in general, and in the present case specifically. National ownership of a process of constitutional change is vital. It must proceed, however, with due recognition of and respect for the valid treaties it has signed and ratified and supranational organizations of which it is a member. Though constitutional matters are generally left to the exclusive competence of member states, fundamental rights, the design of governmental institutions and processes, and the designation of governmental powers are all essential elements of the common values enshrined in the EU treaties. These values are at the heart of the EU, which has a strong interest in seeing them upheld in each member state. Therefore the EU has a number of ways in which to respond to potential breaches of these values, and the resolution proposes new tools to ensure their protection. However, in all interventions aimed at protecting its core values, the preservation of (and respect for) the equality of the member states is essential.

The importance of the national process

One issue that surfaces in the resolution, and is raised in defence of the Hungarian government's actions, is the issue of sovereignty and the importance of national processes. In reaction to the criticisms, the government has maintained that the constitutional changes it has undertaken were in response to a deep need for reform and a mandate from voters to make that reform. On the whole, it denies that the measures have amounted to breaches of the rule of law or TEU principles, and it views much of the criticism raised by the resolution as unwarranted interference from above in a purely national matter.

Article 4 of the TEU recognizes the importance of preserving national identities that are 'inherent in fundamental structures' both 'political and constitutional' of member states. The treaties furthermore require that the EU respect these identities and essential state functions, including maintaining law and order.

Constitutions reflect national identities, and the stakes in constitution-building are high. Constitutions (and the frameworks they put into place) direct and distribute the powers of the state, guarantee rights and enshrine national values. New constitutions are often written in the wake of serious conflict or moments of great change, and the process of instituting a new constitution may represent the negotiation and settlement of hard-fought and deeply divisive issues. A state's historical context and legal traditions are also unmistakably connected to its constitution, and, while one constitutional provision or design element might work in one country, it may fail (or work entirely differently) in another context.

Constitutional change and reform are also an important process that is undeniably tied to national context. The ability to make course corrections and fix institutions and processes if they are broken or failing is vital, and arises best from a deep understanding of how the constitution is functioning or failing. A constitution should not, however, be too easily amended if it is to ensure a functioning government and protect fundamental rights. Most constitutional amendment procedures contain additional hurdles beyond those required to pass legislation—such as a qualified majority, the involvement of two or more branches of government or institutions, ratification of amendments over multiple legislative sessions, or referendums. The Hungarian government's ability to amend the constitution with its two-thirds majority has been criticized for its failure to present sufficient hurdles to amendment.⁷ It has also allowed constitutional change to happen without

many of the hallmarks of an inclusive constitutional process—participation of a diverse range of stakeholders, public participation and consultation, and the inclusion of opposition parties.

However, some of those who criticize the Hungarian government's constitutional changes and non-inclusive processes also object to change being required from above. Opposition leader and former Prime Minister Gordon Bajnai has argued that change must come from democratic forces within Hungary.⁸ Not unlike the Fidesz government, some opposition leaders believe that dissatisfied voters have every opportunity to correct the situation if they do not approve of it. At the same time, destructive systemic changes, such as unbalanced institutions and electoral system reforms, have called into question the ability of voters to make such an impact.

Upholding treaty values

Another important issue raised by the resolution is the other side of the sovereignty coin: the significance of democracy and rule of law principles to the functioning and purpose of the EU. Given the interconnectedness of member states, breaches in one state undermine the legitimacy and values central to the entire union. This centrality is reinforced by the concern expressed by member states and other institutions regarding the protection of article 2 values. These concerns mark a growing awareness that vigilance is required to ensure that democratic gains are not lost.

Moreover, the resolution and related documents reveal a real gap in the EU's structure and approaches. While the Copenhagen Criteria⁹ set out democratic standards that must be met to gain entry into the union, there has been relatively less concern about the maintenance of those standards after entry. These criteria require 'stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' and involve a process of monitoring by the Copenhagen Commission to determine when candidate countries have met these criteria. Whereas the treaties very clearly enshrine the same values of democracy, fundamental rights and the rule of law in article 2, they are not reinforced by monitoring and enforcement measures.

The EU's capacity to respond

A third issue brought to light by the report is the EU's capacity to respond to potential violations of article 2 values. As the resolution and previous attempts to deal with the current situation in Hungary have revealed, the tools needed

to fully address threats of erosion of democratic principles within the EU are lacking.

The treaties offer a number of tools with which the EU and its various bodies can assess and enforce treaty obligations in the member states. The European Commission plays a major role in ensuring that treaty obligations are fulfilled. It is commonly called the guardian of the treaties and has the power, which it has exercised in the case of Hungary, to raise concerns with member states about potential infringements of the treaty and other European law. The EC also has the opportunity to work with member states to ensure that treaty obligations are met. Failing that, it may refer cases of infringement to the ECJ, which it has also done in the present case, regarding both the lowering of the retirement age for judges and the removal of the supervisor for data protection.

Furthermore, the EC has worked closely with the Hungarian government and the CoE to identify problematic areas of constitutional change and potential solutions. The EC has focused specifically on three major issues: (1) the institution of a tax related to ECJ judgements; (2) the power to transfer cases between courts; and (3) the media and advertising restrictions related to election campaigns. In the autumn of 2013, the Hungarian government instigated a fifth round of constitutional amendments, which addressed each of these concerns. The amendments removed the government's ability to institute taxes related to judgements of international courts; eased restrictions on campaign advertisements, making it possible to advertise on both public and commercial media; eliminated the powers of the National Office of the Judiciary to transfer cases; and relaxed standards for state recognition of religious organizations as churches.

Another procedure for dealing specifically with infringement of core values is found in article 7, which outlines a series of increasingly difficult steps on a path towards sanctioning a member state. Only after the Council of the EU determines that a serious and persistent breach has occurred (which requires a proposal by member states or the EC, and the consent of the EP and unanimity at the Council of the EU) may certain treaty rights of the member state in question, such as voting rights, be suspended. Because of the very high threshold put in place by article 7 and the severity of a loss of voting rights, the procedure is widely considered to be a drastic move suitable only for the most egregious cases.

The resolution does not initiate an article 7 procedure, but it prepares the way for a potential initiation by asking 'the Conference of Presidents to assess the

opportuneness of resorting to mechanisms foreseen by the Treaty, including article 7(1) Treaty of the EU (TEU) if the replies from the Hungarian authorities are unsatisfactory. Furthermore, the resolution goes some distance in building the case for ‘a reasoned proposal’ under article 7(1), which is required to ask the Council of the EU to determine whether there is a clear risk of a serious breach of article 2 values by a member state. These are, however, very preliminary steps in a long process and therefore loss of voting rights is very unlikely under article 7 in this case.

Proposed tools

The resolution also proposes a number of new tools for engaging with Hungary and monitoring member states’ compliance with democratic principles.

An Alarm Agenda

The resolution calls on the EC to create an ‘Article 2 TEU Alarm Agenda’, which would require a member state, in the present case Hungary, to submit to monitoring when any risk of violation of article 2 values is identified. This Alarm Agenda would prioritize the issue of compliance with article 2 over all other discussions between the EC and the member state; the resolution envisions that they could continue to hold meetings but not conclude any negotiations in policy fields until compliance is ensured.

Trilogue

The resolution calls on Hungary to comply with the rule of law obligations of article 2 ‘and its key requirements on the constitutional setting, the system of checks and balances and the independence of the judiciary, as well as on strong safeguards for fundamental rights, including freedom of expression, the media and religion or belief, protection of minorities, action to combat discrimination, and the right to property’. It goes on to urge the Hungarian authorities to comply with a related list of specific actions to address the issues raised in the report related to the rule of law. The resolution furthermore asks the Hungarian authorities to inform the EP about the implementation of the measures listed, and invites the EC and the Council of the EU to designate representatives to join EP representatives to form a Trilogue that would monitor and assess the requested information coming from Hungary. If the Trilogue’s assessment finds a failure to comply with article 2, action under article 7 may be taken, as discussed above.

The Copenhagen Commission

A third tool is aimed what the report calls the ‘Copenhagen dilemma’, which refers to the inconsistency between the strictness of the EU with regard to the democratic standards required for entry into the union, on the one hand, and the lack of monitoring once a state has joined. The resolution proposes that member states should be regularly evaluated for compliance with the fundamental values of the union, including upholding the rule of law, human rights and democracy. Assessments would be made under ‘commonly accepted European understanding of constitutional and legal standards’. The EP further calls for cooperation with international bodies, urges reflection and debate among EU institutions on the best mechanisms to tackle breaches of TEU article 2, and suggests that future revisions of the treaties improve the union’s ability to assess and address violations.

For the time being, the resolution suggests creating a Copenhagen Commission, a high-level group that would be independent from political influence, cooperative with other international bodies, and committed to regular and uniform monitoring of all member states for compliance with article 2. It would provide an early warning of any risks to these values.

Legal basis

The fact that no major objections have been raised on the question of the EU’s general legitimacy in engaging in assessments and inquiries into the rule of law is a victory for the union. Though the Hungarian government has rejected many of the claims and criticisms made by the EU, and has argued that the EP has operated outside its treaty mandate, Hungary has maintained engagement with the EC (and even the EP) on these matters, recognizing the legitimacy of the union’s concern for the rule of law and fundamental values in its member states. That is to say, the issue of sovereignty does not mean that the EU has no place in these discussions, yet the question of legitimacy of action under the resolution and by subsequent mechanisms remains important.

The EP seeks to address two very real and separate concerns in the resolution. First, it is very concerned with the current situation in Hungary. Second, it proposes action to address the broader concern about how to enforce treaty values generally. In responding to the Tavares report, Hungary raised concerns that the resolution overstepped the EP’s role by (1) requiring Hungary to inform the EP of measures taken to comply with the resolution’s proposed actions and (2) creating a new body (the Trilogue) to assess the sufficiency of

the response. Hungary points out that the treaties do not give the EP the right to create a monitoring body or demand information from a member state. However, the EP's request falls short of a demand, and the Trilogue itself is not a new body vested with monitoring powers. It is, rather, the EP's attempt to consult with other union bodies in assessing potential action going forward under article 7. Therefore article 7, which requires the EP to make a reasoned proposal to initiate the procedure, appears to supply the basis for establishing the Trilogue and the request for information from Hungary. Yet the creation of bodies with powers of investigation and monitoring—especially enforcement bodies that can compel action and administer sanctions—would require (at a minimum) action by other bodies, and most likely amendment of the treaties. The resolution calls for cooperation in thinking about and creating appropriate evaluating and enforcement mechanisms, but does not establish them.

The EP has real and justifiable concerns that a systematic weakening of institutions is taking place that would severely undermine the rule of law and amount to the infringement of Hungary's obligations under the treaties. The resolution raises markers on this issue and may even lead to action under article 7, but it also works towards a future in which the EP, as a political and legislative body of the EU, does not need to raise such markers—instead, a body devoted to monitoring and enforcing the values of the treaties would address such problems.

Equality of member states

One problem that such an independent body or mechanism might be well equipped to address is the issue of equality among member states. Article 4 the TEU guarantees that 'The union shall respect the equality of member states'. Concern about equal treatment is raised by the resolution and the discussions surrounding the situation in Hungary. This concern is fuelled in part by the real power differentials of different countries in the EU. Not every country has the same amount of influence in the union, due to reasons of design (related to population) and history. Some in smaller countries may feel particularly threatened or singled out for treatment and criticism that bigger countries or more established member states do not face. The Hungarian government has expressed dismay over its perception that Hungary has been unfairly targeted for actions that do not breach the treaty, and that other member states take with impunity.¹⁰

Related to this concern, and relevant to the question of legitimacy discussed above, is the need for clear standards for fulfilling the demands of article 2 values. Article 2 contains broad principles, which are difficult to assess consistently. Further complicating the matter is the fact that, because of the need to respect the individuality of member states, the resolution does not establish a clear standard by which to assess Hungary's (or other states') constitutional changes. In addition, it is often the cumulative effect (rather than one specific instance) that puts a state in danger of breaching article 2 values. For example, the resolution criticizes the Hungarian government for 'the accelerated process for enacting important laws' and worries about a general weakening of the separation of powers.

In the absence of clear standards, one is reduced almost to 'knowing violations when you see them', which makes the process very vulnerable to biased or unequal application (or the appearance thereof). In short, it is easy for a member state to feel attacked. In this regard it is not surprising that Hungary's government has expressed some concern about equal treatment. It has objected to the lack of benchmarks and standards, as well as the lack of clarity regarding the recommendations issued. Given the problematic nature of standards in this and similar cases, it is even more important that other measures are put in place to ensure the equal treatment of member states under the treaty. The use of an independent body of experts, as proposed by the resolution, may be useful in this respect. This proposal is discussed further in the following section.

Going forward

The resolution does not represent the final word on the subject of preserving the values enshrined in article 2, nor does it conclude the EU's engagement with Hungary on these issues. Rather, it marks the start of new processes in both of these areas, with plenty of room for change and a great need for further refinement of the proposals it contains. The following explore possible ways of moving the work of the resolution forward.

Two processes

As stated earlier, the resolution addresses both a specific and a general problem. It attempts to address both the current situation in Hungary and the institutional gap within the union for ensuring adherence to article 2 values. While within the report a discussion of the need to increase the available tools naturally follows an outline of the concerns raised by the

situation in Hungary, going forward, these discussions should be separated. Hungary is not (and should not be seen as) the sole motivation for the creation and use of mechanisms to strengthen the principles of article 2. Moreover, it is unnecessary to couple the general and specific cases, which will now require different sets of actions and involve different actors. The specific case will require continued discussions and exchanges of information between EU bodies and the Hungarian government. (Indeed, the EC has recently expressed satisfaction with remedial action taken by Hungary since the adoption of the resolution.) The general concerns require analysis of how best to achieve the long-term and broad goal of monitoring states for article 2 compliance, potentially through the creation of new mechanisms. Separating the two issues into two independent undertakings will probably go some distance toward achieving success in both areas and abating concerns from within Hungary that it has been unfairly singled out.

Maintain broad involvement

The involvement of the EP in this case—and, indeed, the fact that the EP has led a charge to ensure democratic standards among member states—has both advantages and limitations. Though the resolution itself is not binding and does not compel action from Hungary or other EU institutions, it carries weight not least because of the power of the EP. It has the ability to draw attention to these questions, both in the specific case of Hungary and in the general matter of enforcing democratic principles.

The resolution functions as a powerful call to action and, going forward, the EC and the Council of the EU will need to continue to engage in these questions. The EC's continued engagement with Hungary on exploring and rectifying potential infringements, including the ECJ's involvement in pending cases, is expected. Moreover, all actions contemplated by the resolution, apart from initiation of the article 7 procedure (which may be triggered by the EP), require the involvement of other bodies, and would be best pursued with engagement by both the EC and the Council of the EU. The resolution's proposal for a conference to bring together member states, EU institutions, the CoE, and supranational, national and supreme courts to pursue new enforcement mechanisms represents the kind of broad involvement that will strengthen reforms and demonstrate a strong commitment to the protection of article 2 values.

Focus criticism

The resolution contends that the breach of the rule of law that has occurred (or risks occurring) in Hungary lies in the accumulation of actions—some of which, if taken alone, would not amount to a breach. Therefore, the resolution contains a long list of infractions, both big and small. The resolution thereby presents a convincing argument that the government's actions have run the risk of seriously undermining the rule of law. Nevertheless, the EP (and the EU generally) should remain mindful that obtaining the larger picture requires an even-handed assessment of each measure taken individually, as well as taken together. The resolution occasionally falls short in this respect, and fails to examine the counter-arguments made by Hungary's government, thereby potentially supporting the contention that Hungary is being unfairly targeted for behaviours that are common in functioning democracies.

One such instance of an action that is less clear-cut than suggested in the resolution is the unconstitutional constitutional amendments doctrine—that is, the ability of a constitutional court to declare an amendment to the constitution unconstitutional.¹¹ The unconstitutional constitutional amendments doctrine is not widely embraced, although the opposite is suggested in the resolution. In fact, Hungary's Constitutional Court deemed that it did not have the capacity to review a duly passed amendment to the constitution. Complete capture of the constitution by the Constitutional Court is undesirable in terms of the rule of law, just as capture by the parliament is.

Although amending the constitution in order to pass legislation previously stricken down may raise a red flag and warrant investigation (for instance, the parliament's ability to do this may present more of a rule of law problem under certain contexts, such as when a constitution is also easily amended), it is not in itself a violation of the rule of law. Rather than attack a behaviour that aligns with the requirements of constitutional law, the EP may do better to explain why and how this action, in combination with others, or in Hungary's particular system, undermines Hungary's ability to comply with its treaty obligations to sustain the rule of law, despite the fact that an action of this sort is generally found to comply with rule of law standards. Though describing the Hungarian government's 'override' of the Constitutional Court is a compelling story, and perhaps improves understanding of the big picture, the Hungarian government's critique that the EP creates a false impression of lawlessness may be strengthened by the resolution's falling short of full analysis.

Similarly, the resolution seems to veer off course by using broad admonishments where a more pointed assessment would suffice in the area of family rights. The resolution has a strong point to make in objecting to the attempts made by the Hungarian parliament to define the concept of family narrowly through husband–wife and parent–child relationships on the grounds that it may breach the fundamental rights of people pushed outside the construct of a family and all that it entails. However, the language of the report—in an attempt to emphasize how far from the European norm Hungary now is—seemingly calls on the government to align itself with the current trend in Europe toward legalizing same-sex marriage. Same-sex marriage has not (yet) been recognized as a fundamental right in Europe (the European Court of Human Rights has ruled that it is not)¹² and therefore holding Hungary up to that standard here is misplaced. The resolution may rightly argue that the definition infringes on fundamental rights, but unless and until such a determination is made, the Hungarian government need not be bound by trends in other member states. Of course, the resolution does not technically attempt to bind Hungary by this trend, but blending treaty obligations with speculation and opinion is unhelpful at best, and undermines the position of the EP at worst.

Developing a framework for assessment

As discussed above, the problem of a lack of clear and widely applicable standards is inherent and not easily resolved. Nonetheless, it is important to be mindful of the problem and guard against both the use and the appearance of double standards. The problem here is not so much that standards do not exist—the EU has many years of experience of assessment and enforcement of the Copenhagen Criteria for admission to the EU. Nevertheless, both the assessment and enforcement of article 2 values would be aided greatly by a clear framework of standards to which member states are held. The resolution outlines some of what the EP considers requirements of the rule of law, and proposes that all states be assessed under ‘commonly accepted European understanding of constitutional and legal standards’. The practices and understandings of member states should be carefully studied to clarify these standards. The proposed conference on the issue of the Copenhagen dilemma—which would bring together member states, EU institutions, the CoE, and national constitutional and supreme courts, among others—should also be able to work on developing a framework, which may then be defined in legislation or even eventually added to the treaties.

Other mechanisms may likewise mitigate the lack of clear standards and ensure the fulfilment of the rule of law without placing undue burdens of criticism on some member states. For instance, where no concrete requirements can be found for fulfilling some aspect of the rule of law, there may instead be some identifiable red flags that signify a likely rule of law problem that could then place a burden on the member state concerned to explain the provision or practice—why it is used and how it is prevented from undermining the rule of law (perhaps with a check by another institution, for example). The use of politically independent experts to help evaluation in the area of the rule of law for the Copenhagen Commission, as envisioned by the resolution, will also help ensure that the monitoring of member states remains unbiased.

Continue exploring and refining proposals

The tools such as those proposed in the resolution have been met with support from many experts in the rule of law and by those who are concerned about the potential erosion of article 2 values.¹³ Objections have been raised by the government of Hungary, particularly with regard to demands for information and the creation of the ‘Trilogue’ to monitor its response, but it has also responded with reforms. In his State of the Union address, EC President José Manuel Barroso reaffirmed the commission’s commitment to addressing rule of law issues and ensuring the enforcement of article 2 principles.¹⁴ In the autumn of 2013, the EC gathered together scholars, judges, lawyers and policy-makers to discuss relevant rule of law issues at a conference on ‘shaping justice policies in Europe for the years to come’. While the impact of the resolution has begun to be felt, many questions remain.

The details of a possible mechanism to resolve the Copenhagen dilemma must still be determined. In particular, the exact role of a body to take on this issue is complex. Increasing adherence to article 2 values requires both a determination that a member state has breached them and subsequent enforcement of the treaties. These two tasks, evaluation and enforcement, require different activities and powers, and a number of considerations arise. Endowing a body with significant enforcement powers would require adjusting the treaties, which is a substantial undertaking. There are also several unanswered questions to explore. What kind of monitoring is envisioned? What kind and level of cooperation can be expected from member states—will they object to continuous monitoring? Would a triggering event be preferable, for instance a change to a national constitution or institutional structures? Could a complaint mechanism, involving an expression of concern by another member state or a European institution or citizen, be

useful? Further discussion and debate on these matters are necessary, and are envisioned by the resolution's calls to action.

Conclusion

The EU has an important role in ensuring the preservation of democratic values and the rule of law. It is rightly concerned with instances of deterioration of these values in its member states. The EP and other international bodies have raised compelling concerns regarding the recent constitutional conduct of the Hungarian government. The actions taken may indeed amount to a significant weakening of the rule of law and a degraded respect for fundamental rights in that country. Through its resolution, the EP has spoken out and put pressure on the Hungarian government to reconsider the effects of its constitutional changes. Moreover, the EU continues to pursue, through the established procedures of the EC and the ECJ, legal and political actions to intervene in breaches of the treaty. Following these established procedures and respecting the parameters of the treaty are, in their own way, fundamental to the rule of law. Yet the EP's raising the alarm over these important issues demonstrates the EU-wide commitment to the values of democracy and the rule of law, and reiterates the interconnectedness of the EU member states. The resolution builds a convincing case that the established procedures are insufficient to address concerns about a general lack of oversight and enforcement of the EU's core principles after a member state has joined the union. On the one hand, some current tools may be too fine: infringement procedures may not be able to take on cases where many actions taken together amount to an undermining of the rule of law. On the other hand, article 7 provides a tool that is too drastic to be useful in any but the most dramatic, clear-cut breaches. The resolution therefore offers a modest proposal for collaboration on the creation of new mechanisms. These mechanisms, and their envisioned features of independent and ongoing evaluations of every member state (and of seeking cooperation from a broad array of international bodies) are a reasonable and suitable response to the problems identified.

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Notes

- ¹ EP 2013a, part 1, provision AX.
- ² Ibid., provisions CO, CP.
- ³ European Commission for Democracy through Law 2013a. See also Scheppele 2011.
- ⁴ See, for example, Balazs 2013.
- ⁵ For example, HRW 2013.
- ⁶ EP 2013a, 2013c.
- ⁷ European Council in Copenhagen 1993.
- ⁸ Buckley, Fontanella-Khan and Eddy 2013.
- ⁹ European Council in Copenhagen - 21-22 JUNE 1993- Conclusions of the Presidency European Council - DOC/93/3 - 22/06/1993
- ¹⁰ GOH 2013b.
- ¹¹ Landau 2013.
- ¹² ECHR 2010.
- ¹³ Scheppele 2013; DRI 2013.
- ¹⁴ EC 2013a.



Chapter 7

SAARC and the Regional Promotion of the Rule of Law and Constitutionalism in South Asia



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Introduction

The South Asian Association for Regional Cooperation (SAARC) was formed in December 1985 with seven member states: Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. Afghanistan became the eighth member in 2007. Since its inception, SAARC has had a clear vision to ‘make the region a thriving example of mutual cooperation, collective self-reliance and peaceful coexistence ... however, there have been many hiccups and inhibitions arising from the politico-historical suspicions and mistrusts’.¹ Of all the regional organizations in the world, SAARC is arguably up against the biggest challenge as it seeks to provide a platform for cooperation among diverse nations that are different from one another not only in terms of national identity, but also in terms of religion, economic prosperity and potential, historical narratives and governance structures. While Nepal and Sri Lanka have gone through radical and violent democratization processes, Pakistan and Afghanistan struggle with extreme tribalism and Bhutan is a constitutional monarchy. The Maldives and Bangladesh face immediate threats from climate change, in large part caused by the industrialization of countries like fellow SAARC member India. India and Pakistan have suffered from years of a tumultuous rivalry that, among other implications, has seriously inhibited SAARC’s decision-making processes. Each SAARC member state faces enormous domestic challenges and instability, in addition to fielding bilateral tensions and contentious histories between themselves and other member states. It is therefore no surprise that SAARC has struggled to make a deep impact in the region, especially in the areas of rule of law and

the promotion of constitutionalism, which require a shared commitment to certain political, if not moral and ethical, values.

Although the SAARC Charter's first provision speaks to the desirability of unity and amity in the region, and iterates an explicit commitment to the UN Charter, even a brief reading of the charter and a review of SAARC's activities and organizational documents reveal that, generally speaking, SAARC is more focused on promoting economic cooperation and growth in South Asia than constitutionalism and the rule of law. The association's five founding principles are sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of member states, and mutual benefit. These principles reveal the tension upon which the SAARC alliance was formed: despite recognizing the goal of 'mutual benefit', its primary principles are oddly *separationist as opposed to consolidating*. These principles have expanded over time to include, for example, cooperation on human resource development, agriculture and women's issues. Cooperation on the rule of law, human rights and democratic promotion remains weak, despite forays into these areas. SAARC ultimately aims to provide a platform for cooperation and dialogue among the governments of South Asia; it is not a technical organization and is not seeking to carry out activities or actively participate in the political processes within its member states' borders or to promote constitution writing or rule of law precepts in the region.

That said, there have been moments of significant coming together among SAARC nations on rule of law issues, particularly drug trafficking and anti-terrorism, which are both major security challenges for South Asia. SAARC also formed the South Asian Association for Regional Co-operation in Law (SAARCLAW) in 1991 with the goal to 'bring together the legal communities within the region' and formally adopted the Charter of Democracy in 2011. While SAARCLAW's Charter makes no mention of human rights or rule of law, it does mention promoting 'social justice' as one objective of fostering legal cooperation in South Asia. SAARC's Charter of Democracy, by contrast, is an admirable aspirational document with explicit commitments to the promotion of human dignity, democracy and the rule of law, but the SAARC member state governments have not yet formally endorsed it.

This chapter examines three primary examples of SAARC's efforts to promote the rule of law and constitutionalism in South Asia: anti-drug trafficking and terrorism; SAARCLAW's activities; and the Charter of Democracy. SAARC's ability to move quickly on security issues such as drug trafficking and anti-terrorism will be compared to its relatively slow progress on implementing constitutional and rule of law regimes. Following this discussion of SAARC

policies and activities, the chapter will briefly describe the implementation challenges confronting SAARC, including the difficult realities facing SAARC member states, the stark differences in member states' governance and religious norms, and the effect of India and Pakistan's long-standing animosity on SAARC's effectiveness. These challenges highlight the fact that SAARC is trying to build consensus and solidarity among nations with often-conflicting views on fundamental rule of law and constitutional issues; indeed, 'South Asia has not yet realized the need and the necessity of the idea of a shared destiny of the region'.²

The chapter will conclude by recommending ways to improve SAARC's promotion of the rule of law and constitutionalism in South Asia, for example, the need to find common ground on which to build human rights and democracy among SAARC members. Second, suggestions will be made for reforming SAARC's organizational structure. Finally, the need for a regional enforcement mechanism to ensure that SAARC commitments are implemented—and that international and regional human rights standards are strengthened and become a reality for the citizens of SAARC countries—will be emphasized.

SAARC's promotion of the rule of law, constitutionalism and democracy

SAARC's conventions, publications and monthly activities reveal that it is not primarily focused on the promotion of democracy, constitutionalism and rule of law. Perhaps by necessity, due to the economic status of its member countries (almost all of which are struggling to achieve equitable and sustainable economic standards for their own citizens) SAARC primarily focuses on protecting and promoting economic and social rights. SAARC's mission relies on economic integration and prosperity as the key to regional peace and stability. SAARC Charter article I, which lays out the objectives of its work and formation, focuses almost completely on economic arguments, including the promotion of the welfare of the peoples of South Asia, the acceleration of economic growth, the promotion of collective self-reliance for SAARC nations and the promotion of regional cooperation.

Despite its clear focus on economic and social rights, SAARC has made forays into areas related to the rule of law, democratization and constitutionalism in recent years—most notably the promotion of security in South Asia, the passing of the Charter of Democracy and the creation of SAARCLAW. These actions are significant, and indicate an important shift in SAARC's

focus, though their effectiveness and consistent implementation have been hindered by many of the challenges facing the region. One of these challenges is the fact that when SAARC was first founded only two member states were democratic; the alliance therefore does not represent a commitment to a certain set of political ideals. SAARC's role has mainly been to facilitate diplomatic relations between governments, rather than to promote any one political agenda or understanding of human rights, democracy, rule of law or constitutionalism.

SAARC areas of cooperation

SAARC has official areas of cooperation that represent its priorities. These areas of cooperation were the founding categories for its Integrated Program of Action in the early 1980s; originally they included agriculture, rural development, telecommunications, meteorology, and health and population.³ The list has been expanded over time within the technical, economic and social (rather than political) realms; SAARC has made only hesitant progress toward building a platform for the promotion of the rule of law and constitutionalism.⁴ While it focuses mainly on economic cooperation,⁵ since regional security is intimately connected to regional economic development, SAARC has been able to act more effectively on security aspects of the rule of law.

SAARC's commitment to promoting regional security can be seen as one of its most notable efforts towards forging a culture of the rule of law in South Asia. International practice on behalf of the UN, the World Bank and other international institutions has recognized the strong link between security and rule of law;⁶ often these two concepts are perceived as interdependent in research and programme design and implementation, and SAARC's efforts to increase security in South Asia therefore contribute to the promotion of the rule of law in the region. This can be seen as the least controversial approach to promoting the rule of law, which, in other respects, calls for the acceptance of certain precepts and the implementation of certain practices that remain at odds with several SAARC nations' governance systems. To ensure sustainable peace in the region it will be necessary to address security threats to SAARC nations—as opposed to, for example, concentrated work on the promotion of fundamental freedoms through constitution building.



Security: anti-drug trafficking, trafficking of humans and terrorism efforts

In addition to severe poverty and inequality, and grave threats posed by climate change and natural disasters, the region suffers from a proliferation of drugs and weapons, the manufacture and distribution of which destabilize the region and incite violence and terrorism. While the idea of *collective* security has eluded the SAARC region due to historic animosities, the concept of *cooperative* security has proved realizable in South Asia, largely due to SAARC's efforts. Cooperative security has been acceptable in South Asia, and therefore as an arm of SAARC's initiatives, because it 'is not rooted in idealistic notions of how the world ought to be. Cooperative security accepts the reality on the ground...[it] recognizes the reality of profound interdependence among the South Asian nations in both economic and security realms'⁷ without involving sacrifices of sovereignty or declarations of friendship between nations that are not ready for such actions.

Cooperative security is perhaps most pressing with regard to the threats posed by terrorism in South Asia, as 'the transnational character of terrorism erodes external-internal security distinctions and requires a combination of unilateral, bilateral and multilateral approaches'.⁸ SAARC has successfully provided a platform for multilateral approaches to the regional fight against terrorism. It promulgated the Regional Convention on Suppression of Terrorism in 1987, and an Additional Protocol was passed in 2004 to update the convention on international law developments in the field of terrorism prevention.⁹ The convention and its protocol both call for regional coordination to counter the threat of terrorism, which all SAARC member states face. Furthermore, the convention requires states to make significant sacrifices of sovereignty in relation to extradition and terrorism-related trials, and commits all member states to take consistent action and develop national plans for the prevention, suppression and eradication of terrorism. In 2010, SAARC issued a Ministerial Declaration on Cooperation in Combating Terrorism, which reaffirmed that terrorism 'poses a serious threat to peace and cooperation, and friendly and good neighbourly relations' and that the member states remain committed to combating terrorism in cooperation with the UN.¹⁰

SAARC promulgated the Convention on Narcotic Drugs and Psychotropic Substances, which was signed in 1990 and entered into force in 1993, and the Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution, signed in 2002,¹¹ in the name of promoting regional security and out of recognition of the threats to security posed by the trafficking of drugs and women and children. SAARC also promulgated the Convention on Mutual Assistance in Criminal Matters to foster a cooperative

approach to security promotion in the region. None of these conventions was accompanied by any enforcement mechanisms or institutions, although the establishment of such mechanisms could improve the conventions' effectiveness. Yet it is clear that SAARC member states' governments see security as a major concern for the region, and that they are able to build consensus, make minor sacrifices of autonomy, and move forward with concrete legal and institutional action on security issues.

While the conventions themselves do not call for the establishment of enforcement mechanisms, SAARC has founded a Drug Offences Monitoring Desk (SDOMD) and a Terrorist Offences Monitoring Desk (STOMD). The SDOMD was established in Colombo in 1992 with the objective to 'collate, analyze and disseminate information on drug-related offences in the region'.¹² The STOMD was founded in 1995 in Colombo, and has expanded to allow real-time information sharing on terrorist incidents as well as the exchange of data on specific terrorists and terrorism incidents in the region.

SAARC also runs several regular activities to enhance security and cooperation on security efforts in the region. It has hosted nine conferences on Cooperation in Police Matters, which cover a number of topics from combating corruption to preventing drug trafficking and the abuse of power. SAARC also has a Coordination Group of Drug Law Enforcement Agencies, which is run with 'a view to creating awareness of the problems posed by drug abuse and drug trafficking'¹³ and to increase cooperation with the UN Office on Drugs and Crime.

While all of these efforts represent significant forays on the part of SAARC into the area of security promotion as one component of the rule of law, there is potential to explore the more politicized aspects of terrorism prevention and control, including how these efforts affect the promotion of civil liberties, personal autonomy and anti-discrimination. In the future, a better reflection of this tension and a detailed exploration of how to find an effective balance between preventing terrorism and promoting individual liberty could help make SAARC's activities and efforts in the area of security more nuanced.

Social development: the SAARC Social Charter and civil society

Another SAARC area of cooperation is social development, which yielded the SAARC Social Charter in 2004.¹⁴ This charter is a classic example of SAARC's focus on social and economic (as opposed to political) issues. That said, however, the Social Charter was 'the first document of its kind where citizens have a right under an international agreement to monitor the



progress made by governments in their respective countries'.¹⁵ This aspect of the charter, and its related commitment to strengthen civil society within member states, is evidence of SAARC's involvement in promoting the rule of law and constitutionalism. Empowering civil society is a key component of a healthy rule of law and democratic system, and the SAARC Social Charter's recognition of the import of civil society has put 'pressure [on governments] to do more to fulfil their social responsibilities towards the people'.¹⁶

SAARC's commitment to this empowerment is extremely important, especially since civil society has played such a large role in influencing SAARC's policy and monitoring the member states' progress on key areas. For example, while the Social Charter has no provision for monitoring implementation, the South Asia Centre for Policy Studies (SACEPS) has played a critical role in monitoring the charter's implementation by convening study groups and experts to analyse its implementation and impact in each member state.¹⁷

The SAARC Charter of Democracy

The rule of law and constitutionalism are not necessarily synonymous with democracy, although many of the foundational principles of the rule of law and constitutionalism are found within democratic systems, such as independent judiciaries, checks and balances between the branches of government, the protection of fundamental freedoms, equality before the law and the separation of powers. And, while tensions do at times arise between the precepts of constitutionalism and democracy, the promulgation of the SAARC Charter of Democracy¹⁸ can be regarded as the association's boldest and most progressive foray towards promoting the rule of law and constitutionalism in South Asia.

Even before the ministerial decision to adopt the SAARC Charter of Democracy, SAARC member state governments indicated their acceptance of a few of the principles of democracy, including the need to increase public participation in governments around the region. In the SAARC Tenth Summit Declaration, the SAARC leaders noted the 50th anniversary of the Universal Declaration of Human Rights (UDHR), and beyond reiterating a commitment to better promoting the substantive commitments contained within the UDHR, agreed that 'the strengthening of participatory governance, constituted the foundation for the sustainable economic and social development of the SAARC region'.¹⁹ At the 11th Summit, the leaders agreed 'to take immediate steps for the effective implementation of the programs of social mobilization and decentralization, and for strengthening

institution building and support mechanisms to ensure participation of the poor, both as stakeholders and beneficiaries in governance and development processes'.²⁰ This statement emphasizes that SAARC's overall objective remains achieving the economic and social development of the region instead of, for example, building democratic systems and a culture of the rule of law. This is understandable, given the fact that democracy is only an emerging governance tradition in the region; when SAARC was first established 27 years ago, only two member states were democratic. Today, the majority of member states can be considered democracies (although in varying forms and to differing degrees), but the foundations of the democratic tradition are shaky and the outright promotion of democracy is still not fully embraced by SAARC as an appropriate area of intervention. Nonetheless, the acceptance of the import of participatory governance, exhibited in the statements quoted above and by SAARC's declaration of 1997 as its Year of Participatory Governance, are significant signs of a movement towards the principles of democracy, the rule of law and constitutionalism in South Asia.

The SAARC Charter of Democracy is not officially listed as an agreement or convention on the SAARC or SAARCLAW websites, and its legal status is hard to determine. The charter was endorsed by the SAARC Council of Ministers at its 33rd Summit in Bhutan in 2011; the council has the authority under article IV(a) of the SAARC Charter to formulate SAARC policy. The Charter of Democracy has not been formally adopted by SAARC governments at a summit of the heads of state, which holds the highest authority within SAARC. To date, no concrete activities have been undertaken related to the Charter of Democracy, and there has been no attempt to create an institutional mechanism to oversee or facilitate its implementation. Nonetheless, the charter remains an important tool for the promotion of good governance practices in South Asia, since it renounces unconstitutional changes in government and guarantees (if only vaguely) independent judiciaries and the promotion of the rule of law.

Following its participation in International IDEA's Inter-regional Dialogue on Democracy, SAARC noted on its website that the Charter of Democracy was the 'main instrument for democracy' in South Asia.²¹ And an instrument is indeed needed. As discussed above, democracy is a relatively new concept in South Asia; as an Oxford University report notes, 'Democracy in South Asia did not take a pre-ordained path. The experience of democracy in this region defies conventional notions of preconditions for and outcomes of democracy. South Asia disproves the notions that democracy cannot be instituted in conditions of mass poverty and illiteracy, that deep and politicized diversities are anathema to sustaining democracy, that democracy must be restricted to



a small scale'.²² South Asia's unique approach to democracy renders a tailored and regionally developed charter absolutely necessary, as it is not possible or desirable to import notions of democracy and constitutionalism into the region, rich as it is with its own political traditions and histories.

The charter does, however, have a number of provisions that are relevant to the promotion of the rule of law and constitutionalism in South Asia. Even the preamble acknowledges that the charter was 'inspired' by member states' commitments to the rule of law. Furthermore, the charter affirms a commitment to broad-based participation of peoples in the South Asia region, and commits member states to strengthen democratic institutions. It also includes commitments to:

- the separation of powers and checks and balances between the different branches of government, as per each member state's constitution;
- the independence of the judiciary and primacy of the rule of law;
- the recognition of the monitoring role that civil society plays in democratic societies;
- the promotion of democracy at all levels of government and the decentralization of power; and
- equality.

Together, these commitments (although not yet implemented) provide a robust commitment to many of the central principles of constitutionalism, making the Charter of Democracy a critical document for any future endeavours that SAARC makes to promote constitutionalism and the rule of law in the region. Experts agree that SAARC would be wise to focus more on this area, even though to date it has resisted being too closely associated with the promotion of any kind of ideology: 'Constitutions, by and large, have provided the backdrop against which democracy and the rule of law can be sustained and nurtured. A vision for a secure South Asia must hence incorporate fundamental principles of democracy, which would include freedom, equality and liberty for its people'.²³ The Charter of Democracy has begun to integrate the idea of regional security with democracy and constitutionalism. Thus, whatever its shortcomings, its historic significance in the region cannot be underestimated, especially as it represents an attempt to promote a multilateral commitment to democracy.

Most famously, the Charter of Democracy prohibits coups, or unconstitutional changes in government. This prohibition is highly significant, since it represents a commitment to constitutionalism and a recognition of the fact

that constitutions should be guiding documents that constrain government action, and dictate the validity of such actions, even in moments of great national import and turmoil. Given the history of the region and the SAARC member states, and the fact that each has a written constitution, this commitment is extremely important. Indeed, 'The foundational challenge [in democratization] is the minimalist demand of instituting a democratic government in a manner such that it is not constantly vulnerable to authoritarian and other challenges'.²⁴ The Charter of Democracy's prohibition of such authoritarian and other challenges is therefore an important first step towards meeting and overcoming the foundational democratic challenge facing South Asia. The significance of the commitment is heightened as an indication of member states' acceptance of the need to sacrifice a degree of sovereignty to SAARC and to allow it to oversee government processes and changes within countries.

Critiques of the Charter of Democracy

Despite these strengths, the Charter of Democracy has been criticized as being too weak on democratic, constitutional and rule of law principles. It does not include any dictates about voting or enfranchisement, or about fundamental democratic rights such as freedom of speech, belief and association. It also does not ensure that heads of state and members of government are accountable before the law. This is not entirely surprising, as SAARC member states often struggle to find and define their own relationships to democracy, rule of law and constitutionalism, which have not been 'fully compatible' with 'Western secular paradigms of political and social transformation'.²⁵

Although all the South Asian nations can be described broadly as electoral democracies, the variety of interpretations of democracy in the region makes regional commitments to (and the promotion of) certain principles and practices very challenging. While these variations need not be an absolute obstacle to the development of a Charter of Democracy, consensus must be built among SAARC nations on a 'clearly identified core of indispensable democratic institutions, processes and values'.²⁶ The failure to build such a consensus when developing the charter is the main reason for the shortcomings of its contents, and for the member state governments' lack of will to implement it.

Before the charter was promulgated in its current form, proposals were put forward by SACEPS, with support from International IDEA, for a more comprehensive Charter of Democracy. Known as the Citizens' Initiative, this



version of the charter was formally presented to the Regional Conference on SAARC Democracy Charter hosted in Kathmandu, Nepal, in September 2011. This charter would have, among other things, included an explicit commitment to social justice and equality, the conduct of free and fair elections, and the protection and promotion of minority rights, including the rights of marginalized communities and indigenous peoples.²⁷ While SAARC indicated that it would adopt this more comprehensive version of the charter, it is the more barebones charter that can be found on its website. It seems that the lack of consensus on key democratic and rule of law principles, including those related to secularism, prevented the heads of government from making a more emboldened commitment to the rule of law and constitutionalism. The final Democracy Charter was used to promote a government agenda to prevent military takeovers.

The potential of the secretary general

The Charter of Democracy desperately needs a champion, in the form either of an enforcement mechanism or oversight body or of the SAARC secretary general. SAARC's secretary general is appointed by the Council of Ministers after being nominated by a member state. Several structural problems—including the short terms, the fact that appointments are not primarily made on the basis of merit, and the limitations (mostly financial) placed on the secretary general in hiring experts and professional staff—impede his or her potential to truly influence SAARC policy.²⁸ In 1997, SAARC formed a Group of Eminent Persons to assess its structure and operations and make recommendations for improvements. Their report included concrete recommendations for strengthening the secretary general position. These recommendations were never implemented by SAARC, but they are worth revisiting and implementing, even in moderation, so that the secretary general is more empowered to direct SAARC's initiatives and policy going forward.

The secretary general's identity and expertise

SAARC's secretary general at the time of writing, Mr Ahmed Saleem from the Maldives, who was appointed in March 2012, has a strong background in human rights and democracy. He is best known for his committed service to the establishment and operation of the Maldives' National Human Rights Commission throughout the Maldives' 2008 democratic transition. He has been a consistent advocate of the Paris Principles and of the important role that autonomous human rights institutions can play in ensuring democracy at the national level, as well as on regional cooperation,

the internationalization of human rights and freedom of speech. With his expertise in the institutionalization of human rights institutions, and his knowledge of the challenges facing rights institutions in South Asia as they seek to play their autonomous role in monitoring their nations' transitions towards more rule-of-law-friendly and democratic governance systems, the secretary general could play an important role in promoting a stronger SAARC focus on democratization, constitutionalism and the rule of law and the implementation of the Charter of Democracy. To date, however, Mr Saleem has continued to emphasize economic cooperation as the key to regional peace in South Asia, framing his references to human rights and democracy through an economic lens.²⁹

While the current secretary general has yet to fulfil his potential as a leading advocate of human rights, democratization, constitutionalism and the rule of law, he has made efforts to engage more with the international scheme that promotes these issues, including his personal participation in International IDEA's Inter-regional Dialogue on the Rule of Law in May 2013, at which he publicly emphasized the importance of using the Charter of Democracy as a tool for promoting the rule of law.³⁰ Although it may seem idealistic to link the identity of the SAARC secretary general to the institution's overall focus, priorities and activities, it is not unheard of. Indeed, Nepal's former Foreign Secretary Mr Madan Kumar Bhattarai connected the ascent of the first female secretary general of SAARC in 2011, Ms Fathimath Dhiyana Saeed, to the passing of the Charter of Democracy and, more generally, to optimism for increased dynamism and progressiveness within the association.³¹ It is reasonable to conclude that SAARC's recent appointment of increasingly progressive and pro-democracy secretaries general suggests a shift in its focus, which may in turn be furthered by the actions and ideologies of these secretaries if structural changes are made to empower them in the future.

SAARCLAW

Like the Charter of Democracy and the expertise of the secretary general, SAARCLAW is a tool, albeit underutilized, for promoting constitutionalism and the rule of law in South Asia. Founded in 1991, SAARCLAW's objective is to 'bring together the legal communities within the region for closer co-operation, developing understanding, promoting exchange of ideas and dissemination of information' and to 'use and develop law as a source and an instrument towards social change for development as well as for building cooperation among the peoples of the region'.³² While the idea behind SAARCLAW is lofty, the framework for its existence and operation is



predominantly tied to technical, economic and social cooperation and welfare as opposed to notions of the rule of law, human rights and constitutionalism.

For example, there is no mention in the SAARCLAW Charter of the very important role that an empowered and well-informed corps of lawyers can play in promoting good governance, the rule of law and constitutionalism within member states, or of the benefits that could accrue from information sharing on member states' experience with democratic transitions, constitution-building, and the foundation of the institutions and processes necessary to ensure a culture of the rule of law. Instead, the charter and SAARCLAW's activities both clearly indicate the lawyers' cooperation and exchanges on less politicized (though still important) issues like patent law, trade and anti-corruption efforts. One example is the SAARCLAW Expert Talks, which to date have been held on topics related to leadership, trade and the economy, computer and information technology, and law relating to banking sectors, globalization and tax havens, but have missed critical topics like the rule of law, fundamental freedoms and constitutionalism.³³

SAARCLAW remains, however, an extremely important institution in the region. It has the potential to serve as an excellent platform for the promotion of constitutionalism and the rule of law. SAARCLAW hosts annual conferences that afford 'an opportunity for interaction, exchange of ideas, and for forging a spirit of solidarity'³⁴ among the legal communities in SAARC member states. As stated in the preface to the report issued following the Fourth SAARCLAW Conference in Kathmandu in 1995, 'The Conference, being a symbol of unity and harmony for the legal communities and the people of the SAARC region as a whole, held great importance for the present and future of the region'.³⁵ Topics of conferences have included constitutional and international law and 'law and justice for the common people', as well as methods of alternative dispute resolution, all of which are relevant to building a culture of the rule of law in South Asia. Furthermore, three years after the initiation of its annual conferences, SAARCLAW began hosting conferences of the SAARC chief justices, which have helped develop a culture of solidarity and exchange information about issues such as access to justice. At the Valedictory Session of the Conference of Chief Justices of SAARC, the then prime minister of Nepal, Mr Manmohan Adhikari, stated: 'With the restoration of democracy in this region almost simultaneously, the member countries are faced with the task of making their judiciary and the legal system dynamic and modern so that it can meet the challenges of the next century.... I am confident that this august gathering of eminent jurists and legal experts will address itself to this lofty aim'.³⁶ Indeed, these conferences have been widely regarded as successfully building justice institutions' credibility and

capacity to take on challenges related to constitutionalism and the rule of law in member states.

SAARCLAW also has a Research and Publication Centre with the potential to serve as a resource for developing a more common and effective approach to rule of law and constitutionalism in South Asia. Overall, SAARCLAW appears to be moving in a more progressive direction. Its most recent declaration, issued on 26 May 2013 following the 12th Annual SAARCLAW Conference and the Ninth Annual Chief Justices' Conference, commits it to:

- 'work towards a system of participatory democracy where the principle of separation of power with systems of checks and balances is properly outlined';
- 'have series of lectures in the region by prominent political scientists and thinkers on do's and don'ts for representative governments';
- 'offer legal assistance to the election holding bodies and commissions in the region for guaranteeing free and fair election'; and
- 'work towards making the highest judicial court of the respective member country/ies as the final arbiter with no other organ of the government having any role of interference therein directly or indirectly'.

These commitments are all deeply tied to the promotion of the rule of law, democracy and constitutionalism in South Asia. If implemented, they could go far towards making SAARCLAW a focal point for the discussion of emerging issues and the identification of best practices in these fields. While SAARCLAW and the Supreme Court justices involved in the chief justices' conferences have an obvious interest in promoting judicial independence and the separation of powers, these ideas must be more mainstreamed in SAARC practice and policy. In order for this to happen, however, several major obstacles will have to be overcome.

Challenges faced

While inaugurating the 33rd Session of the SAARC Council of Ministers in Thimphu, Bhutan, in 2011, India's external affairs minister noted that, despite government commitments to abide by SAARC processes, it faced 'continuing challenges to implementing our agreed decisions. We need to move faster in executing the plans of action'.³⁷ Generally speaking, SAARC faces major problems in implementing its conventions and other policy agreements; these challenges severely inhibit the institution's effectiveness.



Regional diversity and the trouble finding common ground

As noted above, SAARC faces severe challenges in uniting such a diverse region—with its different political, social and religious traditions—behind common agendas. While all countries within the SAARC region have a constitution, their approaches to integrating religion into constitutional democracies vary hugely, which complicates the promotion of a united understanding of the rule of law and constitutionalism.³⁸ As one analyst noted, ‘the very diversity of South Asia demands the gradual implementation of conceptual steps that build towards a distinct regional identity’.³⁹ The lack of such a common identity, Basnet argues, has inhibited SAARC’s ability to plan for a common future for the region.

Despite this historic lack of common ground and identity, however, it is critical that SAARC member states put aside their differences and work to forge common solutions to the problems they are facing in development and their economies, as well as corruption, the rule of law and constitutionalism. SAARCLAW’s efforts to focus on some of these issues, and to host dialogues and produce publications on them, could be the first step towards building a more consolidated sense of what democracy, constitutionalism and the rule of law could mean in the region as a whole. To date, the lack of such a common understanding has allowed historic animosities and nationalist divisions to prevent SAARC from effectively promoting constitutionalism and the rule of law in the region, and from using the tools and mechanisms that do exist to enable such promotion.

Tension between India and Pakistan

In addition to the extreme diversity of perspective and philosophy in the SAARC region, the long-standing tension between India and Pakistan (which together comprise 90 per cent of the gross domestic product [GDP] of the whole SAARC region and 84.9 per cent of its population, and are responsible for 86 per cent of its exports) impedes the institution’s ability to act quickly and effectively in all areas.⁴⁰ This obstacle tends to be felt most acutely in democracy promotion and the related areas of rule of law and constitutionalism.⁴¹ As observed by one Bangladeshi scholar, ‘Throughout the region, the quest for prosperity and democracy is too often marred by the spectre of war between India and Pakistan’.⁴² Pakistan, on principle, tends to resist any principle, ideology or action propagated by India, which constantly promotes itself and is spoken about as the ‘world’s largest democracy’. Pakistan is therefore also likely to resist SAARC being identified as a regional

organization that promotes democracy, or for that matter the rule of law and constitutionalism.

In addition to establishing this barrier to SAARC's effectiveness in the promotion of democracy, constitutionalism and rule of law, the tension between Pakistan and India upsets peace, security and stability in South Asia in general, attracts and consumes an undue amount of diplomatic and media attention, and generally stands in the way of SAARC's mission of establishing regional cooperation and identity. There is no quick or easy solution to the historic animosity between the two giants of South Asia, but something must be done to quell this tension in order to make SAARC effective. That said, it is important to acknowledge the role that SAARC has played to date, and which could be expanded upon, as a space in which Pakistan and India can meet and discuss pressing issues without confronting each other head on or hosting a public summit.

Recommendations and conclusion

This chapter has sought to show that, while SAARC remains a political organization and has traditionally focused more on economic and social issues, it has made significant forays into the areas of rule of law and democracy. With the passing of the Charter of Democracy, the cooperation achieved in the area of security, and the founding of SAARCLAW, SAARC has developed the tools necessary to reorient its focus and to play a key role in the general constitutionalization and democratization of South Asia. That said, the tools have remained—mostly—on paper, and more work is required before they are translated into action or into an improved culture of rule of law in South Asia. This is largely due to the lack of enabling mechanisms and institutions, the development of which is crucial to SAARC's effectiveness going forward.

It is critical that SAARC develops a common approach to democratization, constitutionalism and rule of law, especially since developments across South Asia suggest that these will be primary issues for the governments of each of the member states in the near future. Decentralization in India, democratization in Bhutan, and constitution writing in the Maldives and Nepal are all delicate processes that could benefit from regional assistance. In developing such an approach, SAARC can and should reference the history of the UN, which, after much deliberation, settled on the term 'human dignity' in framing its mission in order to appeal to all of its diverse constituents. It is not possible or desirable for all SAARC nations suddenly to agree on what democracy



should look like, what a constitution should stipulate or what demands the rule of law makes on them. However, finding some commonalities, however small, from which to approach these issues is necessary. If better use is made of SAARCLAW, the Charter of Democracy and the expertise/identity of the SAARC secretary general, then there is potential to begin a more intensive and constructive regional dialogue on the rule of law and constitutionalism, and therefore to make use of the wealth of experience that South Asian nations have accumulated in these areas to build a common approach and commitment to the future promotion of the rule of law and constitutionalism.

Developing this platform will not, in itself, resolve the challenges facing South Asia. Significant institutional reform is required to enable SAARC to fulfil its potential in the region. The Declaration of the Tenth SAARC Summit (31 July 1998) states, in regard to the agreement to promulgate a Social Charter, that ‘in order to increase effectiveness, it would be necessary to develop, beyond national plans of action, a regional dimension of action including a specific role for SAARC’. This statement could apply with equal validity to SAARC’s efforts to promote the rule of law, constitutionalism and good governance generally in the region. SAARC could significantly increase its effectiveness by being more active in its areas of cooperation (discussed above), with the intention to truly build a sense of regional cooperation and accountability in South Asia that extends beyond economic dimensions.

SAARC could become more active if it established a regional court and/or other institutions and mechanisms to enable it to be truly *active* in the region and to hold member governments accountable for the commitments they make in SAARC conventions and agreements. As one report explains, ‘the single most important weakness of the SAARC process has not been in the domain of ideas but their execution... In the official SAARC process, non-implementation of decisions can be identified at [all] levels’.⁴³ Execution could be improved by creating a regional ombudsman, empowering an independent agency, or formalizing the role of civil society in monitoring and evaluating the implementation of SAARC commitments. In addition to establishing new institutions, SAARC should revisit and rework its organizational structure. One SACEPS paper accurately states: ‘The role and functions of the SAARC secretariat and the Secretary-General, frozen in its 1986 Memorandum of Understanding, have singularly failed to keep pace with the rapidly changing global environment’.⁴⁴ Empowering existing institutions, as well as creating new ones, would enable SAARC fully to use the tools it has already created to promote constitutionalism and the rule of law in South Asia.

SAARC should also take on a more assertive role in capacity development vis-à-vis the various member state governments. There has been an enormous surge in popular understanding of democracy in South Asia in the last two decades, and, while citizens in the region have voiced demands for democratic progress, the governments have not met these demands. As an Oxford University study notes, 'The cultures, practices and institutions of democracy have transformed the people of South Asia from subjects to citizens, as bearers of rights and dignity, but this gives rise to citizens' expectations that most of our regimes fail to meet'.⁴⁵ As citizens' expectations rise without the accompanying growth in government capacity to meet these demands, the prospect of conflict and social and political unrest increases. SAARC could therefore play an important role in helping member state governments meet their citizens' demands; this action could also contribute to building regional peace and stability.

Despite facing great challenges, SAARC's forays into constitutionalism and the rule of law cannot be underestimated. SAARC is a relatively new institution that is trying to stay abreast of new ideas and best practices, and to promote them in a region that suffers from very real and immediate threats to basic survival and security. Given these threats, SAARC's traditional focus on economic, environmental and social challenges is understandable, but these efforts will be meaningless if the rule of law and constitutionalism are not recognized as equal contributors to regional stability and peace. SAARC has made significant progress in improving economies and infrastructure in South Asia. It is now time for it to shift its focus to other, long-standing political and governance concerns.

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Notes

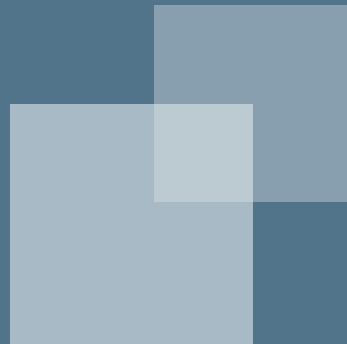
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Chapter 8

Regional Organizations and Threats to Constitutional Democracy from Within: Self- Coups and Authoritarian Backsliding



Chapter 8

Sujit Choudhry and Sumit Bisarya



Regional Organizations and Threats to Constitutional Democracy from Within: Self-Coups and Authoritarian Backsliding

Introduction: defining threats to democracy from within

The problem of unconstitutional transfers of power has long been an issue on the agenda of regional organizations. Historically, the paradigmatic example of an unconstitutional transfer of power is the military coup d'état, in which the armed forces seize power and make no pretence of adherence to the constitutional procedures for changes in government. Over time, however, regional organizations have come to recognize that constitutional democracy can also be undermined *from within*, by democratically elected governments and presidents that capture the state and put an end to political competition and democratic rule. There are at least three main differences between a military coup d'état and internal threats to constitutional democracy.

- A military coup d'état seeks to seize power and overthrow a civilian government, whereas threats to constitutional democracy from within come from governments and presidents who have already obtained power through democratic and constitutional means, but do not wish to surrender it, through either an actual or expected electoral loss and/or presidential term limit.
- A military coup d'état cannot easily lay claim to an electoral mandate or democratic legitimacy to overthrow a civilian government, whereas governments and presidents that seek to remain in power can do so, and regularly do (although it is difficult to sustain this claim without a fresh electoral mandate).
- A military coup d'état acts entirely outside constitutional procedures and institutions, in blatant contravention of the existing constitutional

order, without any pretence of compliance with legality, whereas threats to democracy from within occur through both unconstitutional *and* formally constitutional means.

These three distinctions between the military coup d'état and threats to democracy from within have raised a series of difficult issues for regional organizations that have sought to adapt their existing legal and institutional frameworks for unconstitutional transfers of power to encompass these situations. This chapter draws a further distinction between two categories of attacks on constitutional democracy from within: *self-coups* and *authoritarian backsliding*:

- A *self-coup* (*autogolpe*) arises when democratically elected presidents remain in power unconstitutionally and escape the confines of term limits and/or electoral losses. While the means vary, there are a number of recurring themes. A president may declare a state of emergency that suspends many of the constitution's provisions, and may then amend parts of or rewrite entirely the constitution (especially its provisions on term limits) either by decree or by convening an extra-constitutional constituent assembly. Or he may simply act through brute political might and/or military force. In many instances, the self-coup results from the abuse of constitutional powers for unconstitutional ends. It is like a military coup d'état in that the president remains in power through unconstitutional means.
- *Authoritarian backsliding* arises when a democratically elected government or president has come to power without force or fraud, and then manipulates the state rules and institutions (through constitutional and statutory amendments) to overcome term limits and/or electoral losses. The means vary, and include the manipulation of electoral systems, political party regulation, and/or the modification or abrogation of presidential term limits. The prospect of backsliding under law creates real difficulties for regional organizations. The term authoritarian backsliding is used since the democratic regime under threat may itself have replaced a prior authoritarian regime, to which the constitutional order may be reverting.

The main distinguishing feature between a self-coup and authoritarian backsliding is that the latter is achieved through constitutional means, whereas the former is not. In many disputes, a central point of contention among parties to the conflict is whether capture from within has occurred through constitutional or unconstitutional means. This creates two main issues for regional organizations: (1) they may be called upon to adjudicate

matters of domestic constitutional controversy; and (2) they may be called upon to assess the rulings of domestic constitutional courts on these issues in reaching their own determinations. Authoritarian backsliding raises the additional problem that regional organizations must condemn measures that are entirely constitutional as a matter of domestic law on the substantive ground that they impede political competition.

These issues remain pressing today, and have become matters of international concern, especially for regional organizations. The proliferation of military coups in the second half of the 20th century¹ drove regional organizations, in particular in Latin America and Africa, to develop legal and institutional frameworks that, by protecting democratic and constitutional order, would contribute to these organizations' overall goals of regional unity and stability. Egypt² is the latest country to have its membership in a regional organization suspended for an unconstitutional change in government, joining the Central African Republic, Guinea, Guinea-Bissau, Madagascar, Mauritania, Niger, Côte d'Ivoire, Togo, Fiji, Paraguay and Honduras.

The next section examines how the Organization of American States (OAS) and African Union (AU) have developed their legal and institutional frameworks for unconstitutional transfers of power to extend beyond military coups d'état to encompass authoritarian backsliding and self-coups. Both regional frameworks envision possible suspension of participation in cases of unconstitutional transfer of power. Two recent cases—Honduras (2009) and Niger (2010)—are examined to analyse the challenges for regional organizations in responding to such events. Madagascar is used as a case study to examine when (and under what conditions) those suspensions are lifted. Preliminary lessons are drawn from these case studies, and policy recommendations are provided for regional organizations.

Regional mechanisms: from coups d'état to threats to constitutional democracy from within

The Organization of American States

The OAS is a regional intergovernmental organization of states in North and South America and the Caribbean that was established in 1948 by an international treaty, the OAS Charter.³ The key provision governing unconstitutional transfers of power is article 9 of the OAS Charter, which provides that:

[a] Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

Article 9 defines an unconstitutional transfer of power as the overthrow of a democratically elected government by force. In such an event, a state may be suspended from the right to participate in the OAS. The power to suspend is a last resort that can only be exercised if diplomacy to restore representative democracy has failed (article 9(a)). Suspension requires a two-thirds affirmative vote of member states (article 9(b)), and a suspension may be lifted by another two-thirds vote (article 9(f)).

Article 9 defines an unconstitutional transfer of power as a coup d'état or military invasion. It does not address threats to democracy from within in the form of a self-coup or authoritarian backsliding. Over time, the organization's understanding of unconstitutional transfers of power has evolved to partially address these issues. The key document is the Inter-American Democratic Charter (IADC), which was adopted in December 2001 by the OAS General Assembly, and which serves as an interpretation of the OAS Charter. Article 19 delineates two kinds of threats to democracy that warrant OAS action. First, there is the 'unconstitutional interruption of the democratic order of a member state'. This includes coups d'état and military invasions—already covered by article 9 of the OAS Charter. Second, there is the 'unconstitutional alteration of the constitutional regime that seriously impairs the democratic order of a member state'. This captures changes to the constitutional regime by democratically elected governments to restrict political competition and remain in power—as opposed to an unconstitutional transfer of power. But the changes to which it applies lie outside the normal process of constitutional amendment—for example, by executive decree, ordinary legislative vote or referendum where these are not recognized procedures for amendment. Thus it applies to self-coups, but does not extend to authoritarian backsliding, which is defined here as *constitutional* alterations of the democratic regime that seriously impair the democratic order of a member state. Article 21 of the IADC affirms the need for a two-thirds vote to suspend a member.

Likewise, article 22 affirms that a two-thirds vote is required to lift a suspension, but adds a new substantive precondition: that 'the situation that led to suspension has been resolved', without specifying what an appropriate resolution must entail. In cases of coups d'état, the language is broad enough

to include the transfer of power back to civilian rule. In such situations, an appropriate resolution could entail either restoring a duly elected president or government, or holding fresh elections. The extent of what is politically feasible in a given situation will depend on the context. In cases of self-coups, a resolution of the situation could entail the restoration of the constitutional status quo ante. An interesting question is whether an appropriate resolution could also entail the resignation of the president where the prior term limit had been exceeded, and/or holding fresh elections to give the government a new electoral mandate.

The African Union

The AU was created by an international treaty known as the Constitutive Act of the AU in 2000.⁴ In contrast to its predecessor,⁵ the Organization of African Unity (OAU), the AU has developed a legal and institutional framework aimed at promoting democratic and constitutional order. Article 30 of the Constitutive Act provides that ‘governments which shall *come to power* through unconstitutional means shall not be allowed to participate in the activities of the Union’ (emphasis added), which connotes that they must be suspended if this has occurred. At first glance, article 30 is quite narrow. It applies to *changes* in power that are unconstitutional—for example, military coups d’état. It does not apply to self-coups, because those are instances of democratically elected governments or presidents that have come to power constitutionally *remaining* in power through unconstitutional means. Likewise, it does not apply to authoritarian backsliding, because this is also a case of democratically elected governments or presidents seeking to remain in power through the manipulation of, but formal compliance with, constitutional procedures.

But the AU’s concern for constitutional democracy now extends to threats to democracy from within. The origins lie in the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, adopted in July 2000, which defines four kinds of unconstitutional changes of government:⁶

- military coup d’état against a democratically elected government;
- intervention by mercenaries to replace a democratically elected government;
- replacement of a democratically elected government by armed dissident groups and rebel groups; and

- the refusal of an incumbent government to relinquish power to the winning party after free, fair and regular elections.

The Lomé Declaration also provides a framework for possible responses from the OAU, including suspension, which are aimed at ‘a speedy return to constitutional order’. This implies, at a minimum, the restoration of the constitutional status quo ante. It could also connote the restoration of the deposed government or president, although that is not clear.

The first three instances of unconstitutional regime change in the Lomé Declaration expand upon the traditional focus on the military coup d’état to encompass two other kinds of violent threats to democratically elected governments that African democracies have faced: overthrow by mercenaries and armed rebels. The fourth instance is technically not an example of unconstitutional regime change, but rather unconstitutional regime *maintenance*. It is a self-coup, albeit a narrow one that arises only after there have been elections in which the governing party has lost. It does not extend to a situation in which a president or government pre-empts an electoral loss by delaying or suspending elections altogether or, more generally, by engaging in a variety of forms of unconstitutional conduct (e.g., declaring a state of emergency, convening an extra-constitutional constituent assembly, abrogating or amending the constitution) that put an end to political competition and democratic rule.

In 2007,⁷ the AU sought to further expand its framework for democracy through the African Charter on Democracy, Elections and Governance (ACDEG).⁸ Article 23 of the charter broadens the definition of an unconstitutional change of government to ‘illegal means of accessing *or maintaining power*’ (emphasis added), which clearly applies to threats to democracy from within. It also adds a fifth category of unconstitutional means of accessing or maintaining power to those identified in the Lomé Declaration: ‘any amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of government’. This new category extends the AU’s framework for democracy to encompass authoritarian backsliding, because it applies to constitutional or statutory amendments that are formally legal, but which undermine government turnover. The interpretive question is whether it also includes self-coups, which have the same goal of undermining electoral turnover, but proceed through illegal means. Although article 23 does not expressly capture this category, it would be odd if it did not condemn this conduct, which is arguably more egregious and easier to identify (because it is achieved illegally) than authoritarian backsliding.

The AU may suspend a member and impose sanctions to enforce its framework for constitutional democracy. There are two key institutions that make these decisions: the Peace and Security Council (PSC)—a 15-member state body chosen by the AU Executive Council—and the AU Assembly. Chapter 8 of the ACDEG deals with unconstitutional changes in government. Article 24 provides that, when a situation arises, the PSC shall ‘exercise its responsibilities in order to maintain the constitutional order’. Article 25(1) in turn empowers the PSC to suspend a member state when there has been an unconstitutional change in government and diplomatic efforts to resolve disputes have failed and to impose sanctions (including punitive economic measures) on any member state that is proved to have supported or instigated unconstitutional regime change in another member state. The AU Assembly also seems to have the power to suspend or declare the suspension of a member state.

The ACDEG provides that the PSC can lift sanctions once the ‘situation that led to the suspension is resolved’⁹ without further defining what that might entail, parallel to the IADC. Importantly, and unlike the IADC, article 25(4) stipulates that ‘the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order ...’—a requirement that was put to the test in Madagascar (discussed below).

Case studies

The Organization of American States: Honduras

On 28 June 2009, the Honduran military seized the democratically elected president, Manuel Zelaya, and expelled him from the country. The OAS quickly suspended Honduras under article 21 of the IADC and called for President Zelaya’s reinstatement.¹⁰

On closer examination, however, the Honduran case is far from being as clear as the OAS resolution might suggest.¹¹ On 23 March 2009, Zelaya had issued a decree ordering the holding of a national plebiscite on 28 June on whether to hold a subsequent referendum in November 2009 (simultaneously with national elections) on the establishment of a National Constituent Assembly for the purposes of adopting a new constitution.¹² Although the decree did not specify the reasons for convening a constituent assembly and adopting a new constitution, and Zelaya stated on the record that convening a constituent assembly would not interfere with the election process,¹³ this was widely interpreted as a move to allow him to stay in power beyond his one-term limit set out in article 239 of the constitution.¹⁴

Presidential term limits are often the first casualty of authoritarian backsliding, and in many jurisdictions have been extended or abolished entirely through constitutional amendments. In an analysis of constitutions with fixed executive terms since 1875, one study found that—in situations where it was a possibility (i.e., they had not died in office or been voted out before the maximum term limit)—25 per cent of cases of fixed-term executives broke those limits, and in these cases a large majority (86 per cent) amended or reviewed the constitution.¹⁵ In recognition of this threat, the presidential term limit in article 239 is subject to two layers of constitutional protection. First, article 373 of the constitution of Honduras provides that amending the constitution requires a two-thirds majority of Congress, and stipulates that article 373 (and other articles relating to term limits and the succession of power) are non-amendable. Further, article 239 provides that anyone who violates, or advocates amending, this provision shall immediately cease to hold office.

In the face of this constitutional framework, Zelaya's decree raised serious constitutional concerns and prompted a complicated set of legal proceedings. On 8 May, the Prosecutor's Office filed an action in the Administrative-Contentious Court seeking to (1) bring an injunction against the proposed plebiscite and (2) declare the presidential decree illegal and unconstitutional.¹⁶ On 27 May that court ordered a suspension to preparations for the 28 June plebiscite, pending resolution of the associated legal and constitutional issues.¹⁷ While the court was considering the action filed by the public prosecutor, Zelaya changed the wording of the presidential decree from 'consultation' to 'poll'. However, the court issued a clarification two days after its initial decision that included all decrees aimed at the same objective within the scope of the injunction. It subsequently issued a series of orders demanding that Zelaya comply with its ruling, and ordering the military not to distribute ballot papers for the plebiscite.

Notwithstanding these court rulings, Zelaya continued to press forward with his plans for the plebiscite. When the military refused to distribute ballot papers in accordance with the court order, Zelaya fired the head of the Joint Chiefs of Staff, General Romeo Vasquez. The Supreme Court immediately declared the removal unlawful and reinstated Vasquez. Zelaya rallied supporters and led them personally on a march to the military base where the ballot papers were being held in order to distribute them around the country, proclaiming at the gates of the compound 'Sunday's referendum will not be stopped'.¹⁸ He also asserted his authority to order the military to distribute the ballot papers in his capacity as commander-in-chief of the armed forces.



The Supreme Court then issued an order for Zelaya's arrest on 26 June, leading to his seizure by the military on 28 June and expulsion to Costa Rica. While the seizure was authorized by the court order, the expulsion from the country was the sole decision of the military. Congress subsequently sought to legitimize Zelaya's expulsion retroactively through the acceptance of a purported letter of resignation (which Zelaya denied he had written), and through a resolution that held Zelaya responsible for 'repeated violations against the constitution'. President of the Congress Roberto Micheletti was named president for the remainder of Zelaya's term (until January 2010), under the constitutional rules governing the line of succession when the presidency is vacant.

The OAS determined that the removal of President Zelaya was an unconstitutional transfer of power.¹⁹ There are indeed serious questions about the constitutionality of the actions taken to remove him from office. While it is true that the military never took power, and the line of succession under the constitution was followed, the question is whether Congress had the constitutional power to remove Zelaya. The constitution does not authorize Congress to impeach or dismiss the president. While article 239 provides that anyone advocating an amendment to presidential term limits 'immediately ceases to hold office', Zelaya's decrees calling for referendums on constitutional change did not expressly advocate directly for amending term limits. Even if article 239 was cited, it is far from clear that it applies. A case can be made that the removal of a president from office requires a legal proceeding (perhaps before a court), with appropriate due process, to determine whether a violation of article 239 has occurred.²⁰

The OAS clearly and swiftly decided that the transfer of power from Zelaya to Micheletti was unconstitutional, and acted accordingly. On 1 July, the OAS General Assembly passed a resolution condemning events in Honduras as a coup d'état. The resolution reaffirmed Zelaya as the president of Honduras and demanded his immediate return, and declared that no government emerging from the 'unconstitutional interruption' would be recognized.²¹ Thereafter, the General Assembly passed a follow-up resolution, the 'suspension of the right of Honduras to participate in the Organization of American States', in which it stated that 'diplomatic initiatives taken under Article 20 of the Inter-American Democratic Charter aimed at restoring democracy and the rule of law as well as reinstating' Zelaya had 'been unsuccessful', and thus suspended Honduras' participation in the OAS.²²

Despite increased international attempts to mediate a solution, elections went ahead in Honduras under a state of emergency on 29 November, in

which Porfirio Lobo—who had lost the 2005 elections to Zelaya—was elected president. Lobo entered into negotiations mediated by Colombia and Venezuela to bring Zelaya back to Honduras, and Zelaya finally returned on 28 May 2010. Almost immediately afterwards, the OAS voted to lift the suspension of Honduras.²³

The Honduras case raises interesting questions. If the forced exit of Zelaya from office represented an unconstitutional transfer of power, could his actions amount to an attempt to engage in ‘an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order of a member state’—i.e., a self-coup—by pushing forward his plans for a plebiscite on constitutional provisions rendering one-term president limits unconstitutional, in the face of a court injunction against the holding of the referendum? Or would this only have occurred if the plebiscite had been held, if it had approved a referendum, and if plans for a referendum had been launched? Or if an actual amendment to the term limit was proposed? Further, the original OAS resolution called for Zelaya’s reinstatement as a condition of ending Honduras’ suspension. Zelaya was not reinstated, yet the suspension was terminated. Was this perhaps an implied recognition that Zelaya had engaged in constitutionally questionable conduct to amend the constitutional provisions on term limits (which itself arguably breached the IADC), and that simply restoring to him to power would not be an appropriate resolution of that threat to constitutional democracy? These questions will be addressed after discussing a case of somewhat parallel circumstances in Niger.

The African Union: Niger

Mamadou Tandja was elected president of Niger in 1999, and re-elected in 2004. Approaching the end of his second term in 2009, and confronted by article 36 of the 1999 constitution of Niger, which imposed a limit of two five-year terms for the presidency, Tandja called a referendum to pave the way for a new constitution that would abolish presidential term limits. In a manner parallel to the constitution of Honduras, article 136 of Niger’s constitution prohibits the amendment of article 136, which is specifically excluded from the permissible subjects on which a president may call a referendum. The Constitutional Court accordingly found that the proposed referendum would be unconstitutional,²⁴ to which Tandja responded by dissolving the parliament and the Constitutional Court. The referendum was held on 5 August 2009 and, despite significant protests, approved Tandja’s proposal to adopt a new constitution.²⁵ Tandja proceeded to amend the constitution and win re-election, but his victory was short-lived. On 18 February 2010 the



military ousted him from office, suspended the constitution and stated that it wished to turn the country into ‘an example of democracy and of good governance’.²⁶

Before the AU crafted a response to developments in Niger, and before the military coup, the Economic Community of West African States (ECOWAS) was swift to condemn President Tandja’s efforts to circumvent the constitution and abolish term limits. At an extraordinary summit on 17 October 2009, ECOWAS condemned Tandja’s actions and invoked preliminary measures under its own relevant governance framework, namely the Supplementary Protocol on Democracy and Good Governance,²⁷ which provides in article 45 for sanctions in cases in which ‘democracy is abruptly brought to an end’. Notably, this triggering language is broad enough to encompass threats to democracy from within, including self-coups and authoritarian backsliding. The summit urged Niger to suspend legislative elections indefinitely and to enter into political dialogue with major political parties to resolve the impasse. Moreover, the summit determined that if President Tandja failed to comply with its decision, this would lead to the automatic and immediate imposition of all other sanctions envisaged in article 45, including suspension, and the case would be referred to the AU with the recommendation that it should adopt similar action.²⁸

The AU PSC, meeting two weeks after the ECOWAS Summit, endorsed the ECOWAS decision but did not take any actions under article 30 of the AU Constitutive Act. Moreover, the AU refrained from explicit condemnation of Tandja’s actions and chose instead to launch a mediation process.²⁹ The AU reaction to Tandja’s overthrow, by contrast, was swift and clear. The day after the coup, the PSC condemned the overthrow of the government, stating that ‘the relevant AU instruments systematically condemn any unconstitutional change of Government’ and demanding ‘the speedy return to constitutional order’ until which Niger was suspended from AU activities.³⁰ Here, the PSC defined the ‘return to constitutional order’ as ‘the internal situation [which] stood before the referendum of 4 August 2009’—that is, before the referendum on the abolition of term limits. In fact, Tandja did not return to power, and Niger held presidential elections in 2011 under a newly promulgated constitution, which imposes a limit of two five-year terms, like the 1999 constitution (article 47). After the elections, the PSC lifted Niger’s suspension.

The case of Niger raises interesting questions that parallel those arising from the Honduras case. Were President Tandja’s actions in seeking to extend term limits a form of self-coup? Did such actions breach article 23 of the ACDEG,

which condemns ‘illegal means of accessing or maintaining power’, which it defines as including ‘any amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of government’? This provision certainly encompasses self-coups. Would a constitutional amendment abolishing term limits per se, while nonetheless retaining fixed terms and regular elections, amount to a breach of this provision? Should the AU have followed the lead of ECOWAS and acted more aggressively to condemn the abolition of term limits, and how should the decision of the Niger Constitutional Court have shaped its analysis? Had the AU done so, would it also have prevented the bloody military coup? Without the military coup, would Tandja’s self-coup have remained unaddressed? Did the AU’s decision to demand a return to the situation prior to the referendum—as opposed to prior to the coup—imply a condemnation not only of the coup d’état, but also of the attempt to unconstitutionally amend the provision on term limits as a breach of AU norms? If so, should the AU also have conditioned the lifting of the suspension on measures to address the ‘collateral damage’ caused by Tandja’s power grab (the dissolution of the Constitutional Court and parliament)? Would the return of the constitutional status quo ante address the underlying conflict triggers exacerbated by Tandja’s referendum?

The African Union: Madagascar

AU documents provide different direction, with varying degrees of specificity, on the conditions that would justify lifting a suspension in cases of an unconstitutional transfer of power. For example, the Lomé Declaration refers to ‘a speedy return to constitutional order’, which suggests a return to the constitutional status quo ante, and potentially the restoration to power of the deposed leader or government. By contrast, the ACDEG states that the ‘situation that led to the suspension is resolved’ before a suspension can be lifted, which implies a range of possible responses that encompasses a return to the constitutional status quo ante, but conceivably extends beyond it. What would ‘resolve’ the situation is left undefined and open-ended. In addition, the charter does rule out one kind of response: an election in which the perpetrators of the unconstitutional change of government participate.

The following analyses how the AU has applied this legal framework in practice, and the issues that have arisen. The AU has dealt with unconstitutional transfers of power in the Central African Republic, Guinea, Guinea-Bissau, Madagascar, Mauritania, Niger, São Tomé and Príncipe, Togo, and Egypt.³¹ Only in São Tomé and Príncipe was the deposed president returned to power.



This evidence strongly suggests that in the context of a coup d'état a complete return to the status quo ante is likely to be unrealistic in many cases. While in the Central African Republic, Mauritania and Niger the PSC initially called for the reinstatement of the deposed president, the AU's broad formulation under the ACDEG encompasses the reinstatement of the constitutional order and the deposed leader him/herself, as well as other resolutions. In all of the cases above (except for São Tomé and Príncipe) this 'resolution' took the form of elections. In the Central African Republic, Mauritania and Togo, coup-makers were elected, and the lifting of the AU suspension in effect provided international legitimacy for the new regime. The charter recognized this contradiction in article 25(4) by conditioning the lifting of a suspension on the non-participation of coup-makers in elections to restore democratic rule.

Article 25(4) was put to a severe test in Madagascar.³² The deposed president, Marc Ravalomanana, and the coup leader, Andry Rajoelina, were intent on running in elections. The AU suspended Madagascar's participation following the 2009 coup,³³ and insisted that sanctions would remain in place until elections were held in which neither the deposed president nor the coup-maker were candidates. Following intense mediation by the Southern African Development Community, Ravalomanana and Rajoelina agreed not to stand in the next presidential elections, and made announcements in December 2012 and January 2013 to this effect. However, Ravalomanana's wife proceeded to declare her candidacy for president, which Rajoelina deemed to be a breach of his agreement with Ravalomanana, and led him to declare that he would also be a candidate. It fell to the newly reformed Special Electoral Court to remove both names from the list based on technical shortfalls in their eligibility.³⁴

The AU has maintained Madagascar's suspension throughout the four years of constitutional crisis, and lifted this on 27 January 2014 following the installing of a democratically-elected leader. It is likely that the strong stance taken by the AU regarding eligibility to run in post-coup elections under its new charter influenced the situation in Madagascar. Even if that stance did not affect the Electoral Court's decision, it may have induced Rajoelina to accept the court's decision. Indeed, soon after his acceptance of the judicial ruling, the targeted sanctions against him and some senior colleagues in government were lifted.³⁵

Analysis and recommendations

The analysis and recommendations are as follows:

- ***Expanding the categories of threats to constitutional democracies:*** The frameworks of the AU and OAS relating to unconstitutional transfers of power, as well as the reaction of ECOWAS in the case of Niger, show that over time regional organizations have broadened their understanding of unconstitutional transfers of power to include threats to democracy from within. This is a welcome development from the point of view of maintaining constitutional order. Regional organizations seeking to play a role in ensuring democratic and constitutional order should continue to focus on threats to democracy from within, as well as more obvious extra-legal threats such as military coups. However, threats to democracy from within are complex, and require a suitably nuanced approach from regional organizations. Democratic capture can come in two different forms: self-coups, in which a head of state prevents a democratic change of government by usurping power unconstitutionally, and authoritarian backsliding, where the government or president engages in the steady closure of democratic pathways by manipulating the constitution and laws to eliminate political competition and democratic rule through constitutional means. Regional instruments should be carefully drafted to clearly apply to both kinds of threats to democracy from within. At present, both the OAS and the AU instruments have important gaps in their coverage.
- ***Multiple parties threatening constitutional democracy:*** In Honduras and Niger, the triggering event for regional activity was a military coup d'état. However, both coups were preceded and precipitated by conduct by democratically elected authorities that was clearly (Niger) or arguably (Honduras) unconstitutional, and which threatened constitutional democracy (self-coups). The fact that more than one party may have engaged in conduct threatening constitutional democracy raises difficult issues for regional organizations. Censuring the coup d'état and demanding the restoration of civilian rule and the pre-existing constitution is relatively straightforward, because it is easy to identify and uncontroversial to condemn. By contrast, it may be more politically challenging to condemn self-coups, because presidents can lay claim to a democratic mandate for their actions. Moreover, as explained below, some self-coups raise difficult questions of constitutional interpretation that regional organizations may wish to steer clear of. But the actual or attempted self-coups in both countries ran afoul of the norms set out in regional instruments. A failure to condemn self-



coups, while condemning a closely related coup d'état, when both are part of a broader political struggle, would raise concerns regarding the impartiality and credibility of regional organizations and suggest that they were taking sides in a domestic political dispute. Moreover, the failure to recognize a self-coup for what it is makes it difficult to craft the conditions for an appropriate resolution of the situation and the lifting of a suspension. Restoring the constitutional status quo ante to what it was the moment before the coup would, by implication, legitimize the self-coup. In this context, the AU's decision to require a return to the situation in Niger before the referendum on term limits, and the OAS' decision to lift Honduras' suspension without requiring Zelaya to be restored to power, imply that both organizations understood that the presidents in both countries had themselves threatened democracy from within. Regional organizations should come to grips with the full complexity of a domestic constitutional situation before applying regional instruments to condemn and suspend member states.

- ***Interpretive disagreements require careful expert analysis and deference:*** In domestic constitutional systems, clear violations of the constitution are rare. There are usually two sides to every major constitutional dispute, with good arguments available for each. When regional instruments that seek to protect constitutional democracy incorporate domestic *unconstitutionality* by reference, this draws regional institutions into questions of domestic constitutional interpretation. There will be few interpretive disputes arising from the forcible overthrow of a democratically elected government in a coup d'état, because of the expressly extra-constitutional nature of such acts. However, as the Zelaya example indicates, in a self-coup plausible constitutional arguments can be made to both defend and attack the decision in question. Regional organizations need to devote careful attention to structuring a process that independently and objectively analyses domestic constitutional issues when determining whether there has been an unconstitutional attempt to stem political competition and democratic governance. This will require expertise, in the form of national constitutional experts, equipped with sufficient resources and time to engage in detailed constitutional analysis (and, if necessary, fact-finding). Because of the pervasiveness of these interpretive difficulties, regional organizations should avoid becoming embroiled in national constitutional disputes and consider limiting their interventions to the most obvious forms of unconstitutional conduct.
- ***Authoritarian backsliding:*** The most difficult issue for regional organizations will arise in cases of authoritarian backsliding, because

the impugned decision is entirely constitutional in a formal legal sense. It is therefore difficult to arrive at a conclusion that a constitutional or statutory amendment is a threat to constitutional democracy. One strategy for approaching this task would be for regional organizations to make a substantive judgement that draws on an understanding of the basic or essential elements of constitutional democracy with which all governments must comply. This is extremely challenging. The constitutional arrangements for constitutional democracies are quite varied in how they operationalize the idea of government commitment to democracy, the rule of law and human rights. Accordingly, the list of essential constitutional fundamentals will be relatively limited and easy to identify, drawing on the principal international sources of hard and soft law. Requirements, for example, for regular, periodic legislative elections and direct or indirect election of the executive, and universal suffrage, are part of a relatively short list of hard law international norms that emerge from this exercise. A variation on this strategy would be to emulate the practice of the Venice Commission, which routinely infers from the practice of European democracies a set of common standards for constitutional democracy, which it has developed into a form of international best practices that constitute an emerging body of soft law. One candidate for inclusion is the requirement for presidential term limits, but, even here, there is not uniform agreement that such limits are democratic, because they prevent the polity from having a free choice at the polls.³⁶

- ***Complementarity and national constitutional courts and supreme courts:*** Another commonality between the cases of Honduras and Niger is that in both the incumbent president chose to ignore Constitutional Court and Supreme Court rulings that their plans to change the constitution were unconstitutional. Regional organizations should frame their assessments of self-coups in part by reference to national court decisions. Adopting or adapting the principle of complementarity found in the International Criminal Court Statute may provide clearer guidance to help regional organizations determine when a violation of the national constitution has occurred.³⁷ A domestic court ruling that a proposed constitutional or legal change is unconstitutional and would have the effect of impairing democratic competition could presumptively count as strong evidence for a regional organization considering the issue. Structuring a partnership between domestic courts and regional organizations must also justify regional oversight as a form of intervention designed to buttress domestic constitutional oversight.

- ***Remedies and the underlying conflict:*** As our case studies and a brief survey of other cases show, unconstitutional transfers of power are often rooted in underlying political conflicts that cannot simply be reset by, and may stand as roadblocks to, a return to constitutional normality. Consider the self-coup, in which the questions surrounding what constitutes a ‘resolution of the situation which led to the suspension’ may at first blush seem more straightforward than in a coup d’état. As no transfer of power has taken place, a suspension could in principle be lifted once the offending measure (in the cases of Honduras and Niger, the proposed referendums) is cancelled or reversed. There is no need for the maker of the self-coup to relinquish power, unlike for the military or rebel army coup, if the government or president has been duly elected and holds office under the terms of the prior constitution. Rather, all that is required is that they govern according to the existing constitution. Where a return to the status quo ante restores a presidential term limit, fresh elections for a new president may be necessary. However, in self-coups, other problems will certainly exist. The underlying political conflict that may have led to the self-coup, and the conflict dynamics unleashed by it, cannot easily be reset; thus regional organizations should look to include a menu of possible policy instruments—including power-sharing arrangements, constitutional review and transitional elections—in addition to seeking to simply reverse problematic measure(s).
- ***Graduated sanctions and engagement:*** In many cases, the sanction of suspension is neither desirable nor productive. It may be undesirable, as the effect will be to exacerbate conflicts and tensions within the regional organizations, creating a schism between allies and opponents of the offending state. It may also be unproductive in fostering the disengagement of the offending regime from the regional organization. Gradual sanctions leading up to suspension should be included in the menu of options for regional organization action, to allow for contemporaneous engagement and assistance (including supporting reforms, facilitating political dialogue and monitoring elections).

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Notes

- ¹ Marshall 2005. Annex 2B provides a comprehensive listing of all coups, successful and unsuccessful, during a 58-year period.
- ² The African Union suspended Egypt following the overthrow of President Mohamed Morsi, on 3 July 2013. See AU PSC 2013a.
- ³ OAS 1951.
- ⁴ AU 2000.
- ⁵ See Umozurike (1979) for an analysis of the implementation of the OAU non-interference policy in the context of human rights violations.
- ⁶ OAU 2000.
- ⁷ The charter came into force in February 2012 following the required 15th ratification (by Cameroon).
- ⁸ AU 2007.
- ⁹ AU 2007, article 26.
- ¹⁰ OAS 2009a.
- ¹¹ Much of the description of events leading to the coup is taken from Feldman et al. 2011.
- ¹² While the question of whether Zelaya was calling for a referendum or a poll has important legal and constitutional implications, it is not germane to our discussion here.
- ¹³ Feldman et al. 2011, p. 11.

- ¹⁴ Ibid.
- ¹⁵ Ginsburg, Melton and Elkins 2011.
- ¹⁶ Feldman et al. 2011, p. 24.
- ¹⁷ Ibid., p. 26.
- ¹⁸ CNN 2009.
- ¹⁹ His removal from the country was not only illegal (the court order calling for his detention specified that it was in order that he might answer to the court) but also unconstitutional, as it violated the constitutional prohibition on extradition, but that is not the concern of the IADC's unconstitutional transfer of power clause.
- ²⁰ The report to the Commission on Truth and Reconciliation finds 'no clear answer' to whether Zelaya was in violation of article 239. Feldman et al. 2011.
- ²¹ OAS 2009a.
- ²² OAS 2009b.
- ²³ OAS 2011.
- ²⁴ Constitutional Court of Niger 2009.
- ²⁵ BBC News 2009.
- ²⁶ BBC News 2010.
- ²⁷ See <<http://www.comm.ecowas.int/sec/en/protocol/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf>>.
- ²⁸ ECOWAS 2009.
- ²⁹ AU PSC 2009b.
- ³⁰ AU PSC 2010, para. 4.
- ³¹ Vandeginste 2013.
- ³² Omorogbe 2011.
- ³³ AU PSC 2009a.
- ³⁴ AU PSC 2013b.
- ³⁵ Ibid.
- ³⁶ For a summary of arguments for and against the evasion of term limits, see Ginsburg, Melton and Elkins 2011.
- ³⁷ ICC 2002, preamble, paragraph 10 and article 17. For an explanation of the principle of complementarity, see Schabas 2001.



Conclusion



Conclusion

Raul Cordenillo and Kristen Sample



Rule of law at the regional level

Today, regional organizations lead the promotion and practice of the rule of law in their respective areas. Though the recent past has seen great growth in the engagement of regional organizations on rule of law issues, the forms of engagement have been varied and many challenges have arisen, including limitations in mandates, limitations in political support and willingness, and limitations in enforcement capabilities. Nevertheless, regional organizations wield a powerful potential to implement and influence adherence to the rule of law in their member states. Together, they are a significant force in the establishment and fortification of the rule of law around the world.

The role of regional organizations in the rule of law

Work on the rule of law by regional organizations varies and takes many forms, as can be observed from the eight chapters in this publication. The work of regional organizations in the rule of law includes the development of regional standards on rule of law and human rights issues, the practice of legal cooperation and assistance among member states, and the monitoring and enforcement of rule of law principles.

Developing standards

Perhaps the most recognized role that regional organizations play in this area is in the development of norms and standards on the rule of law, human rights and democracy. These norms and standards are jointly discussed and agreed upon by their member states. Beyond simple expressions of the joint intentions and interests of the countries of the respective regions, these norms and standards also represent guidelines for how the countries conduct themselves in their respective regions. These include treaties, such as the Treaty on European Union (TEU) (commonly known as the Lisbon

Treaty); charters, such as the African Charter on Democracy, Elections and Governance (ACDEG) of the African Union (AU), the Inter-American Democratic Charter (IADC) of the Organization of American States (OAS) and the SAARC (South Asian Association for Regional Cooperation) Charter of Democracy; and declarations, such as the ASEAN (Association of Southeast Asian Nations) Human Rights Declaration, the League of Arab States (LAS) declarations in Tunisia (2004) and Doha (2009, 2013), and the Biketawa Declaration of the Pacific Islands Forum (PIF).

Legal cooperation and assistance

Regional organizations also engage in the area of rule of law through the establishment of legal cooperation and assistance frameworks and practices. These frameworks include cooperation in combating corruption and terrorism; the promotion and protection of human rights, including gender equality; and constitution building and governance.

Monitoring and enforcement

Some regional organizations are accorded enforcement powers by their member states, while others remain a forum for dialogue and mutual understanding. A powerful illustration of this difference in roles is in the area of unconstitutional transfers of power: some regional organizations can suspend membership due to a coup, while others cannot.

Many regional organizations also have monitoring and enforcement capabilities that give them significant influence over the adherence to rule of law principles. Among them, the AU has perhaps the strongest mandate in safeguarding the rule of law and constitutional democracy. This has enhanced the AU's effectiveness in assisting its member states not only in conflict prevention but also in constitution building. The AU directly recognizes the rule of law as one of its guiding principles and has adopted a number of standards that promote the protection of constitutional stability in member states through interventions against unconstitutional changes in government and other serious threats to the rule of law. The AU's mandate, and its historical progression from an approach of non-interference to one of non-indifference, are explored in chapter 1.



Challenges and lessons

Regional organizations have developed a strong capacity to act in the area of the rule of law, but there are also limits to their capabilities. They have faced a number of challenges in the area of the rule of law, including limitations in the mandates of regional organizations, limited political support for action and limited enforcement capabilities.

Mandates

There is significant variation between organizations in terms of their rule of law *mandates*. The mandates determine the regional organizations' capacity to promote the rule of law and, in turn, set out the bodies and mechanisms that do so. In some cases, there are judicial (or quasi-judicial) courts to protect human rights. In others, there are committees or working groups where countries meet to exchange information and jointly agree on courses of action on anti-corruption programmes, for example. These mandates are also tailored to the regional contexts: they signal how prepared the countries in a particular region are to make commitments to the practice of the rule of law, in particular, and democracy in general. Notably, the mandates are evolving, as the issues that regional organizations face are dynamic and require flexibility. In some cases, there is pressure for a regional organization to exceed its mandate—for example in the case of authoritarian backsliding, where the work of a regional organization could be considered as interference in the internal affairs of a member state.

Because instances of authoritarian backsliding distort the constitutional order without the clear displays of force or fraud that accompany a military coup d'état or self-coup, regional organizations may find themselves insufficiently equipped to address the breaches of the rule of law that nonetheless result.

As discussed in chapter 6, recent constitutional changes in Hungary have shifted the country's constitutional landscape to the point where democracies in the region and beyond are concerned. Yet existing EU mechanisms have been insufficient to address the impact on the rule of law, which has highlighted the need to explore mechanisms to improve its system for monitoring and enforcing fundamental values.

Political support

Ensuring the continued *political support* of member states in rule of law work continues to be a challenge. This could take the form of effectively aggregating member states' interests to develop standards. The ASEAN Human Rights Declaration (AHRD) is an example. While widely criticized for simply reflecting the 'lowest common denominator' of the human rights commitments of its member states, and for having no enforcement powers, it is significant in that it fills a gap in codifying human rights standards in the region, a first in Asia as whole. Chapter 5 reflects on how non-binding declarations can become significant first steps that lay the foundation for a robust regional commitment to rule of law principles—for example, by embracing the AHRD to strengthen constitutional interpretation of human rights issues, inspire improved domestic legal structures related to human rights, and advocate on behalf of civil society to other stakeholders working on human rights issues.

Another important manifestation of member states' support occurs with the ratification of regional organizations' treaties or charters on the rule of law. Examples are the Inter-American Convention on Mutual Assistance in Criminal Matters and the Inter-American Convention on Corruption, which were ratified by a great number of OAS member states. These conventions establish well-coordinated mechanisms for legal cooperation in the region and represent a deep commitment among member states to work together on criminal and corruption issues, which pose a significant threat to the rule of law in the region. Chapter 3 provides a detailed exploration of these conventions and the mechanisms they enable.

The next significant indication of member state support is the translation of regional norms and standards on the rule of law into national legislation and institutions. Unlike the EU, which has the European Parliament and a subsidiarity principle (and thus, in some cases, can legislate for its member states on matters relating to the rule of law), other regional organizations lack the power to do so. In this case, the norms and standards only serve as a guide for their member states.

Enforcement

The next challenge that regional organizations face is *enforcement* of rule of law standards. In this context, SAARC has made notable progress in the areas of rule of law and democracy, despite being largely focused on economic and social issues. Without any enabling and enforcement mechanisms, however,



its Charter of Democracy can only be a reference point and guide for its member states. Whether such reform in SAARC could happen, however, largely depends on the political will of its member states and the evolving integration process of the region.

In this regard, the experience of the PIF, which in its early days did not undertake work on the rule of law or democracy, could be instructive. After the adoption of the Biketawa Declaration in 2000, this changed with the articulation of shared principles for political governance. This, in turn, enabled the PIF to respond collectively to a serious breakdown of law and order in the Solomon Islands and to a military coup in Fiji.

It must be recognized, however, that implementation may require technical support if capacity is limited for the regional organization and for the member state where the support is undertaken. Such support could take the form of training for officials and technical support to policy design and legislation. In this case, there is room for closer cooperation not just between the regional organization and its member states but also between the UN, international organizations and even other regional organizations.

Technical support is particularly important for the LAS, where political developments in its member states following the Arab revolutions are fast evolving. The role that the LAS can play in these internal reform processes, while not yet clearly defined, may increase with the needs of its member states. Chapter 2 discusses the region's current activities, mechanisms and capacity for engaging in rule of law issues, and offers a thoughtful discussion of the remaining challenges, including awareness-raising and public support for rule of law initiatives, improving the ability to offer regional-level support that is tailored to national-level needs, and increased human capacity and technical support.

Upholding the rule of law, particularly in the context of political reform, is an ongoing process. In this case, regional organizations and their member states will have to discern the right approach for their respective regions. What is feasible very much depends on the regional context and the issue on the table. A case in point here is authoritarian backsliding as described in chapter 8.

In this light, regional organizations and their member states must exercise flexibility, such as going beyond regional organizations' existing mandates. This is not always an easy process, and the circumstances often dictate the appropriate policy approach by the regional organization and its member states.

In the field of constitution building, it must be noted that an inclusive consultative process is central to sustainable reform. While constitution-building is primarily an internal domestic political process, regional organizations can play a supportive role in the work of their member states by providing technical assistance and know-how.

Prospects

The UN Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels sets the tone for work on the rule of law worldwide. This work is bolstered by the efforts of other organizations, such as International IDEA, which together with the Kofi Annan Foundation initiated the Global Commission on Elections, Democracy and Security, which places the rule of law as central to preserving the integrity of elections.

Regional organizations complement the UN's work in the rule of law and help the UN and the member states develop related norms and standards. In so doing, they also help facilitate their implementation through their member states.

The attention that the international community focuses on the rule of law can only help sustain its promotion and practice. For its part, the Inter-Regional Dialogue on Democracy, through this publication, has sought to promote awareness of the work of regional organizations in the rule of law. Furthermore, it has facilitated the exchange of experiences and lessons learned with the aim of developing good practices that may be of interest and use to policy-makers worldwide.



About the Authors



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Sujit Choudhry is an internationally recognized authority on comparative constitutional law and comparative constitutional development. His work addresses basic methodological questions in comparative constitutional law. He has also written on constitutional design as a tool to manage the transition from violent conflict to peaceful democratic politics, especially in ethnically divided societies, and is currently studying constitutional design in the context of transitions from authoritarian to democratic rule. He has published over 70 articles, book chapters, working papers and reports. He is currently dean of the University of California, Berkeley, School of Law.

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The **Department of Legal Cooperation, Secretariat for Legal Affairs, Organization of American States** provides advisory and technical secretariat services to the REMJA (Meetings of Ministers of Justice or Other Ministers or Attorneys General of the Americas) Process, and to its working groups on Legal Cooperation on Criminal Matters and Cyber-Crime, as well as to the committees, meetings and other mechanisms of coordination or political and technical dialogue established by this process or connected to it. The department also carries out the necessary actions for the development and implementation of its recommendations or decisions.

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Hesham Youssef is a career diplomat with many years of service with the Ministry of Foreign Affairs of Egypt. In 2001, he joined the Arab League where he was the official spokesman and chief of staff of the secretary general, H. E. Amre Moussa. He has also worked for the Arab League on issues of crisis management and organizational reform. In 2014, Mr Youssef joined the Organization of Islamic Cooperation as assistant secretary general for Humanitarian Affairs. He holds a Bachelor's degree in Physics from Cairo University and Master's degrees in Liberal Arts from St John's College in Santa Fe, New Mexico, and in Economics from the American University in Cairo.



About International IDEA



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What is International IDEA?

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

The objectives of the Institute are to support stronger democratic institutions and processes, and more sustainable, effective and legitimate democracy.

What does International IDEA do?

The Institute's work is organized at global, regional and country level, focusing on the citizen as the driver of change.

International IDEA produces comparative knowledge in its key areas of expertise: electoral processes, constitution building, political participation and representation, and democracy and development, as well as on democracy as it relates to gender, diversity, and conflict and security.

IDEA brings this knowledge to national and local actors who are working for democratic reform, and facilitates dialogue in support of democratic change.

In its work, IDEA aims for:

- increased capacity, legitimacy and credibility of democracy;
- more inclusive participation and accountable representation; and
- more effective and legitimate democracy cooperation

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, Sweden, the Institute has offices in the Africa, Asia and the Pacific, Latin America and the Caribbean, and West Asia and North Africa regions.

